

No. B178747

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

SHANNON MERRITT,

Plaintiff-Respondent,

vs.

CINGULAR WIRELESS LLC,

Defendant-Appellant.

From the Order of the Los Angeles County Superior Court
Case No. BC307433
Honorable Teresa Sanchez-Gordon

BRIEF OF DEFENDANT-APPELLANT

Service on Attorney General and District Attorney
required by Bus. & Prof. Code § 17209

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BRIEF OF THE APPELLANT

Appellant Cingular Wireless LLC (“Cingular”) respectfully requests that this Court reverse the superior court’s Order refusing to compel plaintiff to arbitrate her claims and remand with instructions to compel arbitration and to stay litigation of any inarbitrable claims pending arbitration of the remaining claims.

STATEMENT OF THE CASE

This appeal arises out of a lawsuit in which plaintiff Shannon Merritt (“Merritt”) asserts that Cingular’s denomination of certain charges as “taxes” on her bills for cellular telephone service violates, *inter alia*, the Consumer Legal Remedies Act (“CLRA”), Cal. Civil Code § 1750 *et seq.*, and the Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200 *et seq.* Because Merritt had entered into a Wireless Service Agreement (“WSA”) with Cingular that requires her to arbitrate all disputes arising out of or relating to that WSA, Cingular moved to compel arbitration and to stay proceedings pending arbitration. The superior court issued an order denying Cingular’s motion on October 5, 2004. Cingular filed a timely notice of appeal on October 18, 2004. *See* Code Civ. Proc. § 1294(a) (permitting immediate appeal from denial of motions to compel arbitration).

STATEMENT OF FACTS

A. Merritt’s Execution of the Wireless Service Agreement.

Merritt has been a customer of Cingular and/or one of its predecessor companies since August 26, 1999. AA154 ¶ 3. When Merritt obtained a new wireless phone from Cingular on April 19, 2001, she signed the WSA that governs her continuing relationship with Cingular. AA155 ¶ 4. On the front of that WSA, she initialed beneath a provision acknowledging that the Terms and Conditions of the Agreement were on the back of the page. AA165. She also signed her name beneath the

following acknowledgment: “I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT AND THE TERMS AND CONDITIONS, AND THE PLAN PROVISIONS AND CONDITIONS. I AGREE TO BE BOUND THEREBY.” *Id.* (emphasis in original).

On the reverse side of the WSA, the Terms and Conditions begin with the following admonition: “IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER IMPORTANT PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED ‘ARBITRATION’ FOR DETAILS.” AA166 (emphasis in original). In the arbitration provision, which is preceded by the bold-face heading: “**INDEPENDENT ARBITRATION**,” both Cingular and Merritt “agree[d] to arbitrate any and all disputes and claims * * * arising out of or relating to this Agreement, or to any prior Agreement for products or service,” or to bring any such claims in small claims court. AA167. The WSA specifies that it is governed by the “United States Arbitration Act and Federal Arbitration Law.” *Id.*

B. The Revised Arbitration Provision.

In July 2003, pursuant to the change-in-terms provision in its WSAs (*see* AA166), Cingular sent to each of its direct-billed customers, including Merritt, a revised arbitration provision as an insert in their billing envelopes (the “Revised Provision”). *See* AA156 ¶ 2, 159-60. The Revised Provision became effective upon receipt. *Id.* The Revised Provision is, arguably, the most consumer-friendly arbitration provision in the country. It was designed to make arbitration inexpensive and convenient and to respond to criticisms that have been raised by opponents of arbitration by: (i) specifying that Cingular will pay “all AAA filing, administration and arbitrator fees,” unless the arbitrator finds the claim or the relief sought to be frivolous; (ii) obliging Cingular to “reimburse [the customer] for [her]

reasonable attorneys' fees and expenses incurred for the arbitration" if the customer recovers the amount of her demand or more; (iii) providing that arbitration shall take place "in the county * * * of [the customer's] billing address"; (iv) deleting the prior version's requirement that the existence, content, and results of the arbitration be kept confidential; (v) deleting the prior version's prohibition against punitive damages; and (vi) specifying that the AAA, rather than the Wireless Industry Association, rules apply in order to allay any concerns about arbitrator bias. AA159-60. Like in the earlier arbitration provision (*see* AA167), under this Revised Provision each party may "bring claims against the other only in [its] individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." AA160 (emphasis omitted). Also like the predecessor provision, the Revised Provision affords both parties the right to bring claims in small claims court. *See* AA159.

C. Merritt's Superior Court Action.

Ignoring her contractual obligation to arbitrate disputes with Cingular (or bring them in small claims court), Merritt, along with two other Cingular customers, filed a purported "nationwide" class action in superior court in December 2003, alleging that Cingular's denomination of certain charges as "taxes" on their bills violated, *inter alia*, the CLRA and the UCL. AA3-14. Because Merritt's two co-plaintiffs reside outside of California and alleged no connection to California, Cingular filed a Motion to Strike seeking the dismissal of the non-California representative plaintiffs as well as the removal of all "nationwide" class allegations from the pleading. AA18. In response, Merritt filed an amended complaint on April 30, 2004, deleting the two out-of-state plaintiffs and limiting the putative class to California residents. AA48, 52 ¶ 15.

D. Cingular’s Demand That Merritt Arbitrate Her Claims.

On May 17, 2004, Cingular’s attorneys mailed a letter to Merritt’s counsel, advising them that Merritt was subject to a binding arbitration agreement and demanding that Merritt dismiss this action and pursue any claims she believes she has in arbitration. AA162 ¶ 4, 172-79. By letter dated May 24, 2004, Merritt’s counsel advised Cingular’s counsel that Merritt was declining to proceed via arbitration because she believes that Cingular’s arbitration provision is unconscionable under California law. AA181.

E. Cingular’s Motion To Compel Arbitration.

Because Merritt had refused to arbitrate this dispute voluntarily, Cingular filed a motion to compel her to do so. AA131. Merritt opposed that motion, arguing primarily that because the Revised Provision requires the parties to the WSA to resolve disputes through either individual arbitration or an action in small claims court, and specifically precludes either party from bringing an action on a class-wide basis, that arbitration provision is unconscionable. AA182-202. In so arguing, Merritt relied largely on the Fourth District Court of Appeal’s decision in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, *cert. den.* (2003) 537 U.S. 1226, which held that a credit-card issuer’s arbitration provision that contained a class-action waiver was both procedurally and substantively unconscionable.

F. The Superior Court’s Ruling.

After holding oral argument, the superior court refused to compel Merritt to arbitrate this dispute. *See* AA356, 357-58; Reporter’s Transcript (“RT”) 9-11. In so holding, the court relied exclusively on *Szetela*, which it found to be “determinative” (RT9). Evidencing a misunderstanding of the undisputed facts in the record, the court first found the WSA and the

Revised Provision amending that WSA to be procedurally unconscionable, stating:

As in *Szetela*, the arbitration provision at issue was mailed to Plaintiff after she had signed the service contract. Defendant's argument that plaintiff could have become a month-to-month customer in 2001, [when] her initial agreement expired, and would then not be bound by the arbitration [provision] is without [merit]. The arbitration provision prohibiting class actions was not in existence in 2001. It was sent to her in 2003. If a failure to sign a new agreement at the expiration of a two-year agreement makes a customer month to month and not subject to the arbitration provision, then the provision is not binding against plaintiff. The 2001 Agreement was entered into in April and expired in April, 2003. The arbitration provision was sent to plaintiff in July, 2003.

