

Nos. 06-55008, 06-55010

---

**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

---

**REPLY FOR THE APPELLANTS**

---

Donald M. Falk  
MAYER, BROWN, ROWE & MAW LLP  
Two Palo Alto Square  
3000 El Camino Real, Suite 300  
Palo Alto, CA 94306-2112  
Telephone: (650) 331-2000  
Facsimile: (650) 331-2060

Evan M. Tager  
Timothy C. Lambert  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300

Jesse M. Jauregui  
Michele A. Powers  
Scott J. Leipzig  
WESTON BENSHOOF ROCHEFORT  
RUBALCAVA & MACCUISH LLP  
333 South Hope Street  
Sixteenth Floor  
Los Angeles, CA 90071  
Telephone: (213) 576-1000  
Facsimile: (213) 576-1100

*Attorneys for Appellants*

*Cingular Wireless LLC and New Cingular PCS, LLC dba Cingular Wireless*

## TABLE OF CONTENTS

	Page
I. VOORHIES' CLAIMS EASILY FALL WITHIN THE SCOPE OF HER BROADLY WORDED ARBITRATION PROVISION.....	1
II. THE CLASS WAIVER IN VOORHIES' ARBITRATION PROVISION IS NOT UNCONSCIONABLE .....	3
A. Voorhies Has Not Established Procedural Unconscionability.....	3
1. Oppression .....	3
2. Surprise .....	7
B. The Class Waiver In Voorhies' Arbitration Provision Is Not Substantively Unconscionable .....	10
III. IF CONSTRUED TO RENDER THE CLASS WAIVER IN CINGULAR'S ARBITRATION PROVISION UNENFORCEABLE, <i>DISCOVER BANK</i> IS PREEMPTED BY THE FAA .....	18
IV. VOORHIES' CLAIMS FOR PUBLIC INJUNCTIVE RELIEF ARE ARBITRABLE. ....	23
CONCLUSION .....	27

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.</i> , 75 F.3d 1401 (9th Cir. 1996).....	6
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	21
<i>Armendariz v. Found. Health Psychcare Servs., Inc.</i> , 6 P.3d 669 (Cal. 2000).....	13
<i>Arriaga v. Cross Country Bank</i> , 163 F. Supp. 2d 1189 (S.D. Cal. 2001) .....	25, 26
<i>Battles v. Sears Nat’l Bank</i> , 365 F. Supp. 2d 1205 (M.D. Ala. 2005).....	13
<i>Blitz v. AT&amp;T Wireless Servs., Inc.</i> , No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005) .....	12
<i>Bloxom v. Landmark Publ’g Corp.</i> , 184 F. Supp. 2d 578 (E.D. Tex. 2002).....	3
<i>Boys Club, Inc. v. Fid. &amp; Deposit Co.</i> , 6 Cal. App. 4th 1266 (1992) .....	8
<i>Broughton v. Cigna Healthplans</i> , 988 P.2d 67 (Cal. 1999).....	23, 25, 26
<i>Brower v. Gateway 2000, Inc.</i> , 246 A.D.2d 246 (N.Y. App. 1998) .....	3
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 126 S. Ct. 1204 (2006).....	25
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	25
<i>Connolly v. Nat’l School Bus Serv., Inc.</i> , 177 F.3d 593 (7th Cir. 1999) .....	15

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Cases</b>	<b>Page(s)</b>
<i>Credit Suisse First Boston Corp. v. Grunwald</i> , 400 F.3d 1119 (9th Cir. 2005) .....	20
<i>Crippen v. Central Valley RV Outlet</i> , 124 Cal. App. 4th 1159 (2004) .....	10
<i>Cruz v. PacifiCare Health Sys., Inc.</i> , 66 P.3d 1157 (Cal. 2003) .....	23, 25, 26
<i>Dean Witter Reynolds, Inc. v. Superior Court</i> , 211 Cal. App. 3d 758 (1989) .....	5
<i>Diamond D Enters. USA, Inc. v. Steinsvaag</i> , 979 F.2d 14 (2d Cir. 1992) .....	15
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005) .....	<i>passim</i>
<i>Doctor’s Assocs. Inc. v. Casarotto</i> , 517 U.S. 681 (1986) .....	9-10
<i>Falbe v. Dell, Inc.</i> , 2004 WL 1588243 (N.D. Ill. July 14, 2004) .....	3
<i>Flores v. Transamerica HomeFirst, Inc.</i> , 93 Cal. App. 4th 846 (2001) .....	5
<i>Gatton v. T-Mobile USA, Inc.</i> , 2003 WL 21530185 (C.D. Cal. Apr. 18, 2003) .....	3
<i>Geissal ex rel. Estate of Geissal v. Moore Medical Corp.</i> , 338 F.3d 926 (9th Cir. 2003) .....	15
<i>Gentala v. City of Tucson</i> , 244 F.3d 1065 (9th Cir.), <i>vacated on other grounds</i> , 534 U.S. 946 (2001) .....	8

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Cases</b>	<b>Page(s)</b>
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	22, 23, 25
<i>Gonzales v. Raich</i> , 125 S. Ct. 2195 (2005).....	23
<i>Green Tree Financial Corp. v. Bazzle</i> , 539 U.S. 444 (2003).....	22
<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79 (2000).....	24
<i>Gutierrez v. Autowest, Inc.</i> , 114 Cal. App. 4th 77 (2003) .....	9
<i>Harper v. Ultimo</i> , 113 Cal. App. 4th 1402 (2003) .....	8
<i>Hayward v. Ventura Volvo</i> , 108 Cal. App. 4th 509 (2003) .....	14
<i>Hedges v. Carrigan</i> , 117 Cal. App. 4th 578 (2004) .....	10
<i>Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.</i> , 350 F.3d 568 (6th Cir. 2003).....	2
<i>Ingle v. Circuit City Stores, Inc.</i> , 328 F.3d 1165 (9th Cir. 2003) .....	11, 25
<i>James v. Thermal Master, Inc.</i> , 562 N.E.2d 917 (Ohio Ct. App. 1988).....	14
<i>Jenkins v. First Am. Cash Advance, LLC</i> , 499 F.3d 868 (11th Cir. 2005) .....	15
<i>Johnson ex rel. Johnson v. Special Educ. Hearing Office</i> , 287 F.3d 1176 (9th Cir. 2002) .....	7

