NO 55028-4 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DOUG SCOTT, LOREN TABASINSKE, SANDRA TABASINSKE,

Appellants,

v.

CINGULAR WIRELESS LLC,

Respondent,

BRIEF OF RESPONDENT CINGULAR WIRELESS LLC

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ISSUES PERTAINING TO PLAINTIFFS' ASSIGNMENT OF ERROR

In this case, the Superior Court held that the arbitration provision in plaintiffs' Wireless Service Agreements, which requires the parties to those contracts to arbitrate claims arising out of or relating to the agreements on an individual basis (but preserves the option of bringing claims in small claims court), was fully enforceable, and therefore ordered the plaintiffs to arbitrate their claims. The issues implicated by plaintiffs' appeal are:

1) Whether this Court must dismiss this appeal for lack of jurisdiction because "[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)). (This issue has been separately addressed in Cingular's Motion to Dismiss Appeal, filed March 16, 2005, and will not be rebriefed here.)

2) Whether the trial court correctly held that the clause in Cingular's arbitration provision that precludes class actions is not substantively unconscionable under Washington law.

3) Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, would preempt any state-law rule prohibiting the inclusion of class-action waivers in arbitration provisions.

4) Whether the trial court correctly held that Cingular's arbitration

provision is not procedurally unconscionable.

STATEMENT OF THE CASE

A. Overview

This appeal arises out of a lawsuit in which plaintiffs Doug Scott ("Scott"), Loren Tabasinske, and Sandra Tabasinske assert that they were charged improperly for long distance and roaming in violation of their contracts with Cingular Wireless LLC ("Cingular").[1] Because plaintiffs had entered into Wireless Service Agreements ("WSAs") with Cingular that require them to arbitrate all disputes arising out of or relating to those WSAs (or to litigate their claims in small claims court), Cingular moved to compel arbitration and to stay proceedings pending arbitration. The superior court issued an order granting Cingular's motion on September 10, 2004. Plaintiffs filed a notice of appeal on October 1, 2004. Because it is well established in Washington that "[a]n order to proceed with arbitration is not appealable" (*Am. States*, 127 Wn.2d at 254), Cingular has filed a motion to dismiss the appeal for lack of jurisdiction. That motion to dismiss is still pending.

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[1] Although Patrick Oishi and Janet Oishi are listed as plaintiffs-appellants in the caption of plaintiffs' opening brief, they are not parties in this case. The Oishis were first listed as plaintiffs on the Second Amended Complaint (*compare* CP 16 (First Amended Complaint) *with* CP 369 (Second Amended Complaint)), but that complaint never became operative because it was not filed with leave of court or with Cingular's written consent. *See* CR 15(a).

B. Plaintiffs' Wireless Service Agreements

On December 15, 2002, Scott signed a WSA with Cingular for cellular telephone service. *See* CP 339. Similarly, on August 1, 2001, Loren Tabasinske signed a WSA when he signed up for service with Cingular. CP 342.[2] On the front of those WSAs, Scott and Tabasinske each initialed beneath a provision acknowledging that the Terms and Conditions of the WSAs were on the back of the page. CP 339, 342. Each also signed beneath the following acknowledgment: "I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT AND THE TERMS AND CONDITIONS * * *. I AGREE TO BE BOUND THEREBY." *Id.* (capitalization in original); *see also* RP 4-5.

On the reverse sides of the WSAs, 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." *See* CP 345, 349 (capitalization in original); *see also* RP 5. In the arbitration provision, which is preceded by the bold-face heading

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[2] Apparently, Sandra Tabasinske uses a second line purchased as part of her husband's contract with Cingular. *See* CP 342 (Loren Tabasinske's WSA includes service on an "additional line"); CP 40.

"**INDEPENDENT ARBITRATION**," both Cingular and plaintiffs "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. CP 345. The arbitration provision specifies that it is governed by the Federal Arbitration Act. *Id*.

C. The Revised Arbitration Provision

In July 2003, pursuant to the change-in-terms provision in its WSAs (*see* CP 345, 349), Cingular sent to each of its direct-billed customers, including Scott and Tabasinske, a revised arbitration provision as an insert in their billing envelopes (the "Revised Provision"). *See* CP 352 ¶ 3, 355. The Revised Provision became effective upon receipt. *Id.* The Revised Provision 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 limitations on the availability of punitive damages; and (vi) specifying that the AAA, rather than the Wireless Industry Association, rules apply. CP 355-356. 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.