RT10. Turning to substantive unconscionability, the court considered itself bound by *Szetela*, which it treated as holding that class action prohibitions are unconscionable *per se*. RT10-11.

SUMMARY OF ARGUMENT

The binding arbitration provision at issue in this case is fully enforceable. It presents no indicia of procedural unconscionability, aside from the unextraordinary fact that it is a form contract. And, in light of its many consumer-friendly features—including Cingular's undertaking to pay (i) the full cost of arbitrating any nonfrivolous claim and (ii) an award of attorneys' fees to prevailing plaintiffs—the provision is not substantively unconscionable at all, much less egregiously so.

Ignoring the consumer-friendly features of Cingular's arbitration provision, the superior court declined to compel arbitration for one reason and one reason only: the court believed that the Fourth District's decision in *Szetela* established an across-the-board rule that class-action prohibitions in arbitration provisions are unconscionable. The superior court was mistaken in several respects.

First, the superior court erred in interpreting *Szetela* so broadly. Under California law, determinations of unconscionability necessarily are case-specific, turning on the circumstances under which the challenged provision was entered into and the degree of unfairness (if any) of the provision as a whole. The Fourth District in *Szetela* applied that test to the specific provision before it, concluding that it was procedurally unconscionable because it was imposed on existing cardholders as a condition of continuing to use their credit cards and was substantively unconscionable because its class-action prohibition eliminated the only realistic means for customers to vindicate small claims. The court did not, and could not, rule on the propriety of arbitration provisions that were entered into under different circumstances and that contained different features.

The arbitration provision at issue here is materially different from the one struck down in *Szetela*. To begin with, by contrast with the plaintiff in *Szetela*, Merritt voluntarily agreed to arbitrate when she signed Cingular's WSA. The superior court misunderstood the undisputed facts of this case, concluding that, as in *Szetela*, Cingular *added* an arbitration provision to a contract that did not previously have one. Although Cingular later sent Merritt a revised provision that is *more beneficial* to her and other Cingular customers, that provision merely modified her existing provision; it did not add an entirely new term the way the defendant did in *Szetela*. Beyond the mere fact that it is part of a form agreement, therefore, Cingular's arbitration provision bears no indicia of procedural unconscionability. Accordingly, under California's "sliding-scale" approach for assessing unconscionability, significantly *greater* substantive unconscionability would be necessary to invalidate Cingular's arbitration provision than was needed to strike down the provision in *Szetela*.

Yet Cingular’s arbitration provision is not substantively unconscionable *at all*. Unlike in *Szetela*, Cingular’s arbitration provision does not eliminate all effective means of vindicating small claims. Instead, it provides adequate incentive to pursue such claims by obliging Cingular to pay the full cost of arbitrating any claim that is not frivolous and, in addition, to reimburse its customers for their reasonable attorneys’ fees if the arbitrator awards them the amount of their demand or more. Moreover, Cingular’s arbitration provision authorizes customers to bring claims in small claims court, which is a well-recognized means for vindicating small claims. Accordingly, the concerns that animated the finding of substantive unconscionability in *Szetela* are simply not present here.

Second, if *Szetela* is construed as an across-the-board condemnation of class-action prohibitions in arbitration provisions, then it was wrongly decided and this Court should decline to follow it. For one thing, a holding that a particular contractual term is unconscionable under all circumstances cannot be squared with the case-specific nature of unconscionability doctrine. Moreover, the suggestion that a waiver of class actions is so extremely unfair “that no man in his senses and not under delusion” would agree to it—the operative standard under California law—is absurd on its face and can be accepted only at the expense of draining this standard of any real meaning.

It is not surprising, therefore, that the vast majority of courts throughout the country to consider the issue (including many after *Szetela* was decided) have held that it is not unconscionable to include a class-action prohibition in an arbitration provision. Indeed, the California Supreme Court already has suggested that the unavailability of class-wide procedures does not preclude compelling arbitration of claims for monetary relief under the UCL. This is true because, among other reasons, the class-

action mechanism is not so fundamental to the vindication of small claims as to be unwaivable.

Furthermore, *Szetela* failed to consider the preemptive effect of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. Under Section 2 of the FAA, courts cannot rely on the presence of a class-action prohibition to refuse to enforce an arbitration agreement unless extant California law provides that the presence of a class-action prohibition is a ground for invalidating “*any* contract.” Because there is no such California law, the FAA precludes California courts from invalidating arbitration provisions on this basis.

Finally, even if California did have a pre-existing, across-the-board rule that any contract containing any type of class-action prohibition is unenforceable, the FAA would preempt application of such a rule to invalidate an arbitration provision. The kinds of time-consuming procedural safeguards attendant to class actions are utterly irreconcilable with the streamlined nature of arbitration. Because preconditioning the enforcement of an arbitration provision on the availability of class actions and their attendant time-consuming and expensive procedures would frustrate the purposes underlying the FAA, “conflict” preemption results.

For all of these reasons, the superior court erred in refusing to enforce Cingular’s arbitration provision. Accordingly, the Court should order the superior court to compel arbitration of Merritt’s claims for monetary relief.¹

¹ As we discuss in Part II, *infra*, the California Supreme Court has held that claims for “public” injunctions under the UCL and CLRA are non-arbitrable. With respect to the former, the underpinnings of the Court’s holding have been eliminated by Proposition 64. There accordingly is no UCL “public” injunction claim for Merritt to pursue. On the other hand, Proposition 64 does not affect her claim for a public injunction under the

(cont’d)

STANDARD OF REVIEW

Because no material facts are in dispute, this Court reviews the enforceability of the arbitration clause de novo. *See, e.g., NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71. Plaintiff, as the party opposing arbitration, has the burden of proving that the arbitration provision is unconscionable. *See Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 972.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY REFUSING TO ORDER PLAINTIFF TO ARBITRATE THIS DISPUTE.

A. The Federal Arbitration Act Mandates That Cingular's Revised Arbitration Provision Be Enforced

Plaintiff has never disputed that both the original arbitration provision in her WSA and the Revised Provision that amended her WSA are governed by the FAA. *See* AA167, 159. Congress enacted the FAA in 1925 to “reverse the longstanding judicial hostility to arbitration agreements * * *[,] to place [these] agreements upon the same footing as other contracts * * * [and to] manifest a liberal federal policy favoring arbitration agreements.” *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 288-89 (internal quotation marks and citation omitted); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25 (declaring

(... cont’d)

CLRA. This Court therefore is obliged to let her litigate that. But the California Supreme Court has made clear that litigation of the CLRA injunction claim should be stayed pending arbitration of the claims for monetary relief. In the meantime, Cingular will appeal from the CLRA holding in an effort to overturn the California Supreme Court’s holding.

that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”).²

Accordingly, Section 2 of the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; *see also Rosenthal v. Great Western Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 405 (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”) (internal quotation marks and citation omitted). The one exception to this rule is that courts may refuse to compel arbitration and stay the judicial proceedings if “the agreement to arbitrate * * * is revocable ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’” *Perry v. Thomas* (1987) 482 U.S. 483, 489 (quoting 9 U.S.C. § 2) (emphasis added).

