

No. 55028-4 I

SUPREME COURT OF THE STATE OF WASHINGTON

**DOUG SCOTT, LOREN TABASINSKE &
SANDRA TABASINSKE,**

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

**CINGULAR WIRELESS LLC'S RESPONSE IN OPPOSITION TO
PETITIONERS' MOTION FOR DISCRETIONARY REVIEW**

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INTRODUCTION

As this Court has explained, there is a “strong public policy favoring arbitration of disputes.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341 & n.4, 103 P.3d 773 (2004). Petitioners ignore this policy, instead attempting to draw the Court into a debate on the utility of class actions. But the sole question here is whether petitioners have satisfied the requirements of RAP 13.5(b), which delineates the circumstances in which this Court may grant review of the Court of Appeals’ decision not to grant discretionary review of an interlocutory Superior Court decision. As we demonstrate below, petitioners plainly fail to meet the requirements of that Rule. Thus, the Motion for Discretionary Review (“Motion”) should be denied.

BACKGROUND

In this litigation, petitioners allege that they were charged for long distance and roaming services in violation of their Wireless Service Agreements (“WSAs”) with Cingular Wireless LLC (“Cingular”). Petitioners’ WSAs contain provisions requiring them to arbitrate any disputes with Cingular on an individual basis (or to proceed in small claims court). *See* CP 345, 349. Pursuant to the change-in-terms provision in those WSAs (*see* CP 345, 349), in July 2003—long before petitioners commenced this litigation—Cingular sent to each of its direct-billed custom-

ers, including petitioners, a revised arbitration provision as an insert in their billing envelopes (the “Revised Provision”). *See* CP 352 ¶ 3, 355. The Revised Provision was designed to make arbitration inexpensive, convenient, and desirable for Cingular’s customers.¹ Like in the earlier arbitration provision (*see* CP 345, 349), 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.” CP 356 (emphasis omitted). Also like the predecessor provision, the Revised Provision affords both parties the right to bring claims in small claims court. *See* CP 355.

Notwithstanding their contractual agreements to pursue claims only in arbitration or small claims court, petitioners commenced this litigation in Superior Court on February 23, 2004. Cingular moved to compel arbitration and to stay proceedings pending that arbitration and, on September 10, 2004, King County Superior Court Judge Catherine Shaffer

¹ Among other things, the revised provision: (i) specifies 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) obliges 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 (whether or not the claim would otherwise support an award of fees); (iii) provides that arbitration shall take place “in the county * * * of [the customer’s] billing address”; (iv) deletes the prior version’s requirement that the existence, content, and results of the arbitration be kept confidential; (v) deletes the prior version’s limitations on the availability of punitive damages; and (vi) specifies that the AAA, rather than the Wireless Industry Association, rules apply. CP 355-356.

granted that motion. *See* A6-A26.

First, the court rejected plaintiffs' procedural unconscionability argument. *See* A20-22. Although the court held that the WSAs were contracts of adhesion (A20), it stressed that "that's insufficient in Washington to make a finding of procedural unconscionability." *Id.* In this case, the court found, "there is [not] such fine print here that there was a lack of readability" and that there also was no "failure to emphasize important terms." A21; *see also id.* ("it is readable even to someone with eye problems like this court has"). The court further found no evidence of fraud or oppression. *See* A21-A22. As a result, the court held that plaintiffs had not demonstrated procedural unconscionability. *Id.*

Judge Shaffer also rejected plaintiffs' substantive unconscionability arguments. As she noted, in *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1166-67 (W.D. Wash. 2002), Judge Lasnick had found an arbitration agreement that contained a class-action prohibition to be substantively unconscionable. A22. Judge Shaffer explained at some length why the Revised Provision at issue in this case is very different from the provision at issue in *Luna*, and therefore is not substantively unconscionable. Among other factors on which Judge Shaffer relied for this holding were that: (1) "there's no confidentiality provision" in the Revised Provision (A23); (2) the Revised Provision is entirely mutual in that

Cingular is “stuck in the same forums that the consumers are stuck in”—*i.e.*, “arbitration or small claims court” (*id.*); (3) plaintiffs had not demonstrated that they were “financially strapped” (*id.*); and (4) in this case there is no “insuperable financial barrier [to] entering into a forum to resolve disputes” because “here * * * the cost for a consumer to go to arbitration given the fee sharing provisions in the arbitration provision would be much *lower* than the cost of going to court” A23-A24 (emphasis added).