D. Plaintiffs' Superior Court Action

Notwithstanding these agreements to arbitrate, plaintiffs filed their original Class Action Complaint against Cingular on February 23, 2004. *See* CP 1. Plaintiffs later filed a First Amended Class Action Complaint on March 24, 2004. *See* CP 16. Because of the arbitration provision in plaintiffs' WSAs, on April 30, 2004, Cingular moved to compel plaintiffs to arbitrate this dispute. *See* CP 39. Plaintiffs opposed that motion, arguing that the class-action waiver in the revised arbitration provision was substantively and procedurally unconscionable under Washington law. *See* CP 1114.

E. The Superior Court's Ruling

After full briefing and oral argument, the superior court granted Cingular's motion to compel arbitration. *See* CP 1870. In its oral ruling, the court began by summarizing the relevant facts. It noted that both Scott and Tabasinske had signed contracts containing arbitration provisions, and explained the various ways in which those arbitration provisions were repeatedly disclosed to them. RP 4-5. The court observed that the original arbitration provision in the WSAs was "very clearly written. It's not written in legalese, it's not difficult to understand." *Id.* As to the Revised Provision, the court discussed its various pro-consumer aspects (RP 7-8; *see also* pages 4-5, *supra*), explained that "[t]he amended provision is difficult to view as anything but consumer friendly compared to the initial provision" (RP 7), and noted that Cingular had promulgated the Revised Provision before plaintiffs commenced this lawsuit (RP 8).

Turning to the law, the court first held that the Revised Provision was binding on the parties: "[T]he provisions of the original Cingular agreement which provided that Cingular could modify the terms and conditions of the agreement are supported by the same consideration that supported the original contract * * * [a]nd * * * therefore * * * the modified arbitration provision * * * is, in fact, part of the contract that the parties signed and which was at issue at the time that this lawsuit was filed." RP 12.

Given this holding, the court explained that "[t]he question before [it was] whether or not this agreement[,] to the extent that it includes an arbitration provision that does not provide for class action[s] but only for arbitration * * *[,] is unconscionable." RP 9-10. The court held that the Revised Provision is not unconscionable.

First, the court rejected plaintiffs' procedural unconscionability argument. *See* CP 13-15. Although the court held that the WSAs were contracts of adhesion (RP 13), 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." RP 14; *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* RP 14-15. As a result, the court held that plaintiffs had not demonstrated procedural unconscionability. *Id.*

Second, Judge Shaffer rejected plaintiffs' substantive unconscionability arguments. As the court noted, in *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002), Judge Lasnick had found an arbitration agreement that contained a class-action prohibition to be substantively unconscionable. RP 15. 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 unconscionable. Among other factors on which Judge Shaffer relied for this holding were that: (1) "there's no confidentiality provision" in the Revised Provision (RP 16); (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" (RP 16-17) (emphasis added).

Judge Shaffer summarized her ruling as follows:

> What I have before me it seems to me rather than looking at plaintiffs who are barred from a remedy, who are being financially oppressed, who are looking at an inability to gain intelligence because of the confidentiality provisions, or who are being forced into a contract that contains [significant] terms buried in a welter of fine print, rather than those situations which traditionally inspire the courts to find unconscionability and relieve consumers of such unfair bargains, in this case what I simply have is a contract that limits remedies in a way that is fully supported by the Federal Arbitration Act and * * * the court cases that have enforced that Act * * *. [T]o this court it seems clear that the law requires that I grant the motion to stay the proceedings and send this case to arbitration for the reasons that I've stated, and that's what I will do.

RP 17-18. This appeal followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has explained, there are "four guiding principles" in determining whether two parties validly agreed to arbitrate a particular dispute: "1) the duty to arbitrate arises from the contract; 2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; 3) a court should not reach the underlying merits of the controversy when determining arbitrability; and 4) as a matter of policy, courts favor arbitration of disputes." *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45-46, 17 P.3d 1266 (2001).

Avoiding these guiding principles, plaintiffs instead invite this Court to engage in a policy discussion about whether class actions are useful. They even go so far as to assert that this appeal is "not actually about arbitration" (Appellants' Br. 8). But, of course, this appeal ***is*** about arbitration and, in particular, about whether the superior court correctly granted Cingular's motion to compel arbitration.