The superior court concluded that Cingular’s Revised Provision was unconscionable and that the FAA’s exception to enforceability was therefore applicable. In so holding, the superior court expressed the view that *Szetela* was controlling. In *Szetela*, the Fourth District held unconscionable a credit-card issuer’s arbitration provision, which contained

² The FAA “provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4.” *Moses H. Cone*, 460 U.S. at 22. California has a comprehensive statutory regime comparable in many respects to the FAA. *See* Code Civ. Proc. §§ 1281.2, 1281.4. It also has a similar policy favoring the private arbitration of disputes. *See, e.g., Rosenthal v. Great Western Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 406; *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1431; *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 687.

a prohibition on class actions. According to the Fourth District, that provision was procedurally unconscionable because the credit-card holder's original cardmember agreement did not contain an arbitration provision, which instead was imposed on him through an amendment to that agreement. The court found the arbitration provision to be substantively unconscionable because, in the absence of a class action, the costs of arbitration in instances where consumers were allegedly "overcharged small amounts" would "seriously jeopardize[] customers' consumer rights by prohibiting any effective means of litigating [an entity's] business practices." *Szetela*, 97 Cal.App.4th at 1101. As we demonstrate below, the superior court's reliance on *Szetela* to strike down Cingular's arbitration provision is erroneous in multiple respects.

B. Cingular's Revised Arbitration Provision Is Not Unconscionable Under California Law.

It is black-letter law in California that a contractual provision must be *both* procedurally *and* substantively unconscionable in order to be unenforceable. *Armendariz v. Found. Health PsychCare Servs., Inc.* (2000) 24 Cal.4th 83, 114; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1533. Procedural unconscionability involves the manner in which the agreement came into existence, focusing on whether there has been "oppression" or "surprise." *Armendariz*, 24 Cal.4th at 114 (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 of Cal.* (2000) 83 Cal.App.4th 677, 689. In determining whether any particular provision is unenforceable, the courts of this State 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*, 24

Cal.4th at 114. 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.* (2001) 89 Cal.App.4th 1042, 1056. Under this sliding-scale approach, Cingular’s revised arbitration provision is fully enforceable.

1. **Cingular’s arbitration provision is on the low end of the spectrum of procedural unconscionability.**

Cingular’s WSA, including its arbitration provision, is a form contract—as are 99% of all contracts in this country. Burke, *Contract as a Commodity: A Nonfiction Approach* (2000) 24 Seton Hall Legis. J. 285, 290. Although California courts have equated form contracts with procedural unconscionability, this nearly universal feature of modern agreements serves only to put the WSA on the lowest end of the spectrum of procedural unconscionability. Something more than the use of a standardized term is needed to move a form contract up the spectrum and thereby reduce the degree of substantive unconscionability needed to justify refusing to enforce it. *See Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819 (“To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.”) (citation and internal quotation marks omitted).

Thus, California courts have identified several indicia of higher procedural unconscionability. These include: (1) situations in which there is evidence of coercion (*see Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167, 172-73, 174-75 (employer “oppressive[ly]” coerced an employee into signing a contract)); (2) instances in which the drafting party hid a substantively unconscionable term deep within a form contract (*see Stirlen*, 51 Cal.App.4th at 1532 (provision “hidden in the prolix printed

form drafted by the party seeking to enforce the disputed terms”)); and (3) situations in which the dominant party unilaterally added a new provision to a contract in the midst of an ongoing contractual relationship (*see Szetela*, 97 Cal.App.4th at 1096-97, 1100).

The record is undisputed that none of the above factors is present here. Unlike *Mercuro*, in which the employee was “oppressive[ly]” coerced into signing the employer’s arbitration provision, Merritt voluntarily signed Cingular’s WSA, which included an arbitration provision, in April 2001. At that time she was a month-to-month customer of Cingular’s predecessor, and would not have been required to pay any form of early termination fee in order to end her contract. *See* AA190, 348; RT10. Furthermore, the two-year service commitment to which she agreed in 2001 expired in April 2003, after which she again became entitled to cancel her contract at any time without paying an early termination fee. *See* AA166. She chose not to do so.

There also is no evidence that Cingular concealed either the initial or the revised arbitration provision from Merritt. To the contrary, the WSA she voluntarily signed in 2001 prominently adverts to the existence of an arbitration provision at the very outset of the Terms and Conditions. *See* page 2, *supra*. Indeed, the U.S. Court of Appeals for the Fifth Circuit recently relied in part on the prominence of this notification to reject an argument that a materially identical version of Cingular’s arbitration provision was procedurally unconscionable. *Iberia Credit Bureau Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159, 172 fn. 14 (“the first paragraph of the Cingular contract specifically adverts to the arbitration clause, the only provision given such prominent billing”). The Revised Provision, too, was prominently disclosed on a one-page, two-sided insert in Merritt’s monthly bill. That notification began with the prominent heading “**IMPORTANT INFORMATION CONCERNING YOUR**

CONTRACT” and then, after a brief introductory paragraph, bore the equally prominent heading “**ARBITRATION.**” *See* AA159 (emphasis in original).

Finally, Cingular did not unilaterally impose arbitration on Merritt in the midst of an ongoing contractual relationship, like the defendant did in *Szetela*. Rather, Merritt voluntarily entered into a contract with Cingular that contained an arbitration provision when she signed up for service with Cingular in April 2001 (AA164-67)—and, in fact, her 1999 contract with Cingular’s predecessor also contained an arbitration provision (*see* AA190, 348). This is a far cry from *Szetela*, in which the plaintiff’s only options were to accept the defendant’s arbitration provision, which had been unilaterally imposed on him *after he already was a customer*, or immediately cease using the defendant’s credit card and pay off the balance he had accumulated (*see* 97 Cal.App.4th at 1096-97). The fact that Cingular modified that arbitration provision to make it more beneficial to consumers is not evidence of procedural unconscionability. Indeed, it is well established in California that, although a company may not unilaterally add a provision to a contract, it is entitled to invoke a change-in-terms provision to amend an existing term of the contract. *See Badie v. Bank of Am.* (1998) 67 Cal.App.4th 779, 791 (distinguishing between addition of arbitration provision to contract not previously including one and alteration of existing contract, because “a modification made ‘in accordance with the terms of the contract’ means, at least in part, a modification whose general subject matter was anticipated when the contract was entered into”); *Szetela* 97 Cal.App.4th at 1096-97, 1100. Cingular did just that by revising its existing arbitration agreement to make it more consumer friendly.

The superior court’s conclusion that Cingular had imposed arbitration on Merritt in precisely the same way that Discover Bank imposed arbitration on its cardmembers in *Szetela* (*see* RT10) is the product

of a misunderstanding of the record. The court evidently believed that, when Merritt became a month-to-month customer in April 2003, after the two-year term of her WSA expired, she no longer was subject to any of the WSA's terms and conditions, including the arbitration provision. *See* RT10. That belief is manifestly wrong. The fact that Merritt had become a month-to-month customer meant only that she was thereafter entitled to *cancel* her contract for wireless service without paying an early termination fee; absent such cancellation, she continued to receive wireless service pursuant to the original terms and conditions and any amendments thereto. *See* AA166 (“AFTER YOUR SERVICE COMMITMENT, **THIS AGREEMENT** SHALL AUTOMATICALLY RENEW ON A MONTH-TO-MONTH BASIS UNTIL NOTICE IS GIVEN TO CINGULAR”) (additional emphasis added). Accordingly, at the time Cingular sent Merritt the Revised Provision, she remained subject to both the original arbitration provision and the provision that authorized Cingular to change the terms of the WSA upon notice to its customers. In sending her the Revised Provision, Cingular merely gave her a more beneficial version of what she already had.³

In short, the *only* thing about Cingular's arbitration provision that conceivably might bring it within the realm of procedural unconscionability is the fact that it is part of a form contract. Accordingly, under California's sliding-scale approach, it must rise high on the spectrum of substantive

³ Although it is not entirely clear from the court's oral ruling, the court may also have been under the impression that the Revised Provision added a prohibition on class actions that was not contained in the original arbitration provision. *See* RT10. If so, the court again was entirely mistaken: the arbitration provision in the 2001 WSA contained a class action prohibition as well. *See* AA167 (“CINGULAR and you agree that no arbitrator has the authority to * * * order consolidation or class arbitration”); page 3, *supra*.

unconscionability before it can be struck down. *See Marin Storage*, 89 Cal.App.4th at 1056. As we next explain, Cingular’s arbitration provision is not substantively unfair at all, much less sufficiently so to require invalidation under the sliding-scale standard.