Petitioners appealed to the First Division, asserting that the Court of Appeals had appellate jurisdiction under RAP 2.2. Cingular moved to dismiss the appeal on the ground that there was no final appealable order, pointing out that it is firmly established under Washington law that “[a]n order to proceed with arbitration is not appealable.” *Am. States Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995); *see also* RCW 7.04.220. In response, petitioners asserted that the Court of Appeals did indeed have appellate jurisdiction, but argued in the alternative that the court should grant discretionary review under RAP 2.3(b)(2). On May 16, 2005, Commissioner Mary Neel granted the motion to dismiss the appeal, referring the motion for discretionary review to a panel of the court. *See* A5. On June 21, 2005, the Court of Appeals denied that motion. *See* A3. Petitioners thereafter filed this motion for discretionary review.

REASONS FOR DENYING THE MOTION

I. This Case Fails To Satisfy The Requirements Of RAP 13.5(b).

Under Washington law, “interlocutory review” is “not favor[ed].” *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 821, 21 P.3d 1157 (2001). Rather, this Court will grant discretionary review of an interlocutory decision of the Court of Appeals only in the very limited circumstances delineated in RAP 13.5(b). The only one of RAP 13.5(b)’s three bases for review that petitioners claim to be applicable here is RAP 13.5(b)(2), which authorizes review “[i]f the Court of Appeals has committed probable error *and* the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 13.5(b)(2) (emphasis added). *See* Motion at 5.² Petitioners cannot demonstrate that they meet either of the requirements of this rule.

A. The Court of Appeals did not commit probable error by denying review.

To demonstrate that the Court of Appeals has committed “probable error” (RAP 13.5(b)(2)), petitioners must show more than that there can be

² Discretionary review plainly is not authorized under either of the other two subsections of RAP 13.5(b): by denying interlocutory review the Court of Appeals did not “commit[] an obvious error which would render further proceedings useless” (RAP 13.5(b)(1)) (emphasis added) or “so far depart[] from the accepted and usual course of judicial proceedings, or so far sanction[] such a departure by a trial court * * *, as to call for the exercise of supervisory jurisdiction by the Supreme Court” (RAP 13.5(b)(3)).

some question raised as to the lower court's ruling; they must prove that on its face that decision is obviously doubtful. *See, e.g., State v. Haydel*, 122 Wn. App. 365, 369, 95 P.3d 760 (2004) (finding probable error where “[n]o case” supported lower court's decision). Here, there are at least three reasons why petitioners have failed to satisfy this first prong of RAP 13.5(b)(2). First, petitioners focus on the wrong question. Second, they simply ignore the extensive case law from around the nation holding that class-action waivers in arbitration provisions generally are enforceable. Finally, petitioners wrongly suggest that two recent decisions from this Court call into question the Superior Court's order compelling them to arbitrate this dispute.

1. Although petitioners acknowledge that the question before this Court is whether the *Court of Appeals* committed probable error by denying interlocutory review of the Superior Court's decision ordering the parties to arbitrate this dispute (*see* Motion at 5), they then proceed to devote almost all of their attention to the distinct issue of whether the *Superior Court's* decision to compel arbitration was erroneous. *See* Motion at 6-16. But although that question is relevant to the issue before this Court—in that the Court of Appeals was in turn charged with analyzing whether the Superior Court had committed “probable error” and whether the decision of the Superior Court “substantially alter[ed] the status quo or

substantially limit[ed] the freedom of a party to act” (RAP 2.3(b)(2))—the two inquiries differ in critical ways.

In particular, review under RAP 2.3 is, as the Rule repeatedly stresses, “*discretionary*” (RAP 2.3 (emphasis added)). Thus, although the Court of Appeals *may not* grant discretionary review *unless* one of the four subparts of RAP 2.3(b) is satisfied, that court is under no *obligation* to grant review *even if* one of those tests is met. *See* RAP 2.3(b) (“discretionary review *may* be accepted only in the following circumstances”) (emphasis added). Rather, the Court of Appeals is free to exercise its “discretion[.]” to decide, in any given case, that it is appropriate to await final judgment even if interlocutory review might have been permissible under RAP 2.3(b). Petitioners have provided this Court with no reason to question the Court of Appeals’ exercise of its discretion.