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Cases</b>	<b>Page(s)</b>
<i>Jones v. Citigroup, Inc.</i> , 135 Cal. App. 4th 1491 (2006) .....	10
<i>Keating v. Superior Court</i> , 645 P.2d 1192 (Cal. 1982) .....	24
<i>Ketchum v. Moses</i> , 17 P.3d 735 (Cal. 2001) .....	14
<i>In re Knepp</i> , 229 B.R. 821 (N.D. Ala. 1999) .....	13
<i>Kristian v. Comcast Corp.</i> , 446 F.3d 25 (1st Cir. 2006) .....	12
<i>Lealao v. Beneficial California, Inc.</i> , 82 Cal. App. 4th 19 (2000) .....	14
<i>Leonard v. Terminix Int’l Co.</i> , 854 So. 2d 529 (Ala. 2002) .....	12
<i>McManus v. CIBC World Markets Corp.</i> , 109 Cal. App. 4th 76 (2003) .....	5
<i>Mediterranean Enters., Inc. v. Ssangyong Corp.</i> , 708 F.2d 1458 (9th Cir. 1983) .....	2
<i>Mercuro v. Superior Court</i> , 96 Cal. App. 4th 167 (2002) .....	13
<i>Miles v. Prunty</i> , 187 F.3d 1104 (9th Cir. 1999) .....	8
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985) .....	1, 2, 25
<i>Morris v. Redwood Empire Bancorp</i> , 128 Cal. App. 4th 1305 (2005) .....	5, 6

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Cases</b>	<b>Page(s)</b>
<i>Niederer v. Ferreira</i> , 189 Cal. App. 3d 1485 (1987) .....	14
<i>Parrish v. Cingular Wireless LLC</i> , 2005 WL 2420719 (Cal. Ct. App. Oct. 3, 2005), <i>cert denied</i> , ___ S. Ct. ___ (June 5, 2006) .....	12
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	24
<i>Powertel, Inc. v. Bexley</i> , 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).....	13
<i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. Co.</i> , 473 U.S. 614 (1985).....	1, 2
<i>Schultz v. AT&amp;T Wireless Servs., Inc.</i> , 376 F. Supp. 2d 685 (N.D. W. Va. 2005).....	22
<i>Sheppard v. Riverview Nursing Ctr., Inc.</i> , 88 F.3d 1332 (4th Cir. 1996) .....	14
<i>Shroyer v. New Cingular Wireless Servs., Inc.</i> , No. CV 06-1792-R (C.D. Cal. May 30, 2006) .....	7, 12, 22
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	24, 25
<i>State ex rel. Dunlap v. Berger</i> , 567 S.E.2d 265 (W. Va. 2002).....	22
<i>Taylor v. Citibank USA, N.A.</i> , 292 F. Supp. 2d 1333 (M.D. Ala. 2003).....	16
<i>Tillman v. Commercial Credit Loans, Inc.</i> , 629 S.E.2d 865 (N.C. Ct. App. 2006).....	12

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Cases</b>	<b>Page(s)</b>
<i>Ting v. AT&amp;T</i> , 319 F.3d 1126 (9th Cir. 2003) .....	3, 4, 11
<i>United Steelworkers of Am. v. Warrior &amp; Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	1
<i>Villa Milano Homeowners Ass’n v. Il Davorge</i> , 84 Cal. App. 4th 819 (2000) .....	5
<i>Whitney v. Alltel Communications, Inc.</i> , 173 S.W.3d 300 (Mo. Ct. App. 2005) .....	12
<b>Statutes and Rules</b>	
9 U.S.C. § 2.....	19
Fed. R. Civ. P. 11(c)(2).....	13
<b>Other Authorities</b>	
AAA, <i>Consumer Due Process Protocol</i> , Principle 12(1), <a href="http://www.adr.org/sp.asp?id=22019">http://www.adr.org/sp.asp?id=22019</a> .....	17
Broome, <i>An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act</i> , 2 Hastings Bus. L.J. __ (2006) .....	19
Drahozal, <i>Federal Arbitration Act Preemption</i> , 79 Ind. L.J. 393 (2004) .....	26
Hillebrand & Torrence, <i>Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits</i> , 8 Santa Clara L. Rev. 747 (1988) .....	17

**TABLE OF AUTHORITIES**  
**(Continued)**

<b>Other Authorities</b>	<b>Page(s)</b>
Holloway, <i>Prepaid Wireless Has Clear Benefits—Even If You Have a Good Credit History</i> , Consumer Action News, Fall 2005, <a href="http://www.consumer-action.org/downloads/english/Fall_2005.pdf">http://www.consumer-action.org/downloads/english/Fall_2005.pdf</a> .....	7
Manakides, Note, <i>Arbitration of “Public Injunctions”</i> : <i>Clash Between State Statutory Remedies and the Federal Arbitration Act</i> , 76 S. Cal. L. Rev. 433 (2003).....	26
<i>Sprint Class Action Settlement Info</i> , <a href="http://www.sprintclassactionsettlement.com">http://www.sprintclassactionsettlement.com</a> .....	17
Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 Wm. & Mary L. Rev. 1 (2000) .....	22

In her responsive brief, Voorhies not only defends the district court's grounds for refusing to compel arbitration, but also raises additional grounds that the district court never reached. Regardless, none of her arguments overcomes the FAA's strong presumption in favor of enforcing contractual agreements to arbitrate.

**I. VOORHIES' CLAIMS EASILY FALL WITHIN THE SCOPE OF HER BROADLY WORDED ARBITRATION PROVISION.**

Voorhies begins by asserting that claims involving "pre-sale advertising by Cingular ... concerning the price of phones" fall outside the scope of her arbitration provision. Resp. Br. 16. That contention is baseless. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration [when] the problem at hand is the construction of the contract language." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (internal quotation marks and citation omitted). Therefore, a motion to compel arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). That surely isn't the case here.