2. **Cingular’s revised arbitration provision is not substantively unconscionable.**

a. ***Szetela* is not an across-the-board holding that requires invalidation of Cingular’s arbitration provision without consideration of its various consumer-friendly features.**

The superior court treated *Szetela* as an across-the-board holding that class-action prohibitions are *per se* substantively unconscionable. The court was plainly wrong in so doing. The sliding-scale approach is necessarily case-specific: the degree of substantive unconscionability needed to invalidate a particular contractual provision depends on the degree of procedural unconscionability involved in its formation, and vice versa. In other words, unconscionability analysis in California depends on “the facts of [each] case.” *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 482-483. Arbitration provisions vary from company to company, and so do the manner in which they are entered into. Accordingly, the Fourth District could not, and did not, hold that all arbitration provisions containing a class-action prohibition are highly substantively unconscionable no matter what other consumer-friendly features they may contain (the holding necessary for invalidation of Cingular’s arbitration provision (*see* pages 11-12, *supra*)). To the contrary, it focused squarely on the arbitration provision before it (which, it warrants emphasizing, bore an important indicium of severe procedural unconscionability). *See* 97 Cal.App.4th at 1100 (“The manifest one-sidedness of the no class action provision *at issue here* is blindingly obvious.”) (emphasis added); *id.* at 1101 (“*This provision* is clearly meant

to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the \$29 sought by Szetela.”) (emphasis added).

Cingular’s revised arbitration provision is very different from the arbitration provision deemed by the Fourth District to be “manifest[ly] one-sided[]” in *Szetela*. The Fourth District concluded that the arbitration provision in that case was “clearly meant to prevent customers * * * from seeking redress for relatively small amounts of money,” and thus would operate (in the court’s colorful phrase) as a “‘get out of jail free’ card.” 97 Cal.App.4th at 1101. That conclusion in turn was predicated on the court’s perception that the cost of arbitrating under Discover’s arbitration clause would outstrip the “relatively small amounts of money” at stake, making it economically irrational to pursue claims on an individual basis and thus leaving “millions of customers * * * without an effective method of redress.” *Id.* Cingular’s revised arbitration provision directly addresses this concern in two different ways, making that case’s holding inapplicable here.

First, unlike Discover Bank in *Szetela*, Cingular has eliminated any financial disincentive to bring small claims in arbitration by specifying in the Revised Provision that it will pay the full cost of arbitration—including “all AAA filing, administration, and arbitrator fees” (AA160)—so long as the claim is not frivolous and, in addition, will reimburse customers for their reasonable attorneys’ fees in the event that the arbitrator awards them the amount of their demands or more. *See* pages 2-3, *supra*. Several courts have relied on precisely these sorts of provisions to reject unconscionability attacks on class-action prohibitions.

For example, the U.S. Court of Appeals for the Eleventh Circuit was recently faced with an unconscionability challenge to an arbitration provision that precluded class actions. In that case, “[t]he Arbitration

Agreements expressly permit[ed] [the plaintiff] and other consumers to recover attorneys' fees and expenses "if allowed by statute or applicable law," and required the company to "advance [the plaintiff's] arbitration expenses, such as filing and administrative fees, if she submit[ed] a written request." *Jenkins v. First Am. Cash Advance of Ga., LLC* (11th Cir. Feb. 18, 2005) __ F.3d __ [2005 WL 388269, at *8 & fn. 8]. The court held that, because of these features, "the * * * contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded." *Id.* at *8.

A federal district court also recently rejected an unconscionability attack on a class-action prohibition in equivalent circumstances, explaining:

[Plaintiff's] argument is based on the erroneous assumption that her costs and attorney's fees will be paid from her damage award. This is simply not the case. If the Plaintiff's claim is successful, [Defendant] will pay the Plaintiff's attorneys' fees and costs; the Plaintiff will not have to forego [sic] any of her damages in order to compensate her lawyers. * * * Although the Plaintiff and her lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or her attorneys are so lacking in economic incentive to warrant a finding that [Defendant's] class action prohibition is unconscionable.

Billups v. Bankfirst (M.D. Ala. 2003) 294 F.Supp.2d 1265, 1274.

Finally, in a case involving an earlier version of Cingular's arbitration provision that (unlike the current version) did not expressly provide for an award of attorneys' fees to successful plaintiffs, the Fifth Circuit nonetheless held that the arbitration provision "does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability" in part because "an arbitrator would presumably be empowered to award [attorneys' fees] in enforcing a [Louisiana Unfair

Trade Practice Act] plaintiff’s substantive rights.” *Iberia*, 379 F.3d at 175 & fn. 19.⁴

The reasoning of these cases applies with even greater force here: If “the * * * contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded” when the defendant is obligated to advance the costs of arbitration and the arbitrator is authorized to award attorneys’ fees under fee-shifting statutes (*Jenkins*, 2005 WL 388269, at *8), it is all the more so when, as here, the defendant has contractually agreed to reimburse prevailing claimants for their reasonable attorneys’ fees *in all cases* and also has agreed to pay all of the costs of arbitration outright—not merely to “advance” those costs. See Wilson, “*No-Class-Action Arbitration Clauses*”: *State-Law Unconscionability, And the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action* (2004) 23 *Quin. L. Rev.* 737, 826-27, 841-42 (class-action prohibition should not be deemed unconscionable, even when amount at stake is small, if the arbitration provision commits the defendant to pay the full cost of arbitration and a reasonable attorneys’ fee to prevailing parties).⁵

⁴ See also, e.g., *Snowden v Checkpoint Check Cashing* (4th Cir. 2002) 290 F.3d 631, 638 (rejecting argument that small TILA claim was not economically viable unless brought on a class-wide basis as “unfounded in light of * * * the fact that attorney’s fees are recoverable * * * in a TILA action.”); *Johnson v. W. Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 374.

⁵ Indeed, precisely because it would cost Merritt nothing to arbitrate her claims against Cingular (and she would receive an award of attorneys’ fees if she were to recover the amount of her demand or more), she cannot validly contend that a class action is necessary for the vindication of her own rights. Rather, it is evident that she wants to raise the rights of other customers who, for one reason or another, have chosen not to sue or pursue arbitration against Cingular. Unconscionability doctrine, however, does not allow a plaintiff to invalidate his or her own *conscionable* contract on the
(cont’d)

Second, Cingular’s arbitration provision does not limit customers only to arbitration; it also affords them the opportunity to pursue their claims in small claims court. *See* page 3, *supra*; AA159. That alternate forum is speedy, simple, and inexpensive—and therefore is a fully adequate means for Cingular’s customers to obtain redress for any valid claims they may have without the need for a class action.