Moreover, to the extent this case involves policy questions, the relevant policy, as repeatedly enunciated by Washington courts, is the "strong public policy favoring arbitration of disputes." *E.g.*, *Adler v. Fred Lind Manor*, __ Wn.2d __, 103 P.3d 773, 779 n.4 (2004). The superior court correctly noted that, while the debate regarding the utility of class actions rages on both sides, a court's job is not to rule on such questions of public

policy but rather to "apply the law as written." RP 4. The issue before this Court is about arbitration and, in particular, whether the specific arbitration provision in the parties' contracts should be enforced.

As the superior court correctly held, it should be. The only reason plaintiffs give for invalidating that provision is that it contains a class-action waiver. But there is no authority for the proposition that, under Washington law, the inclusion of a class-action waiver in an arbitration provision is unconscionable. Indeed, in *Stein,* this Court ***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." *Stein*, 105 Wn. App. at 48-49.

Cingular's arbitration provision is, in fact, more favorable to consumers than the one involved in *Stein* because it (1) obliges Cingular to pay the entire cost of arbitration unless the arbitrator finds a consumer's claim to be frivolous; (2) obliges Cingular to reimburse consumers for their reasonable attorneys' fee if they recover the amount of their claims or more; and (3) specifically preserves the right of either party to litigate claims in small claims court.

These consumer-friendly features of the arbitration provision directly refute plaintiffs' core premise that the prohibition against arbitral class actions makes it impossible for consumers to obtain redress for small-dollar

disputes with Cingular. In fact, numerous courts have relied on the presence of these precise features in arbitration provisions to reject unconscionability challenges to class-action waivers. *See* pages 24-30, *infra*. Plaintiffs' only "authority" to the contrary is two self-serving affidavits from other members of the plaintiffs' bar, which the superior court appropriately discounted. *See* page 27, *infra*.

Plaintiffs also imply that two recent Washington Supreme Court decisions—*Adler* and *Zuver v. Airtouch Communications, Inc.*, __ Wn.2d __, 103 P.3d 753 (2004)—support their contention that the Revised Provision is unconscionable. In fact, these cases fully support the superior court's holding that the Revised Provision is ***enforceable***. In both decisions, the Washington Supreme Court refused to enforce only those 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*, 103 P.3d at 786-787 (provision shortening statute of limitations); *Zuver*, 103 P.3d at 764-765 (confidentiality provision that precluded employees from discovering past wrongdoing by the employer). Again, Cingular's arbitration provision fully addresses this concern.

Even if there were some basis in Washington law for concluding that it is unconscionable to include a class-action waiver in an arbitration pro-

vision, moreover, the FAA would nonetheless mandate that Cingular's arbitration provision be enforced. First, because there is no general principle of Washington law precluding class-action waivers, Section 2 of the FAA prohibits striking down an arbitration provision on that basis. *See* pages 36-38, *infra*. Second, even if there were such a general rule prohibiting class-action waivers, that rule would frustrate the purposes of the FAA—in particular, to encourage the speedy and inexpensive resolution of disputes—and therefore would be barred by basic principles of conflict preemption. *See* pages 38-45, *infra*.

Finally, *Zuver* and *Adler* establish that the mere fact that Cingular's arbitration provision is part of a form agreement does not render it procedurally unconscionable. Because plaintiffs can point to no impropriety in the formation of their agreements, the superior court was manifestly correct in rejecting their claim that Cingular's arbitration provision is procedurally unconscionable. *See* pages 45-50, *infra*.

STANDARD OF REVIEW

Although plaintiffs are correct that review of the superior court's decision to grant the motion to compel arbitration is *de novo* (*see* Appellants' Br. 10; *see also Adler*, 103 P.3d at 780), they neglect to mention that, as "[t]he party ***opposing*** arbitration" they "bear[] the burden of showing that the agreement is ***not*** enforceable." *Adler*, 103 P.3d at 780 (emphasis

added, citations omitted). Further, as the Washington Supreme Court recently noted, "[c]ourts must indulge every presumption in favor of arbitration." *Id.* at 779-780 (quotation marks and citation omitted).

ARGUMENT

THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS' CONTRACTUAL COMMITMENT TO ARBITRATE ON AN INDIVIDUAL BASIS IS FULLY ENFORCEABLE.

Plaintiffs' brief is based largely on attacking a straw man. Rather than address the ***actual*** arbitration provision at issue in this case, which the superior court specifically described as "consumer friendly" (RP 7), plaintiffs spend many pages dwelling on other cases involving substantially less consumer-friendly arbitration provisions. Once attention is returned to the actual arbitration provision that governs this case, the conclusion is inescapable that there is nothing unconscionable about that provision—as the superior court correctly held.