Moreover, even if the Court of Appeals had been of the view that the Superior Court had committed “probable error”—the vast bulk of petitioners’ argument in this Court—the Court of Appeals nonetheless could have determined that the decision of the Superior Court did not “substantially alter[.] the status quo or substantially limit[.] the freedom of a party to act” (RAP 2.3(b)(2)). Although petitioners make a half-hearted attempt to argue that “the trial court’s order compelling arbitration, and the Court of Appeals’ refusal to review that decision, substantially altered the status

quo by terminating the litigation” (Motion at 16), they never explain how that is so. As we discuss below (at 16-18), it isn’t.

Thus, petitioners have failed to show that the Court of Appeals committed probable error *in deciding not to grant discretionary review under RAP 2.3(b)*—the only question before this Court.

2. In any event, petitioners’ argument that *the Superior Court* committed “probable error” by compelling the parties to arbitrate according to the terms of their contracts is unsupportable. Rather—as we explained at much greater length in our merits brief to the Court of Appeals³—the Superior Court’s well-reasoned order enforcing the arbitration provision, including the class-action waiver in that provision, is entirely consistent with Washington law.⁴

Petitioners mainly seek to demonstrate that the Superior Court’s decision was probably erroneous by arguing that it is substantively unreasonable to allow arbitration to prevail over the class action device in this case. Petitioners identify a handful of cases from around the nation that have refused to enforce specific class-action waivers in arbitration provisions—in particular, the recent decisions in *Discover Bank v. Superior*

³ Although Cingular filed its motion to dismiss petitioners’ appeal before Cingular’s merits brief was due, that motion was not acted upon until after the due date for Cingular’s brief.

⁴ In our merits brief, we also explain why the self-serving affidavits on which petitioners rely (at 9-10) are entirely beside the point. *See* Cingular Br. at 27-28.

Court, 113 P.3d 1100 (Cal. 2005), and *Kinkel v. Cingular Wireless LLC*, 828 N.E.2d 812 (Ill. App. Ct. 2005), *petition for review pending*, No. 100925 (Ill.).⁵ See, e.g., Motion at 8, 9, 9 n.8, 12, 14 n.10. But what petitioners neglect to mention is that the **overwhelming** majority of courts around the country that have confronted this issue have disagreed and have instead declared that class-arbitration waivers are **not** unconscionable.⁶

⁵ *Kinkel*, upon which Petitioners heavily rely, is inapposite. In *Kinkel*, the Illinois Appellate Court struck down the class waiver in an earlier version of Cingular's arbitration provision—one that did not oblige Cingular to pay the full costs of arbitration and to reimburse prevailing plaintiffs for their attorneys' fees—**expressly refusing to consider the enforceability of the newer, more consumer-friendly version at issue in this case**. Similarly, the arbitration provision at issue in *Discover Bank* was far less consumer-friendly than the provision at issue in this case.

⁶ See, e.g., *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) (Louisiana law); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002) (Delaware law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004) (Alabama law); *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1377 (N.D. Ga. 2004) (Georgia law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1260-64 (M.D. Ala. 2003) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at *15 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist.

In fact, two *Washington* appellate courts have indicated that the unavailability of class actions generally does not make an arbitration agreement unenforceable. In particular, in *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001), the First Division enforced an arbitration provision even though it “prevent[ed the plaintiff] from bringing a class action” or proceeding in arbitration “on a class-wide basis.” *Id.* at 48-49. And in *Heaphy v. State Farm Mutual Automobile Insurance Co.*, 117 Wn. App. 438, 447, 72 P.3d 220 (2003), *review denied*, 150 Wn. 2d 1037 (2004), the Second Division embraced that holding. Remarkably, petitioners never even *mention* *Stein* or *Heaphy* in their Motion.⁷

LEXIS 514, at *5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat’l Mgmt Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-495 (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, __ N.E.2d __, 2005 WL 1968774 (Ill. App. Ct. Aug. 12, 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. 2005) (Kansas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. App. Div. 2001) (New Jersey law); *Tsadilas v. Providian Nat’l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law); *cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting argument that disputes under the Age Discrimination in Employment Act should not be subject to arbitration because, among other things, arbitration procedures “do not provide for * * * class actions”).