Voorhies agreed "to arbitrate all disputes and claims arising out of or relating to this Agreement, or to any prior oral or written agreement for Equipment

or services between” her and Cingular. ER35. The terms “arising” from and “relating to” signal the existence of “a broad arbitration clause” (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967)) that covers disputes so long as “the allegations underlying the ... claim[] **touch** matters covered by” the contract. *Mitsubishi*, 473 U.S. at 624 n.13 (emphasis added). The telephone that Voorhies claims was falsely advertised is expressly referenced in her contract. *Ipsa facto*, her claims “touch matters covered by” her Agreement.<sup>1</sup>

Indeed, even under a **narrower** arbitration provision covering only claims “arising out of” (but not “related to”) the underlying contract, the Sixth Circuit has held, “consistent with every circuit that has addressed this issue,” “that ‘arising out of’ is broad enough to include a claim of fraudulent inducement of a contract.” *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 578 (6th Cir. 2003) (citing cases).

An arbitration provision that adds the term “related to” expands the provision’s scope. *See Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). Here, Cingular’s arbitration provision uses both terms, unmistakably conveying an intent to cover as broad a range of claims as possible.

Courts routinely have held that provisions like Cingular’s encompass claims for

---

<sup>1</sup> Voorhies’ telephone is “[e]quipment” expressly covered by Cingular’s arbitration provision. *See* ER23 (Agreement listing Nokia 6010); ER8 ¶ 25 (complaint alleging sales tax charged on Nokia 6010).

false advertising or fraud in the inducement. *See, e.g., Falbe v. Dell, Inc.*, 2004 WL 1588243, at \*5 (N.D. Ill. July 14, 2004); *Gatton v. T-Mobile USA, Inc.*, 2003 WL 21530185, at \*13 (C.D. Cal. Apr. 18, 2003); *Bloxom v. Landmark Publ'g Corp.*, 184 F. Supp. 2d 578, 583-84 (E.D. Tex. 2002); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 255-56 (N.Y. App. 1998). Accordingly, this effort to avoid arbitration is manifestly misguided.

## **II. THE CLASS WAIVER IN VOORHIES' ARBITRATION PROVISION IS NOT UNCONSCIONABLE.**

### **A. Voorhies Has Not Established Procedural Unconscionability.**

#### **1. Oppression**

At bottom Voorhies' position is that all contracts of adhesion are oppressive and hence procedurally unconscionable. She relies for that position primarily on this Court's decision in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), and the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

As we explained in our opening brief (at 16-17), however, *Ting's* procedural-unconscionability holding was not based solely or even predominantly on the fact that AT&T's arbitration provision was contained in a non-negotiable form contract. To the contrary, this Court emphasized that the arbitration provision had been imposed on existing customers in a bill insert and that AT&T "intentionally dissuaded its own customers from seeking" other options by telling

them that “all other major long distance carriers have included an arbitration provision in their services agreement.” *Ting*, 319 F.3d at 1149. Moreover, as we also pointed out (Opening Br. 17-18), *Ting* pre-dates the California cases on which we rely and therefore, to the extent it is inconsistent with them, no longer is a binding interpretation of California law.

While *Discover Bank* does contain some preliminary boilerplate to the effect that “[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion” (113 P.3d at 1108), the California Supreme Court had no occasion to address the effect of a showing that the plaintiff could have obtained comparable goods or services from another source without having to accept the disputed contractual provision. That is because the actual basis for the court’s finding of procedural unconscionability was that Discover Bank had imposed its arbitration provision on *existing customers*, giving them no option other than to accept the provision or immediately close their accounts and stop using their credit cards. *Id.* That is a far cry from presenting a *potential* customer with a take-it-or-leave-it contract at the outset of the relationship when the customer has the option of obtaining similar service without having to accept the disputed term.

To be sure, one case cited by Voorhies found adhesiveness notwithstanding the defendant’s argument that the plaintiff homebuyers could have purchased

homes elsewhere without accepting the disputed term. *See Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal. App. 4th 819 (2000) (cited at Resp. Br. 21, 22). The court reasoned: “[Defendant] provides no citation of authority in support of the proposition that a contract can never be adhesive if the weaker party could have rejected the agreement and gone elsewhere.” *Id.* at 826. Both the defendant and the court appear to have overlooked *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 795 (1989), in which another California appellate court held that “any claim of ‘oppression’ may be defeated if the complaining party had reasonably available alternative sources of supply from which to obtain the desired goods or services free of the terms claimed to be unconscionable.” Hence, at worst, the law in California is unsettled on this point.<sup>2</sup>

Although Voorhies strives mightily to distinguish the many cases that follow *Dean Witter* (Resp. Br. 21 n.6), her own parentheticals confirm that she cannot do so. As her discussion of *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305 (2005) reflects, the rule in California is that “the “oppression” factor of the

---

<sup>2</sup> None of the other California cases on which Voorhies relies mentions, much less rejects *Dean Witter*. Nor do any of them reject even the more modest proposition that there is no oppression when the defendant has proven the existence of realistic market alternatives. In fact in two of Voorhies’ cases—*Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846 (2001), and *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76 (2003) (cited at Resp. Br. 19)—the plaintiffs introduced evidence that there were no market alternatives.

procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice,” so long as those market alternatives are “realistic.” *Id.* at 1320.<sup>3</sup>

In the end, Voorhies is forced to argue that Cingular’s evidence of “just two” other carriers from which she could have obtained cellular service without agreeing to arbitrate on an individual basis is not enough. Resp. Br. 22 n.7 She overlooks the fact that she has the burden of proving unconscionability and hence the burden of proving that she lacked adequate alternatives. But even if Cingular had the burden, there is no basis for Voorhies’ insinuation that two is not enough. Nor is there any basis for Voorhies’ further assertion that the “pay-as-you-go” service offered by those two carriers is not “comparable” to the service she obtained from Cingular. It is well established that the service need not be identical, so long as it is a reasonable substitute.<sup>4</sup> Moreover, Virgin Mobile’s “Auto Top-Up” service offered payment and service arrangements that are virtually indistinguishable from

---

<sup>3</sup> The *Morris* court gave as an example of an unrealistic alternative “a sick patient seeking admittance to a hospital [who] is not expected to shop around to find better terms on the admittance form.” *Id.* Significantly, Voorhies does not claim that it was “unrealistic” for her to search out available alternatives at the time she contracted for wireless service.