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

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.*, 534 U.S. 279, 288-89, 122 S. Ct. 754, 151 L.Ed.2d 755 (2002) (quotation marks and citation omitted). Washington similarly "has

a strong public policy favoring arbitration." *Adler*, 103 P.3d at 779 n.4.

Plaintiffs have never denied that (i) both the original arbitration provision in their WSAs and the Revised Provision are governed by the FAA (*see* CP 345, 355), or (ii) their claims fall within the scope of those arbitration provisions. Thus, plaintiffs must arbitrate this dispute unless they can point to an exception to the principle that arbitration agreements generally must be enforced according to their terms. *See Adler*, 103 P.3d at 780. Here, plaintiffs assert that the Revised Provision is unconscionable, but, as we next show, the superior court was entirely correct in rejecting that argument.

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

As the Washington Supreme Court has explained, "[s]ubstantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. 'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Zuver*, 103 P.3d at 759 (quotation marks and citations omitted); *see also Adler*, 103 P.3d at 781 (same).

Here, as the trial court recognized, Cingular's arbitration clause is particularly "consumer friendly" (RP 7). It contains provisions that favor

the consumer by making arbitration convenient and essentially free, and by authorizing both parties also to bring claims in small claims court. Rather than acknowledging these pro-consumer aspects of Cingular's arbitration provision, plaintiffs focus exclusively on the class-action waiver that is an integral part of that provision. However, especially in light of these consumer-friendly features, the class-action waiver does not render the Revised Provision substantively unconscionable.

1. Class-action waivers in arbitration provisions are generally enforceable under Washington law.

In their brief, plaintiffs repeatedly imply that ***all*** arbitration provisions that contain class-action waivers are substantively unconscionable under Washington law. *See*, *e.g.*, Appellants' Br. 16, 21. This suggestion entirely ignores the fact that this Court has affirmatively held that the unavailability of class actions generally does ***not*** make an arbitration agreement unenforceable. In *Stein*, the Court expressly rejected the plaintiff's argument that the arbitration provision he had agreed to was "unenforceable because it prevents him from bringing a class action," concluding that there is no conflict between the concept of individual arbitration and "statutory provisions, contract law, or due process requirements." 105 Wn. App. at 48-49. Division 2 of the Court of Appeals has embraced that holding. *See Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn. App. 438,

447, 72 P.3d 220 (2003), *review denied*, 150 Wn. 2d 1037 (2004). *Stein* and *Heaphy* should be dispositive here: if an arbitration clause that is ***silent*** about class actions and therefore is construed to preclude them is not unenforceable, it follows inexorably that neither is an arbitration clause that expressly prohibits class actions. Remarkably, plaintiffs never even ***mention*** *Stein* or *Heaphy* in their brief.

The holdings in *Stein* and *Heaphy* are all the more applicable here. As discussed above, under Washington law, a contractual provision must be "shocking" or "monstrously harsh" to be deemed substantively unconscionable. *Zuver*, 103 P.3d at 759. It would deprive that strict standard of any meaning to say that a fully disclosed class-action prohibition in an arbitration provision that, in all other respects, is enormously favorable to the consumer runs afoul of it. Not only are there many reasons why a business would include a class-action prohibition in a contract, but there are also many reasons why a reasonable consumer would accept such a term, 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*, 499 U.S. 585, 594, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *see also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*

Agreements, 2001 J. DISP. RESOL. 89, 94 (arguing that class arbitration makes consumers worse off by increasing the cost of doing business and, as a result, raising prices for consumers).

The conclusion that a class-action waiver, standing by itself, cannot render an arbitration provision "shocking" or "monstrously harsh" is not merely a matter of plain English and common sense; it also is the conclusion of the vast majority of courts in other jurisdictions that have addressed the question.

For example, the U.S. Supreme Court broached the issue in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991). 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.* (quotation marks and citation omitted; alteration in original).