It has long been recognized in this State that the very purpose of small claims courts is “to make it possible for plaintiffs with meritorious claims for small amounts of money * * * to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims [a]re worth.” *San Francisco v. Small Claims Ct.* (1983) 141 Cal.App.3d 470, 474. Indeed, as one court elsewhere has recognized, small claims court is often a *better* option than a class action for the resolution of small claims because “[c]ertification of * * * a class [can] promote complicated lengthy legal embattlement,” while small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *See Pulver v. 1st Lake Props., Inc.* (La. App. 1996) 681 So.2d 965, 970.

(... cont’d)

basis of an argument (and an unfounded one at that) that someone else’s rights can’t be adequately vindicated. Merritt’s desire to raise the rights of other consumers cannot trump the “strong federal policy favoring arbitration” (*Waffle House*, 534 U.S. at 290). If Merritt disagrees with the policy choice Congress has made, the forum for her disagreement is in Congress, not the courts. *See, e.g., Rosen v. SCIL, LLC* (Ill.App.Ct. 2003) 799 N.E.2d 488, 494 (upholding class-action prohibition in arbitration provision and stating that “the question of whether an individual is entitled to participate in a class action as a matter of right is a question of public policy, which we suggest should be addressed by the legislature”).

For precisely this reason, the U.S. Court of Appeals for the Fifth Circuit recently rejected a contention that an earlier version of Cingular’s arbitration provision made it impossible to pursue small claims. *See Iberia*, 379 F.3d at 175 fn. 19.⁶ And in *Jenkins*, the U.S. Court of Appeals for the Eleventh Circuit also recently relied on the existence of a small claims court provision in rejecting challenges to a class-action waiver. As that court explained:

[T]he provision providing access to small claims tribunals was intended to benefit, not injure, consumers. The American Arbitration Association (AAA) has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration. Principle 5 of this Protocol expressly states that consumer arbitration agreements, like those at issue here, should offer all parties the option of seeking adjudication in a small claims tribunal. The Comment to Principle 5 explains ‘access to small claims tribunals is an important right of Consumers’ because it provides ‘a convenient, less formal, and relatively expeditious judicial forum for handling ... disputes’ involving small amounts of money. By including a provision that offers access to such tribunals, the Arbitration Agreements at issue here merely complied with the AAA’s Consumer Due Process Protocol.

⁶ *See also* Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration: Green Tree Fin. Corp. v. Bazzle* (2004) J. Disp. Resol. 259, 274 (“Although the possibility of leaving individual consumers without any avenue to pursue relief is not by any means a favored outcome, to employ a procedural device which negates the very advantages of arbitration as an alternative form of dispute resolution is equally unfavorable. In light of the alternatives available even in the absence of class-wide arbitration, such as small claims court or individual arbitration, it should not be said that plaintiffs would be left without alternatives, especially because these alternatives may not necessitate the hiring of costly legal counsel.”).

Jenkins, __ F.3d __ [2005 WL 388269, at *10] (quoting AAA, *Consumer Due Process Protocol* (available at <http://www.adr.org/protocols>) (internal citations omitted). Thus, *Szetela* is distinguishable on this basis as well.⁷

In sum, the superior court erred in treating *Szetela* as an across-the-board condemnation of class-action prohibitions that required it to hold Cingular's revised arbitration provision to be substantively unconscionable. Cingular's provision is materially different from the one at issue in *Szetela*, both in the way it came into existence and in its substantive terms. Accordingly, under California's sliding-scale approach, it is fully enforceable. *See Marin Storage*, 89 Cal.App.4th at 1056 (observing that, because "of the low level of procedural unfairness, * * * a greater degree of substantive unfairness than has been shown" was required for invalidation of challenged contractual provision under the sliding-scale approach).

b. If construed as holding that any arbitration agreement containing a class-action prohibition is substantively unconscionable, *Szetela* is wrong and should not be followed.

Insofar as *Szetela* is construed as an across-the-board holding, the superior court may have been bound by it, but this Court plainly is not. *See, e.g., Wolfe v. Dublin Unified Sch. Dist.* (1997) 56 Cal.App.4th 126, 137; *see generally* 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 934, p. 971. This Court has rejected *Szetela* before (in a case involving the same arbitration provision). Although that decision was vacated when the

⁷ There is one off-hand reference in *Szetela* that suggests that the customer in that case also might have been entitled to proceed in small claims court (*see* 97 Cal.App.4th at 1101), but the court did not analyze that factor at all, and there is no mention of small claims court in the arbitration provision quoted in the case (*see id.* at 1096-97). More to the point, the *Szetela* court did not discuss either the many benefits that small claims court provides to consumers or the ways in which the existence of this provision addresses the primary concerns raised by that court.

California Supreme Court granted review to resolve the division in the courts (*see Discover Bank v. Super. Ct.* (Cal. 2003) 65 P.3d 1285, granting review of 129 Cal.Rptr.2d 393 (argument set for Apr. 7, 2005)), *Szetela* is no more valid now than it was then. Indeed, in the intervening time, numerous state and federal appellate courts have agreed with this Court that there is nothing unconscionable about including a class-action prohibition in an arbitration provision, especially when, as here, the provision contains multiple consumer-friendly features that are designed to ensure that small claims can be adequately vindicated.

i. **A holding that class-action prohibitions are categorically unconscionable contravenes well-established California law.**

To begin with, if *Szetela* is construed as an across-the-board holding that all class-action prohibitions are unconscionable, it deviates from California law, which treats unconscionability as a case-by-case inquiry. More broadly, the standard in California is that, to be deemed substantively unconscionable, a contract provision must be “so unreasonable, unjustified, or one-sided as to shock the conscience.” *Marin Storage*, 89 Cal.App.4th at 1055-56. Put another way, the contract 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.” *California Grocers Ass’n v. Bank of Am.* (1994) 22 Cal.App.4th 205, 214 (internal quotation marks and alterations omitted).

To put it bluntly, to say that “no man in his senses and not under delusion” would accept a fully disclosed class-action prohibition in an arbitration provision that is part of a contract for the provision of goods or services is absurd and would distort that stringent standard beyond recognition. There are many reasons why a reasonable person would accept a class-action prohibition, not the least of which might be the belief

that it would ultimately result in a lower price for the goods or services being offered. *See Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 594 (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *see also* Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements* 2001 J. Disp. Resol. 89, 94 (arguing that class arbitration makes consumers worse off by increasing the cost of doing business and, as a result, raises prices for consumers).

As the First District has put it, California unconscionability law does not authorize a court to “thrust” itself into “the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable.” *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391. Because the *Szetela* court did just that, its condemnation of class-action prohibitions runs afoul of California law.

ii. **A holding that class-action waivers are categorically unconscionable would go against the overwhelming weight of authority on the issue.**

California unconscionability doctrine aside, the vast majority of courts that have addressed the question—both before and after *Szetela*—have either expressly held or strongly implied that it is not unconscionable to prohibit class actions in arbitral proceedings. For example, the U.S. Supreme Court broached the issue in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20. The plaintiff there contended that disputes under the Age Discrimination in Employment Act (“ADEA”) should not be subject to arbitration because, among other things, arbitration procedures “do not provide for * * * class actions.” *Id.* at 32. The Supreme Court rejected that argument, explaining that, “even if the arbitration could not go forward as a class action or class relief could not be granted by the

arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* (internal quotation marks and citation omitted; alteration in original).