<sup>4</sup> See, e.g., *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1413 (9th Cir. 1996) (“The fact that a buyer or seller is the only source not of a particular product or service but of a particular price advantage is an insufficient argument for unconscionability where alternative sources for the product or service exist.”).

long-term contracts by automatically refilling the prepaid account over time. ER79-81. *See generally* Holloway, *Prepaid Wireless Has Clear Benefits—Even If You Have a Good Credit History*, Consumer Action News, Fall 2005, at 1, [http://www.consumer-action.org/downloads/english/Fall\\_2005.pdf](http://www.consumer-action.org/downloads/english/Fall_2005.pdf) (study of wireless plans concluding that “prepaid wireless is a viable option to postpaid plans in terms of price and services”).

In short, as a different district judge in this Circuit recently held, because customers could obtain wireless service without agreeing to arbitrate on an individual basis, the “oppression” element of procedural unconscionability is absent. Order Compelling Arbitration and Dismissing the Action Without Prejudice, *Shroyer v. New Cingular Wireless Servs., Inc.*, No. CV 06-1792-R, at 4 (C.D. Cal. May 30, 2006) (“*Shroyer* Order”).

## **2. Surprise**

Voorhies claims that the district court’s holding on the “surprise” element of procedural unconscionability is a factual determination reviewable only for “clear error.” Resp. Br. 22. But the underlying facts are undisputed, and the only issue is whether the court properly applied California law to those facts. Accordingly, review is *de novo*. *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1179 (9th Cir. 2002) (“If the district court relied on an erroneous legal standard or committed an error of law, we review the legal questions *de novo*.”);

*Gentala v. City of Tucson*, 244 F.3d 1065, 1071 (9th Cir.) (“Because the facts here are undisputed, we review the district court’s decision *de novo*.”), *vacated on other grounds*, 534 U.S. 946 (2001); *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999) (same).

Without citing a single case, Voorhies asserts that the “surprise” element of procedural unconscionability is present here because the arbitration provision is part of a terms and conditions booklet that was incorporated by reference in her contract. Resp. Br. 22-23.<sup>5</sup> As we pointed out in our opening brief (at 18-19), however, in California (as elsewhere), documents incorporated by reference into a contract are part of the contract every bit as much as if they were included in the body of the contract. *See also Boys Club, Inc. v. Fid. & Deposit Co.*, 6 Cal. App. 4th 1266, 1273 (1992). If anyone should be aware of this basic principle of contract law, it should be Voorhies, who is a practicing lawyer. Accordingly, she hardly can claim to have been “surprise[d]” by the fact that the terms and conditions of her service were contained in a separate booklet that was

---

<sup>5</sup> *Harper v. Ultimo*, 113 Cal. App. 4th 1402 (2003) (cited at Resp. Br. 19 n.5), did not involve the incorporation by reference of another document contemporaneously provided to the plaintiff. To the contrary, in that case arbitration rules that severely limited available relief were *not* provided with the contract, leaving it up to the customer to independently search them out. *Id.* at 1405.

incorporated by reference.<sup>6</sup>

Voorhies gains no ground by asserting that Cingular’s arbitration provision is “hidden,” that she did not initial it, and that it was “lengthy and formatted into one long, cumbersome paragraph” (Resp. Br. 22-23). Cingular’s arbitration provision is by no means “hidden.” To the contrary, the Agreement itself *twice* references the arbitration provision (the only term so prominently featured). *See* ER23. And the separate booklet containing the terms and conditions mentions the arbitration provision at the outset. ER26.<sup>7</sup> As for Voorhies’ other criticisms, California law neither requires that all material contract terms be initialed nor limits the length of paragraphs containing such provisions.

Implicit in Voorhies’ argument is the premise that Cingular was required to provide *special* notice of the arbitration provision. But that premise is squarely foreclosed by the FAA. A state law that “conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally” is preempted because it would “directly

---

<sup>6</sup> Of course, if Cingular had tried to include all of the terms and conditions on a single-page contract, Voorhies surely would be complaining about the font size and the difficulties presented by the amount of text included on one page.

<sup>7</sup> In *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77 (2003) (cited at Resp. Br. 19 n.5), by contrast, the arbitration provision was located “on the opposite side of the signature page of the lease” (*id.* at 89), and there is no indication that the provision was referenced on the signature page.

conflict[] with § 2 of the FAA.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Hedges v. Carrigan*, 117 Cal. App. 4th 578, 585 (2004) (FAA preempts California statute prescribing special “font and point size, notification, and warning requirements” that applied “*only to arbitration clauses*”) (emphasis in original).

\* \* \*

Because Voorhies has failed to establish either the oppression or the surprise elements of procedural unconscionability, California law requires enforcement of her agreement without regard to whether the class waiver in her arbitration agreement is substantively unconscionable. *See Crippen v. Central Valley RV Outlet*, 124 Cal. App. 4th 1159, 1167 (2004).<sup>8</sup>

**B. The Class Waiver In Voorhies’ Arbitration Provision Is Not Substantively Unconscionable.**

In arguing that the class waiver in her arbitration provision is substantively unconscionable, Voorhies offers two contradictory interpretations of *Discover Bank*, neither of which is valid.

First, she asserts that all class waivers in contracts between businesses and

---

<sup>8</sup> Although Voorhies doesn’t mention *Jones v. Citigroup, Inc.*, 135 Cal. App. 4th 1491 (2006) (cited at Opening Br. 11, 16, 18, 20), we no longer rely on *Jones* because the California Supreme Court recently granted review in that case, thereby depriving it of precedential force. The reasoning of *Jones* remains sound, however, and the points for which we cited *Jones* are supported by one or more of our other cases.

their customers are “completely one-sided” and hence substantively unconscionable because businesses never bring class actions against their customers. Resp. Br. 25 & n.9. But the California Supreme Court made clear in *Discover Bank* that not “all class action waivers are necessarily unconscionable” (113 P.3d at 1110), and, in particular, that substantive unconscionability turns on whether the class waiver serves to “insulate a party from liability that otherwise would be imposed under California law” (*id.* at 1109). Accordingly, the fact that Cingular does not bring class actions against its customers is a plainly insufficient basis upon which to declare the class waiver in its arbitration provision unconscionable.<sup>9</sup>

Second, Voorhies contends that under *Discover Bank* a class waiver is substantively unconscionable so long as the complaint alleges that the defendant carried out a scheme to defraud customers out of small amounts of money. Resp. Br. 26.<sup>10</sup> But as just noted the underlying concern in *Discover Bank* is whether the class waiver serves to “insulate a party from liability that otherwise would be

---

<sup>9</sup> To the extent they rely on this rationale, *Ting* and *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) do not accurately reflect California law and hence are not binding on this panel.