Numerous other courts have also upheld arbitration provisions that included a prohibition on class actions. As the Seventh Circuit has ex-

plained, "[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.*, 55 F.3d 269, 276 (7th Cir. 1995) (quotation marks and citation omitted). 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*, 225 F.3d 366, 369 (3d Cir. 2000). In fact, every federal appellate court to address the issue—except the Ninth Circuit, on facts distinguishable from those in this case (*see* pages 22, 33 *infra*)—as well as the substantial majority of other federal and state courts, have held that arbitration provisions barring class arbitration are fully enforceable.[3]

[3] *See*, *e.g.*, *Jenkins v. First Am. Cash Advance of Ga., LLC*, __ F.3d __, 2005 WL 388269, at *8-9 (11th Cir. Feb. 18, 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (court is "obliged to enforce the type of arbitration to which [the] parties agreed, which does not include arbitration on a class basis") (quotation marks and citation omitted); *Johnson*, 225 F.3d at 369; *Champ*, 55 F.3d at 276-277; *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1274 (M.D. Ala. 2003); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 518-519 (M.D. La. 2003); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 n. 23 (Haw. 1996); *Ragan v. AT&T Corp.*, __ N.E.2d __, 2005 WL 487126, at *9 (Ill. App. Ct. Mar. 1, 2005) (New York 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); *Tsadilas v Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003); *cf. Burden v. Check Into Cash of*

That so many courts have held that there is nothing unconscionable about class-action waivers makes perfect sense because class actions, although at times useful, are in no way so fundamental to the vindication of small claims as to be unwaivable For the vast majority of the history of this State and this nation, 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.[4] Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable under Washington law.

Thus, this Court should reaffirm *Stein* and hold that in general it is not substantively unconscionable for the parties to an arbitration agreement to agree to include a class-action waiver in that arbitration agreement.

Ky., L.L.C., 267 F.3d 483, 492-93 (6th Cir. 2001) (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 Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261 (9th Cir. 2005) (class-action prohibition in arbitration provision that did not provide an alternative means for vindicating small claims held to be unconscionable under Washington law); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (same under California law).

[4] "[M]odern class action practice emerged in the 1966 revision of [Federal Rule of Civil Procedure] 23" (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833, 119 S. Ct. 2295, 144 L.Ed.2d 715 (1999)), which gave federal-court class actions their "current shape" (*Amchem Prods., Inc. v. Windsor* 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614-615. Modern Washington class-action practice dates to 1967, when the state adopted its current rule (which largely duplicates the federal rule). *See* 3A WASH. PRAC., RULES PRACTICE CR 23 (4th ed.). Before that time, class actions for monetary relief were virtually unheard of.

2. Cingular's revised arbitration provision is not "one-sided."

Rather than addressing Washington's standards for unconscionability or engaging *Stein* and *Heaphy*, plaintiffs contend that this Court should refuse to enforce the Revised Provision because it is "one-sided." Appellants' Br. 11-19. This argument is baseless.

a. To the extent plaintiffs mean to suggest that the class-action prohibition is non-mutual, they are mistaken. As the superior court found, the revised provision—including the class-action waiver—is fully mutual. *See* RP 16 (Cingular is "stuck in the same forums that the consumers are stuck in").

As for plaintiffs' assertion that in practical ***effect*** this clause is non-mutual because "[i]t is unimaginable * * * that Cingular would ever sue its customers on a class action basis" (Appellants' Br. 16[5]), the straightforward answer is that term-by-term mutuality is not required under Washington law. Rather, Washington law is clear that contractual provisions, including arbitration provisions, need not affect both parties equally in order to be enforceable, so long as "the contract ***as a whole*** is otherwise supported by consideration on both sides." *Walters v. A.A.A. Waterproofing,*

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[5] *See also id.* at 16-17 ("'[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 [Cingular], because * * * companies typically do not sue their customers in class action lawsuits'") (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002)).

Inc., 120 Wn. App. 354, 359, 85 P.3d 389 (2004) (emphasis added).[6] Because Washington does not have a general rule requiring term-by-term mutuality, plaintiffs cannot validly contend that Cingular's arbitration provision must fall for lack of such provision-specific bilaterality. As the Washington Supreme Court has explained, "courts may not refuse to enforce arbitration agreements under state laws that apply only to such agreements." *Zuver*, 103 P.3d at 759.

There can be no doubt that plaintiffs' contracts were supported by adequate consideration (*see* RP 12); therefore, those contracts are enforceable even if some terms are not "mutual" in their practical effect.

b. In any event, the cases plaintiffs cite (at 12-18) do not stand for the proposition that it is the "one-sided" or non-mutual nature of any particular term that matters; rather, they suggest that, for purposes of determining whether an arbitration agreement is substantively unconscionable under Washington law, the relevant question is whether that agreement—or a specific provision within it—interferes with the other party's ability to obtain redress. *See*, *e.g.*, *Zuver*, 103 P.3d at 765 (specific confidentiality

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[6] *See also Zuver*, 103 P.3d at 766-767 ("Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms—not that both parties have identical requirements"); RESTATEMENT 2D (CONTRACTS) § 79(c) (1981) ("If the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'"); 2 PERILLO, CORBIN ON CONTRACTS § 6.1 (1995) (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.").

provision "hampers an employee's ability to prove a pattern of discrimination"); *id.* at 767 (unilateral waiver of the right to collect punitive damages "heavily favors" defendant because it can obtain redress for all claims but the plaintiff cannot); *Adler*, 103 P.3d at 786-787 (provision shortening statute of limitations could bar plaintiff from obtaining relief).