For its part, the California Supreme Court has not yet expressly resolved the issue, though it may do so in the *Discover Bank* case now pending before it. The Court has, however, already strongly suggested that the existence of a class-action prohibition is not an impediment to the enforcement of an arbitration agreement. In *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, the Court held that, although claims for injunctive relief under the UCL are non-arbitrable, claims for unjust enrichment, restitution, and disgorgement *can* be arbitrated. In that connection, it observed (quoting *Gilmer*):

The unavailability of classwide arbitration would not alter our conclusion in the present case. As the Supreme Court has stated in rejecting the argument that the unavailability of classwide relief is grounds for not enforcing an arbitration agreement: “Even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that a statute provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”

30 Cal.4th at 319 fn. 5 (internal quotation marks, alterations, and citation omitted).

Numerous other courts have upheld arbitration provisions that included a prohibition on class actions. As the Seventh Circuit has explained, “[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. * * * One of those * * * is the possibility of pursuing a class action.” *Champ v. Siegel Trading Co.* (7th Cir. 1995) 55 F.3d 269, 276. This is perfectly acceptable

because the right to a class action is “merely a procedural one, * * * that may be waived.” *Johnson v. W. Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 369. In fact, every federal appellate court to address the issue, except the Ninth Circuit (which merely followed *Szetela*), as well as the substantial majority of other federal and state courts, have held that arbitration provisions barring class arbitration are fully enforceable.⁸ Significantly,

⁸ See, e.g., *Jenkins*, 2005 WL 388269, *8-9; *Iberia*, 379 F.3d at 174-75; *Carter v. Countrywide Credit Indus., Inc.* (5th Cir. 2004) 362 F.3d 294, 298; *Livingston v. Assocs. Fin., Inc.* (7th Cir. 2003) 339 F.3d 553, 559 (court is “obliged to enforce the type of arbitration to which [the] parties agreed, which does not include arbitration on a class basis”) (internal quotation marks omitted); *Johnson*, 225 F.3d at 369; *Champ*, 55 F.3d at 276-277; *Adkins v. Labor Ready, Inc.* (4th Cir. 2002) 303 F.3d 496, 502; *Snowden v Checkpoint Check Cashing* (4th Cir. 2002) 290 F.3d 631, *Snowden*, 290 F.3d at 638; *Lloyd v. MBNA Am. Bank, N.A.* (3d Cir. 2002) 27 Fed. Appx. 82, 84; *Randolph v. Green Tree Fin. Corp.* (11th Cir. 2001) 244 F.3d 814, 818-819; *O’Quin v. Verizon Wireless* (M.D.La. 2003) 256 F.Supp.2d 512, 517; *Lomax v. Woodmen of the World Life Ins. Soc’y* (N.D.Ga. 2002) 228 F.Supp.2d 1360, 1365; *Rains v. Found. Health Sys. Life & Health* (Colo.Ct.App. 2001) 23 P.3d 1249, 1253; *Brown v. KFC Nat’l Mgmt. Co.* (Haw. 1996) 921 P.2d 146, 166-67 fn. 23; *Ragan v. AT&T Corp.* (Ill. App. Ct. Mar. 1, 2005) __ N.E.2d __ [2005 WL 487126, at *9] (New York law); *Rosen*, 799 N.E.2d at 494-95 (Illinois law); *Hutcherson v. Sears Roebuck & Co.* (Ill.App.Ct. 2003) 793 N.E.2d 886, 894-96 (Arizona law); *Tsadilas v Providian Nat’l Bank* (App. Div. 2004) 786 N.Y.S.2d 478, 480; *AutoNation USA Corp. v. Leroy* (Tex.App. 2003) 105 S.W.3d 190, 200; *Stein v. Geonerco, Inc.* (Wash.Ct.App. 2001) 17 P.3d 1266, 1270-71; cf. *Burden v. Check Into Cash of Ky., L.L.C.* (6th Cir. 2001) 267 F.3d 483, 492-93 (remanding case to district court to decide unconscionability challenge to arbitration agreement, but noting that class action waiver was likely valid under existing law). But see *Ting v. AT&T* (9th Cir.), 319 F.3d 1126, 1150 (finding class action prohibition in arbitration provision that did not provide an alternative means for vindicating small claims unconscionable under California law), *cert. den.* (2003) 124 S.Ct. 53.

many of these decisions post-date and either expressly or implicitly disagree with *Szetela*.⁹

That so many courts have held that there is nothing unconscionable about class-action waivers makes perfect sense because the underlying premise of *Szetela*—that class actions are so fundamental to the vindication of small claims as to be unwaivable—cannot be squared with the fact that, for the vast majority of the history of this nation and this State, class actions for money damages did not even exist. Class actions for damages of the type so prevalent today took shape no more than 38 years ago.¹⁰ Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable.

⁹ See *Jenkins*, 2005 WL 388269, *8-9; *Iberia*, 379 F.3d at 174-75; *Carter*, 362 F.3d at 298; *Livingston*, 339 F.3d at 559; *Adkins*, 303 F.3d at 502; *Snowden*, 290 F.3d at 638; *O’Quin*, 256 F.Supp.2d at 517; *Lomax*, 228 F.Supp.2d at 1365; *Ragan*, ___ N.E.2d at ___ [2005 WL 487126, at *9]; *Rosen*, 799 N.E.2d at 494-95; *Hutcherson*, 793 N.E.2d at 894-96; *Tsadilas*, 786 N.Y.S.2d at 480; *AutoNation*, 105 S.W.3d at 200.

¹⁰ Although Code of Civil Procedure Section 382 authorized limited class actions as early as 1872 (see *Hefferman v. Bennett & Armour* (1952) 110 Cal.App.2d 564, 590), for most of the first century afterward the “common relief” doctrine inhibited the availability of class actions for damages in California state courts. See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading §§ 274-75, pp. 356-59. For practical purposes, damages class actions in California state courts were limited to “common fund” situations. Note, *Class Action and Interpleader: California Procedure and the Federal Rules: Class Actions* (1953) 6 Stan. L. Rev. 120, 123-33. Not until 1967 did the California Supreme Court squarely reject common relief as a prerequisite to class certification (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-08), opening the door to class representation of disparate plaintiffs with minor economic injuries. See Berk, *Daar v. Yellow Cab Co.: The Advent of the Consumer Class Action in California* (1976) 10 U.S.F. L. Rev. 651, 664. Federal class actions for money damages are of equally recent vintage. See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)* (1967) 81 Harv. L. Rev. 356, 381.

- iii. **Section 2 of the FAA would expressly preempt an across-the-board rule that class-action prohibitions in arbitration provisions are substantively unconscionable under California law because that rule does not apply equally to all contracts.**

Even if *Szetela* were properly construed as holding that class-action waivers in arbitration agreements are categorically unconscionable, that holding would be expressly preempted by federal law. Under Section 2 of the FAA,

[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” * * * A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

Perry, 482 U.S. at 492-93 fn. 9 (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only “*if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.*” *Id.* (emphasis in original).