<sup>10</sup> For what it’s worth, Voorhies’ assertion that Cingular’s collection of sales tax will “quickly accumulate to large ill-gotten profits for Cingular” (*id.*) is baseless. There is no dispute that any taxes Cingular collects are remitted to the government.

imposed under California law.” 113 P.3d at 1109. That question in turn requires an analysis of the specific arbitration provision at issue to determine whether customers can realistically vindicate their claims by means of individual arbitration.<sup>11</sup>

---

<sup>11</sup> As Voorhies points out, several California appellate courts have interpreted *Discover Bank* as a categorical condemnation of class waivers whenever the claims at issue are small. Resp. Br. 25 n.8. But in none of those cases does it appear that the defendant argued that individual arbitration remained a feasible means for handling small claims under the specific features of its arbitration clause. When such an argument has been made, the results have been mixed. Compare *Parrish v. Cingular Wireless LLC*, 2005 WL 2420719 (Cal. Ct. App. Oct. 3, 2005) (invalidating Cingular’s class waiver), *cert denied*, \_\_ S. Ct. \_\_ (June 5, 2006) (cited at Resp. Br. 27), with *Shroyer* Order (enforcing Cingular’s class waiver).

Voorhies’ suggestion that “the weight of apposite authority” from other jurisdictions supports the categorical rule for which she argues (Resp. Br. 27-28 n.11) is badly misguided. As we explained in our opening brief (at 20-22 & n.8), the overwhelming weight of authority is against her. See also *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865, 872-74 (N.C. Ct. App. 2006) (rejecting unconscionability attack on class waiver under North Carolina law). As for the handful of cases Voorhies cites, none helps her. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), held only that the antitrust claims at issue could not be vindicated by means of individual arbitration because the six-figure cost of the expert witnesses needed to prove the claims far outstripped the value of an individual claim. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 303, 313-14 (Mo. Ct. App. 2005), involved an arbitration provision that imposed high costs on the consumer, while limiting statutory remedies. The Missouri Court of Appeals expressly distinguished that combination of features from a predecessor of Cingular’s arbitration provision, which had been upheld by the Fifth Circuit. *Id.* at 313 n.10. Indeed, a Missouri trial court recently found *Whitney* distinguishable in upholding Cingular’s current arbitration provision. *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip. op. at 2 (Mo. Cir. Ct. Nov. 28, 2005) (Opening Br., Addendum 1, at 3-4). Like *Whitney*, *Leonard v. Terminix Int’l Co.*, 854 So. 2d 529 (Ala. 2002), is limited to cases in which the arbitration costs are high and/or remedies are limited. Numerous subsequent cases have so recognized. See, e.g.,

Here, Voorhies implicitly concedes that it would cost her nothing to arbitrate under Cingular’s arbitration provision and that the arbitrator would be authorized to award her any damages that a court could award her.<sup>12</sup> She contends, however, that the provision’s requirement that Cingular reimburse prevailing customers for their reasonable attorneys’ fees is inadequate because the arbitrator “may well be reluctant to award fees that are out of proportion to the plaintiff’s damages” and “a fee award tied to the amount at stake will make the case a money-loser for the

---

*Battles v. Sears Nat’l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005). *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999), similarly involved an arbitration provision that precluded punitive damages and other statutorily mandated remedies. Finally, *In re Knepp*, 229 B.R. 821 (N.D. Ala. 1999), involved an arbitration provision that required the debtor to pay high arbitration costs, while precluding an award of attorneys’ fees.

<sup>12</sup> Voorhies does complain that a customer could be made “to reimburse Cingular” if the arbitrator finds the claim to be “improper or not warranted.” Resp. Br. 33 n.17. She mischaracterizes Cingular’s arbitration provision, misunderstands the AAA’s rules, and misapplies the case law. The arbitration provision specifies that, if the claim is unwarranted or improper *as measured by the standards of Fed. R. Civ. P. 11(b)*, then the payment of arbitration fees is governed by the AAA’s rules. ER36. Those rules require consumers to pay one half of the forum costs, *up to a maximum of \$125*. ER75. Hence, even if a customer files a frivolous arbitration, the maximum cost that he or she could be made to bear is \$125. A customer who files a frivolous claim in federal court could have to pay far more. *See* Fed. R. Civ. P. 11(c)(2) (sanctions can include reimbursement of opposing party’s attorneys’ fees). Because in both cases Voorhies cites—*Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 764-65 (Cal. 2000), and *Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 181-82 (2002)—employees ran the risk of paying high arbitration costs under *all* circumstances, neither supports her assumption that the slim possibility of a customer having to pay \$125 would undermine the vindication of small claims.

attorney.” Resp. Br. 31-32.

Voorhies ignores that under California law attorneys’ fees are awarded according to “the fair market rate for such services.” *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001). Thus, “the primary method for establishing the amount of ‘reasonable’ attorney fees is the lodestar method,” under which the court “multipl[ies] the number of hours reasonably expended by counsel by a reasonable hourly rate increased or decreased by a ‘multiplier’ to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.” *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000) (internal quotation marks omitted). For this reason, “[t]he provision for recovery of attorney’s fees allows consumers to pursue remedies in cases ... where the compensatory damages are relatively modest.” *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003) (awarding attorneys’ fees of approximately twice the recovery); *see also Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1508 (1987) (affirming attorneys’ fees “award [that] is large in proportion to the amount of damages awarded”).<sup>13</sup>

---

<sup>13</sup> *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332 (4th Cir. 1996) (cited at Resp. Br. 31-32) involved a discretionary fee award under a federal civil rights statute and therefore is irrelevant to the award available under Cingular’s arbitration provision and California law. Voorhies’ other cases (Resp. Br. 32 n.15)