⁷ In the courts below, petitioners claimed that neither *Stein* nor *Heaphy* dispositively addressed this issue. Even assuming, *arguendo*, that *Stein* and *Heaphy* are not dispositive, those cases *surely* preclude a conclusion that the rulings below were “probabl[y]” erroneous.

Furthermore, as we explain in some detail in our merits brief in the Court of Appeals, federal law would preempt a holding that the class-action waiver in Cingular’s arbitration provision is substantively unconscionable. *See* Cingular Br. 35-45.

Thus, given the immense amount of authority holding that class-action waivers generally are not unconscionable, and given the fact that—as the Superior Court noted—Cingular’s arbitration provision is exceptionally “consumer friendly” (A9), petitioners’ assertion that the Superior Court committed “probable error” in refusing to strike the class waiver in Cingular’s arbitration provision is untenable.

Finally, petitioners’ assertion (at 11-13) that Cingular’s arbitration provision is procedurally unconscionable has no basis. Petitioners claim to “have introduced evidence that the terms of the original arbitration clause were buried in a ‘maze of fine print’” (Motion at 11). This is simply not true. Rather—as Judge Shaffer explained—“[h]ad the consumers in these cases actually read their contract they would know that there was an arbitration clause. There is no way they could have missed it.” A21.⁸ And petitioners’ objection to the manner in which “Cingular’s *revised* ar-

⁸ Petitioners cannot escape from this finding by claiming *not* to have read their contracts. In Washington, “[o]ne who accepts a written contract is conclusively presumed to know its contents and to assent to them * * *.” *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 897, 28 P.3d 823 (2001).

bitration clause was sent to customers” (Motion at 12 (emphasis added)) is equally off base. Petitioners are conflating two dramatically different situations: one in which an arbitration provision is *added* to a contract that previously did not mandate arbitration at all, and one in which a pre-existing arbitration provision is merely *amended* (in a way that is undeniably more favorable to the consumer, no less).⁹ Thus, the Superior Court plainly did not commit probable error in rejecting petitioners’ claim that Cingular’s arbitration provision is procedurally unconscionable.

3. Petitioners also repeatedly assert that two recent decisions from this Court—*Adler and Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004)—demonstrate that the Superior Court probably erred in granting the motion to compel arbitration. *See, e.g.*, Motion at 6, 7, 8, 9. In fact—as we again demonstrated at much greater length in our merits brief in the Court of Appeals (at 20-35)—these cases fully support the Superior Court’s holding that the parties’ arbitration provision is *enforceable*.

In both *Adler and Zuver*, this Court refused to enforce only those

⁹ *See, e.g., Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577 (W.D.N.C. 2000) (enforcing revised arbitration provision that, under change-in-terms provision, amended existing arbitration provision to bar class actions); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 791 (1998) (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”).

aspects of the challenged arbitration provisions that—unlike the class-action waiver at issue here—directly interfered with the plaintiffs’ ability to obtain redress for the specific claims they raised. *See, e.g., Adler*, 153 Wn.2d at 355-56 (provision shortening statute of limitations); *Zuver*, 153 Wn.2d at 312-14 (confidentiality provision that precluded employees from discovering past wrongdoing by the employer). As Judge Shaffer recognized, Cingular’s arbitration provision fully addresses this concern. *See* A22-A24.

First, as Judge Shaffer explained (A23), ***Cingular has eliminated any financial deterrent to the pursuit of even the smallest claims in arbitration***: Cingular’s Revised Provision specifies that Cingular (i) will pay the full cost of arbitration—including “all AAA filing, administration, and arbitrator fees” (CP 356)—so long as the claim is not frivolous, and (ii) will reimburse customers for their reasonable attorneys’ fees in the event the arbitrator awards them the amount they demanded or more—even if their claim would not otherwise support an award of attorneys’ fees.¹⁰ In fact, as the Superior Court noted, “here * * * the cost for a consumer to go to arbitration given the fee sharing provisions in the arbitration provision would be much ***lower*** than the cost of going to court.” A23-A24. (empha-