That principle does not simply prohibit the invalidation of “arbitration agreements under state laws applicable *only* to arbitration provisions.” *Doctor’s Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 (emphasis in original). It also bars courts from impeding the enforceability of arbitration agreements by fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. As the First District has explained, under Section 2 of the FAA a court may refuse to enforce an arbitration provision only on the basis of a state-law ground that “does not subject arbitration clauses to disparate treatment”—*i.e.*, one that “is imposed in a broad array of commercial and noncommercial settings” (such as the rule in that case

requiring that credit service contracts be signed by both parties). *Mitchell v. American Fair Credit Ass'n* (2002) 99 Cal.App.4th 1345, 1357. In upholding the version of Cingular's arbitration provision that was in Merritt's original WSA, the U.S. Court of Appeals for the Fifth Circuit similarly explained:

That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. * * * [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

Iberia, 379 F.3d at 167; *see also Oblix, Inc. v. Winiecki* (7th Cir. 2004) 374 F.3d 488, 492 (“[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.”).¹¹

California has no ***generally applicable*** prohibition against contractual waivers of class actions: There is no statute or judicial decision deeming all contractual class-action waivers unenforceable whether or not they are part of an arbitration prohibition.¹² Accordingly, under Section 2 of the FAA, California is not free to declare ***arbitration provisions*** to be

¹¹ Thus, the superior court was mistaken in characterizing Cingular's position as “attempting to narrow the scope of the [unconscionability] defense” (RT11). The fact that “the defense of unconscionability is [a recognized contract] defense” (*id.*) is not the end of the matter. The courts instead must evaluate the application of that doctrine to the specific contractual provision at hand to ensure that it is not applied “in ways that subject arbitration clauses to special scrutiny.” *Iberia*, 379 F.3d at 167.

¹² Although the CLRA has been construed to preclude consumers from waiving their right to bring a class action under that law (*see America Online, Inc. v. Superior Ct.* (2001) 90 Cal.App.4th 1), “[b]ecause the CLRA applies to such a limited set of transactions, * * * it is not a law of ‘general applicability.’” *Ting*, 319 F.3d at 1148.

unconscionable merely because they happen to prohibit class actions. Any such effort is expressly preempted.¹³

- iv. **Even if California had a general prohibition against contractual class-action waivers, as applied to arbitration provisions, it would conflict with the objectives of the FAA and therefore be preempted.**

Finally, even if California did have an across-the-board rule that the presence of a class-action waiver is grounds for revoking *any* contract containing it, if applied in the arbitration context, such a rule 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 of Article VI of the U.S. Constitution. *United States v. Locke* (2000) 529 U.S. 89, 109 (internal

¹³ For similar reasons, the *Szetela* court was not free to condemn Discover Bank’s class-action prohibition on the ground that, “[a]lthough styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits” (97 Cal.App.4th at 1101). The FAA precludes this rationale because there is no general principle of California contract law that requires every provision of every contract to be facially mutual, much less one that requires facially mutual terms also to be mutual in practical effect. To the contrary, it is black-letter law that point-by-point mutuality is not required. Rather, the “standard contract principle” holds that, “[i]f the requirement of consideration is met, there is no additional requirement of * * * mutuality of obligation.” *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 672 fn.14 (quoting Rest.2d Contracts (Tent. Draft No. 2, 1965) § 81) (other citations and internal quotation marks omitted); *see also, e.g.*, Rest.2d Contracts § 79 (“If the requirement of consideration is met, there is no additional requirement of * * * ‘mutuality of obligation.’”); 2 Perillo, Corbin on Contracts (1995) § 6.1 (The “so-called requirement of mutuality of obligation is now widely discredited. It is consideration (or some other basis for enforcement) that is necessary, not mutuality of obligation.”).

quotation marks and citation omitted); *accord Dowhal v. Smithkline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.¹⁴

Section 2 of the FAA declares pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because, as one of its framers explained, “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., p. 7 (1924), statement of Charles Bernheimer, N.Y. Chamber of Commerce. As Congress later explained, 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, p. 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); *see also Engalla*, 15 Cal.4th at 978 (“The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties * * *.”) (citation and internal quotation marks omitted).

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 (*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 280-81), class actions take years. Class actions invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including

¹⁴ Neither an express preemption provision nor a savings clause “bar[s] the ordinary working of conflict pre-emption principles.” *Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 869. Hence, even if a state-law rule does not run afoul of Section 2 of the FAA, it may nonetheless be preempted if its enforcement would undermine the policies of the FAA.

depositions of all class 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) a writ proceeding initiated by the losing party.

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 commence and likely continue for months, if not years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be a fairness hearing, complete with extensive briefing by both sides, as well as by any objectors. And if the defendant chooses not to settle, there would need to be a 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. Finally, few defendants would agree to subject themselves to a class-wide arbitration (and the attendant risk of catastrophic liability) unless post-judgment review of arbitration awards were far more searching than is now the norm.¹⁵

¹⁵ See Bunch, *supra*, 2004 J. Disp. Resol. at 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.”); Wilson, *supra*, 23 *Quin. L. Rev.* at 778 (“[c]lass arbitration just seems to present too many risks [including the fact that] it is still unclear what sort of judicial review” will be available).

All of these procedures, of course, make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction between arbitration and litigation. In fact, some commentators believe that “class arbitration may actually prove *more* burdensome than class litigation.” Wilson, *supra*, 23 Quin. L. Rev. at 774. As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place. *See id.* at 778 (“The intuition is that firms will conclude that the known, class litigation, is preferable to unknown, class arbitration. Class arbitration just seems to present too many risks.”).

Nothing could conflict more clearly with the objectives of the FAA. As the Fifth Circuit recently put it in rejecting an unconscionability attack on the class-action prohibition in the version of Cingular’s arbitration provision that was included in Merritt’s original WSA, “the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Iberia*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31); *see also id.* at 175-76 (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”). Accordingly, the doctrine of conflict preemption precludes any state rule requiring the injection of class action procedures into the arbitration process.

* * * * *

In short, *Szetela* is on the wrong side of California principles of unconscionability law, the overwhelming majority of cases outside of California addressing the validity of class-action prohibitions, and federal law. This Court was right to reject it in 2003 and should do so again now.

II. THIS COURT SHOULD ORDER MERRITT TO ARBITRATE ALL OF HER CLAIMS UNDER THE UCL AND SHOULD INSTRUCT THE SUPERIOR COURT TO STAY MERRITT'S CLAIM FOR INJUNCTIVE RELIEF UNDER THE CLRA.

In addition to seeking monetary relief for her alleged injuries, Merritt asserts claims for injunctive relief under the CLRA and UCL. The California Supreme Court has held that claims for injunctive relief under the CLRA are not arbitrable, notwithstanding the FAA. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066.¹⁶ All of Merritt's claims under the *UCL*, however, are arbitrable. Although the California Supreme Court has held that UCL "public injunction" claims are not arbitrable (*see Cruz*, 30 Cal.4th at 312), after the adoption of Proposition 64, no court can grant the forward-looking UCL public injunction that Merritt seeks. Because any injunctive relief she might seek on her own behalf (rather than for the "general public") does not fall within the exception to arbitration recognized in *Cruz*, her entire UCL claim should be considered and decided by the arbitrator.

¹⁶ We submit that *Broughton* cannot be reconciled with binding U.S. Supreme Court precedent holding that, because "arbitrators do have the power to fashion equitable relief," even federal claims seeking broad injunctive relief can be arbitrated. *Gilmer*, 500 U.S. at 32. Although Congress can exempt claims from the FAA, states cannot: Section 2 of the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. *See also Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with * * * § 2 [of the FAA]."). We preserve for further appellate review our argument that the FAA precludes California from excluding claims for injunctive relief under the CLRA from arbitration, but recognize that this Court is bound to follow *Broughton* until either the U.S. Supreme Court or the California Supreme Court overturns it. In the meantime, Merritt's claims for monetary relief under the CLRA are arbitrable and her injunctive claims should be stayed until arbitration is complete. *See Broughton*, 21 Cal.4th at 1084-1086.