Not only may arbitrators award prevailing plaintiffs the full lodestar, plus possibly a risk multiplier, but they may do so in a broader range of cases than may a court. That is because Cingular's arbitration provision allows plaintiffs who receive the full amount of their demands to recover attorneys' fees even if their claims are solely for breach of contract or some other common-law cause of action for which fee shifting is unavailable under the "American rule." Accordingly, contrary to Voorhies' assertion, Cingular's arbitration provision will foster, not undermine, a customer's ability to obtain representation to arbitrate a small claim (assuming that the customer concludes that she needs representation). *See, e.g., Jenkins v. First Am. Cash Advance, LLC*, 400 F.3d 868, 878 (11th Cir. 2005)

---

do not support her contention that attorneys' fees in excess of an arbitration demand would be "unreasonable." *See Geissal ex rel. Estate of Geissal v. Moore Medical Corp.*, 338 F.3d 926, 932-33 (8th Cir. 2003) (encouraging "common sense" in settling ten-year-old controversy by instructing district court on remand to limit award of attorneys' fees *for further proceedings*); *James v. Thermal Master, Inc.*, 562 N.E.2d 917, 919-20 (Ohio Ct. App. 1988) ("given the facts of the case ... plaintiffs' counsel had performed more services than reasonably necessary to properly represent his clients"). Limitations on attorneys' fees in the Second and Seventh Circuits are not as strict as Voorhies' citations might indicate. *See Connolly v. Nat'l School Bus Serv., Inc.*, 177 F.3d 593, 597 (7th Cir. 1999) ("[T]his Court [has n]ever held that an attorney's fee award is unreasonable simply because it exceeds by some multiple the amount recovered by the plaintiff."); *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19-20 (2d Cir. 1992) (amount in controversy in the litigation "is only ... a starting point in the process of ultimately determining whether a fee award is reasonable" intended to prevent the recipient of attorney's fees from "manipulat[ing] the actual damage incurred by burdening [an adversary] with an exorbitant fee arrangement") (internal quotation marks omitted).

(“when the opportunity to recover attorneys’ fees is available, lawyers will be willing to represent [debtors with small claims] in arbitration”); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1343-44 (M.D. Ala. 2003) (rejecting unconscionability challenge to class waiver and noting that “the central purpose behind statutory attorneys fees is to encourage lawyers to accept cases in which damages may be small or nominal”).<sup>14</sup>

Voorhies also asserts that there are other “disincentive[s]” to the pursuit of a small claim (Resp. Br. 28-29), presumably the fact that many people don’t think it is worth the time to file either a lawsuit or an arbitration over a \$10 dispute. But there is no reason to suppose that a customer who is unwilling to take the time to pursue a cost-free arbitration would be any more willing to take the time to file a claim after a class action has settled. To the contrary, available data reflect that, when the amount that a consumer can expect to receive is small, the percentage of

---

<sup>14</sup> Voorhies is mistaken in contending (Resp. Br. 31) that *Discover Bank* “explicitly rejects the argument that provisions in an arbitration agreement allowing recovery of attorneys’ fees by the prevailing party are an adequate substitute for the important mechanism of class-wide arbitration.” As discussed in our opening brief (at 25), *Discover Bank* held only that “the **potential availability** of attorney fees to the prevailing party ... [is not] an adequate substitute for the class action ... mechanism.” 113 P.3d at 1109-10 (emphasis added). Cingular’s arbitration provision offers far more than the **possibility** of attorneys’ fees by **obligating** Cingular to reimburse customers for their reasonable attorneys’ fees if they are awarded the amount of their demands or more—even for claims that would not otherwise support an award of attorneys’ fees.

class members who submit claim forms is low.<sup>15</sup> The reason is not hard to discern: generally, these cases are settled for pennies on the dollar (if that), making it both exasperating and economically irrational for most claimants to research their records and fill out the necessary forms. By way of example, consider the recent class-action settlement with Sprint over regulatory fees charged customers. Class members waited three years to be eligible for, at most, a payment of \$19 or \$15 *if* they commit to an additional two years of Sprint service. Moreover, many class members are eligible only for Sprint long-distance phone cards worth as little as \$1.50. *See Sprint Class Action Settlement Info, available at <http://www.sprintclassactionsettlement.com>.*

Similarly, the assumption that pursuing an individual arbitration would be materially more time-consuming than being a member of a class action is mistaken. Voorhies' arbitration provision and the relevant AAA rules allow for a brief, in-person hearing, a telephonic hearing, or a "desk" arbitration based on the submission of documents alone. *See AAA, Consumer Due Process Protocol, Principle 12(1) & cmt., available at <http://www.adr.org/sp.asp?id=22019>.* A desk arbitration or telephonic hearing might take no longer than it takes for a class

---

<sup>15</sup> *See, e.g., Hillebrand & Torrence, Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 753 (1988) (discussing three settlements in which claim rates were 3%, 10.5%, and 18%).

member to research his or her records and submit a claim (but potentially could have materially greater rewards).

Finally, Voorhies asserts (without any support) that many customers do not realize that they have been wronged and hence that a class action is the only way to ensure that every customer receives a remedy—even if those who do recognize that they have been wronged would be willing to arbitrate individually. Resp. Br. 30. Of course, as just noted, only a small fraction of class members ever receive a remedy and then generally only pennies on the dollar. But beyond that, the premise of Voorhies' argument is unfounded. Tellingly, Voorhies makes no claim that her putative class remains ignorant of the harms she alleges. Nor could she. Her claim is that the tax on her phone was inadequately disclosed in Cingular's advertising and that she and the class members received a rude shock when they were charged sales tax on the full price of their phones. Hence, the class members knew at the time of the transaction what they were being charged. If they did not know that they had a claim, that would only be because they didn't see the advertising or didn't construe it the way Voorhies did.