¹⁰ If a customer is awarded less than her demand, the arbitrator could still award her attorneys’ fees if state or federal law provides for such an award.

sis added). Numerous courts have relied on precisely these sorts of cost-transfer provisions to reject unconscionability attacks on class-action prohibitions.¹¹

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. As Judge Shaffer noted, 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: See A17 (“the reason that small claims court exist[s] is [so that] consumers have a place to go to litigate their disputes”). Indeed, the un rebutted evidence in the record is that, as a result of this provision, “[t]here are hundreds of small claims cases filed against Cingular throughout the country, including * * * in the State of Washington.” CP 1725 (Decl. of Michael Cross ¶ 2).

Other courts also have recognized that the very purpose of small

¹¹ For example, 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*, 400 F.3d at 877-78 & n.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.* Here, as indicated above, the arbitration provision goes even further by obliging Cingular to pay attorneys’ fees even if there is no statutory basis for fee-shifting.

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.*, 141 Cal. App. 3d 470, 474 (1983). Indeed 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.*, 681 So. 2d 965, 970 (La. Ct. App. 1996).

In fact, for precisely this reason, the Fifth Circuit recently rejected a contention that an earlier version of Cingular’s arbitration provision—one that did not oblige Cingular to pay the full costs of arbitration or to reimburse prevailing customers for their attorneys’ fees—made it impossible to pursue small claims. *See Iberia*, 379 F.3d at 175 n. 19.¹²

Thus, because Cingular’s arbitration provision is neither “one-sided” (Motion at 6) nor an “exculpatory clause” (Motion at 8), nothing in

¹² To be sure, the California Supreme Court recently held that the availability of small claims court is not sufficient to justify inclusion of a class-action waiver in an arbitration provision. *Discover Bank*, 113 P.3d at 1110. Here again, though, the fact that there is a division in the courts serves only to confirm that the Court of Appeals’ decision to deny discretionary review could not have been “probable error.”

Adler or *Zuver* suggests that the Superior Court probably erred in granting the motion to compel arbitration, much less that the Court of Appeals probably erred in denying discretionary review.

B. The Court of Appeals’ decision did not substantially alter the status quo or substantially limit the freedom of a party to act.

Even if the lower courts’ decisions could be said to be probably erroneous, however, neither the Court of Appeals’ decision to deny discretionary review nor the Superior Court’s decision to grant the motion to compel arbitration “substantially alter[ed] the status quo or substantially limit[ed] the freedom of a party to act” (RAP 13.5(b)(2)).

For starters, the Superior Court merely ordered the parties to comply with the terms of their *existing* contractual agreements to arbitrate—nothing more. Thus, that order in no way changed the status quo and did not limit the freedom of either party to do anything that the party was previously allowed to do. Instead, an order refusing to enforce that arbitration provision would have effected such a change.

In any event, to the extent the lower courts’ decisions could be said to have changed the status quo or limited the freedom of a party to act *at all*, such change certainly was not “substantial.” Far from “depriving [petitioners] of the only effective means of seeking redress for alleged wrongdoing by [Cingular]” (Motion at 17), all that the lower courts have

done is to require petitioners to arbitrate their claims *before* challenging the Superior Court's decision compelling arbitration. There can be no serious question that each of these plaintiffs can obtain full relief for his or her claims in arbitration.¹³ And to the extent it remains necessary after that arbitration, petitioners will be fully able to challenge the order compelling arbitration *at that time*, just as challenges to an order granting a new trial may be raised after that new trial. See *Teufel Constr. Co. v. Am. Arbitration Ass'n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970).¹⁴

This possibility of eventual appeal demonstrates that there has been no substantial alteration to the status quo or limit on the freedom of any party to act. In fact, the Court of Appeals made precisely this point in explaining why orders granting motions to compel arbitration are not appealable as of right:

[I]f a trial court stays litigation pending arbitration, for several reasons *the order to arbitrate would not impose a sufficiently serious consequence on the resisting party to justify an appeal of that stay*. The party resisting arbitration agreed to arbitrate disputes arising after the formation of the contract, at least in some circumstances. Because an

¹³ As Cingular explained in its merits brief (at 27 n.10), plaintiffs' desire to raise the rights of *other* consumers cannot trump the "strong federal policy favoring arbitration" (*EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 122 S. Ct. 754, 151 L.Ed.2d 755 (2002)).