The relevant passage in *Cruz* created “a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements,” but limited that exception to “requests for injunctive relief *designed to benefit the public.*” 30 Cal.4th at 312 (emphasis added).¹⁷ Proposition 64 has eliminated Merritt’s ability to pursue “public” injunctive relief under the UCL and the false advertising law, deleting language that formerly authorized the prosecution of actions by private parties purportedly “acting for the interests of * * * the general public.” Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, §§ 3, 5, pp. 109-10 (“Prop. 64”) (attached) (amending Bus. & Prof. Code §§ 17204, 17535). The repeal withdrew Merritt’s “standing to sue” for public relief. *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 215.

That repeal precludes Merritt’s claim for purportedly “public” injunctive relief. A substantial majority of the California appellate courts, including Division Five of this District, have held that Proposition 64 applies with full force to pending actions because the Proposition repealed the statutory authority to bring and continue the purely statutory UCL action on behalf of the “general public.” *Branick v. Downey Savings & Loan Ass’n* (Feb. 9, 2005) __ Cal.App.4th __, 24 Cal.Rptr.3d 406, 412-18 (2d Dist., Div. 5); *Benson v. Kwikset Corp.* (Feb. 10, 2005) __ Cal.App.4th __, 24 Cal.Rptr.3d 683 [2005 WL 327472, at *4-*12] (4th Dist., Div. 3); *Bivens v. Corel Corp.* (Feb. 18, 2005) __ Cal.App.4th __, 24 Cal.Rptr.3d 847 [2005 WL 388245, at *4-*7] (4th Dist., Div. 1); *Lytwyn v. Fry’s Elecs., Inc.* (Feb. 22, 2005, D042401) __ Cal.App.4th __ [2005 WL 407363, at

¹⁷ That exception was based on the holding in *Broughton* that claims for public injunctive relief under the CLRA are inarbitrable because the “plaintiff * * * is functioning as a private attorney general, enjoining future deceptive practices *on behalf of the general public.*” 21 Cal.4th at 1079-80 (emphasis added).

*12-*16] (4th Dist., Div. 1). *See, e.g., Governing Bd. of Rialto Unified Sch. Dist. v. Mann* (1977) 18 Cal.3d 819, 829 (“when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, ‘a repeal of such a statute without a saving clause will terminate all pending actions based thereon’”) (quoting *Southern Serv. Co. v. Los Angeles County* (1940) 15 Cal.2d 1, 11-12).

Although all of these decisions rely on the same essential grounds, the Fourth District’s decision in *Benson* contains the most extensive reasoning. In holding that Proposition 64 applied to the “pending appeal from the trial court’s judgment” that was before it (2005 WL 327472, at *10), the Fourth District applied the “statutory repeal principle” (*id.* at *6) because the plaintiff’s action, and particularly his standing, rested on a statutory rather than a common-law basis. *Id.* at *4-*6, *9; *see also Branick*, 24 Cal.Rptr.3d at 413-14 (citing Gov’t Code § 9606), 416. Because Proposition 64 “does not contain a provision either expressly or impliedly precluding its application to pending matters,” and because the “plaintiff ha[d] not yet converted his causes of action to a final judgment, the amendments appl[ied].” *Benson*, 2005 WL 327472, at *6. The Fourth District recognized that the withdrawal of standing for non-injured parties repealed their causes of action (*id.* at *7), specifically rejecting contentions that only repeals that liberalize penal statutes fall within the statutory repeal rule and that partial repeals do not count (*id.* at *8).¹⁸

The *Benson* court further explained why the minority view expressed in *Californians for Disability Rights v. Mervyn’s, LLC* (Feb. 1, 2005) —

¹⁸ *See, e.g., Moss v. Smith* (1916) 171 Cal. 777, 787 (repeal that removes statutory basis for an action deprives plaintiffs of all “right further to prosecute [it], whether that action be in its nature penal or remedial”; repeal need not abrogate the statute “*in toto*”).

Cal.App.4th ___, 24 Cal.Rptr.3d 301 (1st Dist., Div. 4) “reflects a fundamental misunderstanding of the repeal principle.” *Benson*, 2005 WL 327472 at *9-*10. In particular, the perception of the *Mervyn*’s court that the repeal principle somehow conflicts with the general presumption of prospectivity “ignores the fact” that, when a repeal withdraws a right “existing solely by way of statute,” the presumption does not apply at all. *Id.* at *9; see also *Branick*, 24 Cal.Rptr.3d at 415. The *Benson* court also noted that the result in *Mervyn*’s was “particularly troubling” because the trial court on remand might “be faced with the prospect of potentially issuing injunctive or restitutionary relief in favor of a party that lacks the jurisdictional basis to maintain the underlying action,” a “circumstance” the court found “absurd.” *Benson*, 2005 WL 327472, at *10.

Indeed, because the only aspect of this case affected by the Proposition 64 amendments is Merritt’s claim for forward-looking “public” injunctive relief, the application of the Proposition 64 amendments to this case is especially clear.¹⁹ It is well settled that the “application of new statutes passed after the events in suit is unquestionably proper” when “the intervening statute authorizes or affects the propriety of prospective relief.” *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 273-74. The California Supreme Court repeatedly has made this clear: “Relief by injunction operates in futuro, and the right to it must be determined as of the date of decision by an appellate court.” *Hays v. Wood* (1979) 25 Cal.3d 772, 782

¹⁹ The purely prospective nature of injunctive relief underscores the fact that the application of Proposition 64 to this case is not retroactive at all. A statute limiting the ability of courts to grant forward-looking injunctive relief “addresses conduct in the future”; thus, the statute’s effect “is actually prospective in nature since [it] relate[s] to the procedure to be followed in the future.” *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 (internal quotation marks omitted). See also *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.

(applying intervening amendment) (internal quotation marks omitted).²⁰ Under this settled line of authority, any court considering Merritt’s request for a public injunction would have to apply the law as Proposition 64 has changed it—and therefore would have to deny relief. What remains—Merritt’s claims for monetary relief and a private injunction—are undeniably arbitrable. Accordingly, Merritt should be ordered to arbitrate them.²¹

CONCLUSION

This Court should reverse the superior court’s order denying Cingular’s motion to compel arbitration and instruct the superior court to (i) order arbitration of all of Merritt’s claims except for her claim for injunctive relief under the CLRA, and (ii) stay litigation of that claim pending resolution of the arbitration and of Cingular’s further appeals from the holding that such claims are non-arbitrable.

²⁰ See also, e.g., *White v. Davis* (1975) 13 Cal.3d 757, 773, fn.8; *Cal-Dak Co. v. Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496-97; *American Fruit Growers v. Parker* (1943) 22 Cal.2d 513, 515; *Sutter’s Place, Inc. v. Kennedy* (1999) 71 Cal.App.4th 674, 684; 6 Witkin, *Cal. Procedure* (4th ed. 1997) Provisional Remedies, § 399, pp. 324-25 (collecting cases); 9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, § 332, p. 373 (collecting cases).

²¹ Even if Merritt’s claims for public injunctive relief somehow could go forward, they should be stayed pending the completion of arbitration. *Cruz*, 30 Cal.4th at 320.

Dated: March 9, 2005

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RULE 14(c)(1) CERTIFICATE

According to the word-count facility in Microsoft Word 2000, this brief, including footnotes but excluding those portions excludable pursuant to Rule 14(c)(3), is 11,810 words long, and therefore complies with the 14,000-word limit contained in Rule 14(c)(1).

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