**III. IF CONSTRUED TO RENDER THE CLASS WAIVER IN CINGULAR'S ARBITRATION PROVISION UNENFORCEABLE, DISCOVER BANK IS PREEMPTED BY THE FAA.**

Voorhies' response to our preemption argument is devoted mostly to defending a proposition that we never contested—that courts may refuse to enforce

an arbitration provision “upon such grounds as exist at law or in equity for the revocation of any contract” (Resp. Br. 33 (quoting 9 U.S.C. § 2)).<sup>16</sup> Instead, our argument is that, *as applied to arbitration provisions*, California’s putatively neutral limitation on class waivers is preempted because it will discourage the use of arbitration and thereby frustrate the purposes of the FAA.<sup>17</sup>

---

<sup>16</sup> We *do* dispute, however, that the California courts, in holding class waivers unconscionable, have truly applied a “generally applicable state law contract defense.” Although *Discover Bank*, on its face, bars class waivers in both litigation and arbitration, the overwhelming majority of class waivers are contained in arbitration provisions. See Opening Br. 31-32 n.13. That is because class actions are inherently inconsistent with arbitration: to superimpose class-action procedures onto arbitration is to convert arbitration into litigation. The California Supreme Court’s heavy reliance upon “public policy” favoring class lawsuits over individual arbitration (*e.g.*, 113 P.3d at 1105-08, 1112, 1115-16) amounts to an assertion of state judicial veto power over the FAA. The California courts have often distorted state unconscionability law in order to thwart arbitration agreements, and the California Supreme Court’s decision in *Discover Bank* is merely the latest example of that practice. See Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act*, 2 Hastings Bus. L.J. \_\_ (forthcoming 2006) (attached as Addendum II) (arbitration agreements were found unconscionable in 47% of arbitration cases and 11% of non-arbitration cases decided by California Court of Appeal in past two decades). Hence, the California Supreme Court’s rule is even-handed only in the most trivial sense; in purpose and practical effect, it discriminates against arbitration.

<sup>17</sup> Voorhies suggests that there is “a strong presumption” against preemption of state contract law. Resp. Br. 34-35. But she admits that this presumption means only that “when there are two equally plausible readings of a federal statute, courts should adopt the reading that would find no preemption of state law.” *Id.* at 35. Here, there can be no doubt that a central purpose of the FAA was to encourage arbitration and that, as construed by the district court, *Discover Bank* would frustrate that purpose. Accordingly, the “strong presumption” against preemption is of no assistance to Voorhies.

To put it simply, when a business is deciding whether to include an arbitration provision in its agreements with its customers, it undertakes a risk-benefit analysis. The benefits of arbitration are that it is fast, easy, and inexpensive. The risks are that the arbitrator will get it wrong and that the decision will be essentially unreviewable. Many businesses are willing to take that risk because of the cost savings and the desire to have a less adversarial way of resolving disputes with customers.

But the risk-benefit calculus changes dramatically if the business must bear the risk of a class arbitration as the price of admission. A class arbitration would eliminate all of the cost savings and efficiencies of individual arbitration. At the same time, the stakes would be multiplied exponentially. Yet the arbitrator's decision would remain reviewable only under the very narrow standard of review set forth in the FAA. Under those circumstances, very few companies would be willing to include arbitration provisions in their agreements with customers. Because this outcome is inconsistent with the central purpose of the FAA, which is to encourage arbitration, it is preempted. *Cf. Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1135 (9th Cir. 2005) (Securities and Exchange Act of 1934 impliedly preempts the imposition of state ethics standards on NASD arbitrators because those standards would "mak[e] arbitration more costly for investors and employees," might "deter well-qualified individuals from serving as

NASD arbitrators,” and would increase the “complexity, cost, and uncertainty” of arbitration).

Voorhies concedes the factual underpinnings of this argument. First, she admits that the superimposition of the class-action device onto arbitration would cause arbitration to resemble litigation, arguing that “[t]he added complexity in the arbitration context should be *no more pronounced* than the added complexity that occurs when an individual civil claim is transformed into a class action.” Resp. Br. 40 (emphasis added). Second, Voorhies implicitly acknowledges that, if forced to choose between class litigation and class arbitration, businesses will find arbitration “undesirable.” *Id.* at 41.

Having accepted the premise of our argument, Voorhies fails to see that the conclusion follows inexorably. She states simply that “[c]lass actions accord with public policy” and that, if businesses are unwilling to subject themselves to class arbitration “in accord with public policy, then so be it.” *Id.* But whatever California’s public policy regarding class actions may be, the only relevant policy is the one embraced by Congress when it enacted the FAA. That policy is to encourage arbitration.<sup>18</sup>

---

<sup>18</sup> Significantly, money-damage class actions didn’t even exist at the time Congress enacted the FAA. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-15 (1997) (chronicling development of Fed. R. Civ. P. 23). Hence, Congress necessarily understood arbitration as an individualized proceeding. Indeed, one

Voorhies ignores the four cases we cited in support of our preemption argument. *See also Shroyer* Order at 6. Instead, she seeks to distinguish *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which was cited in two of our cases for the uncontroversial proposition that “simplicity, informality, and expedition” are among the benefits of arbitration. She affirmatively cites *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) without acknowledging that a federal district court expressly held that *Dunlap*’s unconscionability holding is preempted by the FAA. *See Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005). Finally, Voorhies is equally misguided in relying on *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *Bazzle* recognized only that parties *may* agree to arbitrate on a class-wide basis if they so choose and expressed no view on whether conditioning the enforceability of an arbitration provision on a company’s amenability to class arbitration would frustrate the purposes of the FAA.<sup>19</sup>

---

author who researched the topic concluded that there were only a handful of class arbitrations before the current century. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38-41 & n.148 (2000).

<sup>19</sup> Contrary to Voorhies’ suggestion (Resp. Br. 41 n.24), the fact that individual claims against securities dealers must be arbitrated, while class actions must be pursued in court, does not belie our prediction that businesses will avoid arbitration altogether if there has to be a carve-out for class actions. Because the NASD framework is mandatory, it provides no basis for assuming that businesses will *voluntarily* choose to make arbitration available to customers on an individual

#### IV. VOORHIES' CLAIMS FOR PUBLIC INJUNCTIVE RELIEF ARE ARBITRABLE.

Voorhies argues that, whatever this Court concludes on the unconscionability issue, her claims for public injunctive relief under the UCL and CLRA are non-arbitrable under *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999) and *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003). In *Broughton*, the California Supreme Court declared CLRA claims for public injunctions to be non-arbitrable, and in *Cruz* the court extended that holding to UCL claims for public injunctions. The court reasoned in both cases that arbitration is incompatible with the pursuit of public injunctions.

*Broughton* and *Cruz* are clearly preempted by the FAA. Although *Congress* will be deemed to have rendered a *federal* statutory claim non-arbitrable if there is an “inherent conflict” between the “underlying purposes” of that claim and arbitration (*Gilmer*, 500 U.S. at 26), there is no basis whatever for the California Supreme Court’s assumption that states may declare state-law claims off limits to arbitration. To the contrary,

[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.