¹⁴ Unlike interlocutory review at this point, an eventual appeal *after* arbitration not only protects petitioners' right to object to the Superior Court's order but also comports with federal and Washington policy favoring arbitration and mandating that arbitration proceed forthwith whenever possible.

arbitration award is not self-executing, moreover, *the party resisting arbitration will have an opportunity, at the conclusion of the arbitration, to oppose enforcement of the award* as a judgment. Taking an appeal from a stay of litigation pending arbitration would only increase the time and expense necessary to resolve the dispute and thus would run counter to the purposes of arbitration.

Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 444-445, 783 P.2d 1124 (1989) (internal alterations, quotation marks, and citations omitted; emphasis added).¹⁵

Thus, petitioners cannot satisfy the second requirement of RAP 13.5(b)(2).

II. Petitioners' Other Arguments For Reviewing The Court Of Appeals' Decision To Deny Discretionary Review Lack Merit.

In two final throwaway sections of their Motion, petitioners assert that review should be granted so that this Court can decide “an important and unsettled question of Washington law” (Motion at 17 (capitalization omitted)) and “to conserve judicial resources and avoid unnecessary delay” (Motion at 19 (capitalization omitted)). Neither of these reasons is a ground for discretionary review under RAP 13.5(b), and in any event neither has any merit.

As to the first of petitioners' arguments, the enforceability under

¹⁵ For precisely these reasons, Washington is far from unique in not allowing appeals from orders granting motions to compel arbitration. In fact, both the Federal Arbitration Act and the Uniform Arbitration Act “authoriz[e] appeals from orders *denying* motions to compel arbitration, but not * * * from orders *requiring* arbitration.” *Herzog*, 56 Wn. App. at 445 (emphasis in original).

Washington law of arbitration provisions mandating individual arbitration was settled in *Stein* and *Heaphy*. See page 10, *supra*. It is petitioners who wish to **unsettle** it. Although they suggest that the new *Discover Bank* and *Kinkel* decisions—which found the class-action waivers in the particular arbitration provisions at issue to be unenforceable under California and Illinois law—somehow render this question “unsettled” **under Washington law** (Motion at 17), they in no way explain why these two decisions affect that question any more than *Iberia*, *Jenkins*, *Strand*, and *Walther*, which held that class-action waivers are enforceable under Louisiana, Georgia, North Dakota, and Maryland law (*see* note 6, *supra*).

Similarly, petitioners’ suggestion that this question is unsettled because there is “an effective split of authority between Division Three and Division One” is frivolous. According to petitioners, this “split” exists because in *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 106 P.3d 841 (2005), Division Three refused to enforce a forum-selection clause that required Washington customers to litigate claims in a far-flung forum—Virginia—that does not permit class actions and therefore would effectively preclude the vindication of those customers’ claims. *Dix* did not involve an arbitration provision at all, let alone one that is “consumer friendly” (A14) and designed to make arbitration an efficient and cost-

effective means of resolving small disputes (*see* A14-A15).¹⁶ Thus, nothing in *Dix* purports to address the question that petitioners would have this Court resolve, and there is no split of authority between the Divisions on the subject.

Finally, petitioner's argument that "to deny review would merely delay the inevitable" and would waste "judicial resources" (Motion at 19) is both factually incorrect and legally irrelevant. For starters, judicial resources would not, in fact, be wasted by a denial of review at this time. Rather, it is at least possible that this case can be resolved in arbitration in such a way that no further judicial review would be necessary. And if not, petitioners will be able to raise their arguments to the Court of Appeals (and if necessary to this Court) *after* that arbitration. In any event, the argument that denying interlocutory review "would merely delay the inevitable" can be made in almost every case involving an interlocutory appeal. It is presumably for this reason that RAP 13.5(b) does not include this as a factor justifying discretionary review.

CONCLUSION

For the foregoing reasons, the motion for discretionary review should be denied.

¹⁶ It bears mention that Cingular's arbitration provision provides that arbitration shall take place in the county of the customers' billing address.

RESPECTFULLY SUBMITTED,

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