---

basis (bearing all or almost all of the costs) if they also have to be exposed to class actions in court.

*Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005) (internal quotation marks omitted).

Consistent with this principle, the Supreme Court frequently has rejected the argument that state legislatures have a free hand in cutting back the scope of the FAA. For example, after the California Supreme Court construed the California Franchise Investment Law to render claims under that law non-arbitrable (*Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982)), the Supreme Court reversed, declaring that “[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Shortly thereafter, the Supreme Court again reversed a decision of the California Supreme Court holding that the California legislature has the power to declare a claim non-arbitrable—this time one to collect wages under the California Labor Code. *Perry v. Thomas*, 482 U.S. 483 (1987). Explaining that California’s “requirement that litigants be provided a judicial forum for resolving wage disputes” was in “unmistakable conflict” with Section 2 of the FAA and its underlying policy, the Court held that, “under the Supremacy Clause, the state statute must give way.” *Id.* at 491.

More recently, the Court explained that the arbitrability of claims depends

on “whether *Congress* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (emphasis added). The following year, the Court refused to apply *Gilmer*’s “inherent conflict” exception to California’s Fair Employment and Housing Act, thus rejecting the very reasoning applied by the California Supreme Court in *Broughton*. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001) (“[T]he argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here.”).

Even more recently, the Court reiterated that in *Southland* it “rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature’s judgment concerning the forum for enforcement of the state-law cause of action.” *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006); see also *Mitsubishi Motors*, 473 U.S. at 623 n.10 (“any contention that the local antitrust claims [arising under Puerto Rico law] are nonarbitrable would be foreclosed by this Court’s decision in *Southland*.”) (citation omitted).

In part because *Broughton* and *Cruz* are far out of step with Supreme Court case law, few if any courts have followed them. To the contrary, one district judge in this Circuit has expressly held that the FAA preempts *Broughton*. See *Arriaga*

*v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1199 (S.D. Cal. 2001) (“If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (i.e., interstate commerce).”), *overruled on other grounds by Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

Commentators have come to the same conclusion. *See, e.g.,* Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 416 (2004) (“*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date.”); Manakides, Note, *Arbitration of “Public Injunctions”: Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. Cal. L. Rev. 433, 481 (2003) (“A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a ‘public injunction.’ The U.S. Supreme Court has held that only Congress and not state legislatures can prevent the enforcement of arbitration clauses.”).

Accordingly, this Court should hold that *Broughton* and *Cruz* are preempted by the FAA.

## CONCLUSION

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

DATED: June 22, 2006

Respectfully submitted,

Donald M. Falk  
MAYER, BROWN, ROWE & MAW LLP  
Two Palo Alto Square  
3000 El Camino Real, Suite 300  
Palo Alto, CA 94306-2112  
Telephone: (650) 331-2000  
Facsimile: (650) 331-2060

---

Evan M. Tager  
Timothy C. Lambert  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
Telephone: (202) 263-3000  
Facsimile: (202) 263-3300

Jesse M. Jauregui  
Michele A. Powers  
Scott J. Leipzig  
WESTON BENSHOOF ROCHEFORT  
RUBALCAVA & MACCUISH LLP  
333 South Hope Street  
Sixteenth Floor  
Los Angeles, CA 90071  
Telephone: (213) 576-1000  
Facsimile: (213) 576-1100

*Attorneys for Appellants*  
*Cingular Wireless LLC and New Cingular PCS, LLC dba Cingular Wireless*

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

I certify that:

- 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 6,871 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),

DATED: June 22, 2006

MAYER, BROWN, ROWE & MAW LLP

By \_\_\_\_\_  
Evan M. Tager  
*Attorney for Appellants*

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of June, 2006, I filed the original and 15 copies of the foregoing brief 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 by third-party commercial carrier for delivery within 3 calendar days on the parties herein, at the following addresses:

Matthew B. Butler, Esq.  
NICHOLAS & BUTLER, LLP  
225 Broadway  
19th Floor  
San Diego, CA 92101

Attorneys for Plaintiffs  
Tel: (619) 325-0492  
Fax: (619) 325-0496  
E-Mail: mbutler@nblaw.org

William N. Kammer  
Alison L. Pivonka  
SOLOMON WARD  
SEIDENWURM &  
SMITH, LLP  
401 B Street, Suite 1200  
San Diego, California 92101

Attorneys for Defendant TMO CA/NV, LLC  
erroneously sued as PACIFIC BELL  
WIRELESS, LLC, T-MOBILE USA, INC.,  
OMNI POINT COMMUNICATIONS, INC.  
dba T-MOBILE  
Tel: (619) 231-0303  
Fax: (619) 231-4755  
E-Mail: wkammer@swsslaw.com  
apivonka@swsslaw.com

James C. Grant  
Michael Patrick McGinn  
STOKES LAWRENCE, P.S.  
800 Fifth Avenue, Suite 4000  
Seattle, WA 98104-3179

Attorneys for Defendant TMO CA/NV, LLC  
Tel: (206) 626-6000  
Fax: (206) 464-1496  
E-Mail: jim.grant@stokeslaw.com  
michael.mcginn@stokeslaw.com

John C. Wynne  
Steven T. Coopersmith  
DUCKOR SPRADLING  
METZGER & WYNNE  
401 West A Street, Suite 2400  
San Diego, California 92101

Attorney for Defendant GO WIRELESS, INC.  
Tel: (619) 231-3666  
Fax: (619) 231-6629  
E-Mail: wynne@dsmwlaw.com  
coopersmith@dsmwlaw.com

Henry Weismann  
Shont E. Miller  
MUNGER, TOLLES, &  
OLSON LLP  
355 South Grand Avenue  
35th Floor  
Los Angeles, California 90071

Attorneys for Defendant VERIZON  
WIRELESS  
Tel: (213) 683-9523  
Fax: (213) 593-2823  
E-Mail: shont.miller@mto.com  
Leigh.Schachter@VerizonWireless.com

DATED: June 22, 2006

MAYER, BROWN, ROWE & MAW LLP

By \_\_\_\_\_  
Evan M. Tager  
*Attorney for Appellants*