This is true of all of the cases on which plaintiff relies (at 15-18) in which class-action waivers in arbitration provisions were found to be unconscionable—such as *Szetela* and *Luna*.[7] The animating concern of these cases was that the specific arbitration provision at issue would "prevent customers * * * from seeking redress for relatively small amounts of money," and thus would operate (in the *Szetela* court's colorful phrase) as a "'get out of jail free' card." *Szetela*, 97 Cal. App. 4th at 1101.[8]

In *Szetela*, for example, that conclusion was predicated on the court's perception that the cost of arbitrating under Discover Bank's arbitration clause would outstrip the "relatively small amounts of money" at stake,

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[7] Although plaintiffs also discuss a few other cases, including *Ting*, *Al-Safin*, and *Discover Bank v. Shea*, 827 A.2d 358, 366 (N.J. Super. Ct. 2001), *appeal dismissed*, 827 A.2d 292 (N.J. Super. A.D. 2003) (*see* Appellants' Br. 17-18), these cases in turn merely rely on or make the same points as *Szetela* and *Luna*.

[8] Plaintiffs also cite *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 123 Wn. App. 355, 98 P.3d 66 (2004), for the proposition that "[t]his Court has been equally resolute in holding that one-sided terms in arbitration clauses are substantively unconscionable under Washington law." *See* Appellants' Br. 14-15. In *Kruger*, this Court refused to enforce an arbitration provision that required the arbitrator to "afford[] deference" to the determinations of one of the parties and hence to display "evident partiality" towards that party. *See* 123 Wn. App. at 370-371. Cingular's arbitration provision contains no similar attempt at biasing the result.

making it economically irrational to pursue claims on an individual basis and thus leaving "millions of customers * * * without an effective method of redress." *Id*.

Similarly, in *Luna*, the court's finding of substantive unconscionability was predicated on the existence of ***four*** features that, "***taken together***, grossly favor[ed]" the defendant: (i) a cost-splitting provision under which "a borrower's cost for arbitration likely would exceed the cost of a court proceeding by at least a factor of ten"; (ii) a confidentiality provision; (iii) a provision that allowed the defendant to pursue various remedies in court, while requiring almost all claims by borrowers to be arbitrated; and (iv) a class-action prohibition. 236 F. Supp. 2d at 1178-1183 (emphasis added). In that context, the *Luna* court held that an arbitration agreement was unconscionable in part because its "prohibition of class actions is likely to bar actions involving practices applicable to all potential class members, but for which an individual consumer has so little at stake that she is unlikely to pursue her claim." *Id.* at 1179.

As Judge Shaffer recognized, Cingular's revised arbitration provision directly addresses the *Luna* court's concern about the availability of redress for small claims. In fact, Judge Shaffer ***relied*** on *Luna* in concluding that the class-action waiver in Cingular's Revised Provision is ***not*** unconscionable. *See* RP 15-16. Plaintiffs simply ignore the specific details of

Cingular's arbitration provision, which differentiate it from these prior cases.

First, as Judge Shaffer explained (RP16), ***Cingular has eliminated any financial deterrent to the pursuit of small 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 that they recover the amount of their demands or more. *See* page 4, *supra.* 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." RP 16-17 (emphasis added).

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

tive fees, if she submit[ed] a written request." *Jenkins*, 2005 WL 388269, at *8 & 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.*

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, 294 F. Supp. 2d at 1274 (citations omitted).

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 & n.19.[9]

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* Jack 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).[10]

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[9] *See also, e.g.*, *Snowden*, 290 F.3d at 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,* 225 F.3d at 374 (same).

[10] Indeed, precisely because it would cost plaintiffs nothing to arbitrate their claims

Rather than confronting the persuasive and abundant legal authority supporting the proposition that arbitration provisions like Cingular's are fully enforceable, plaintiffs rely heavily on declarations from a pair of self-evidently self-interested members of the plaintiffs' class-action bar. *See* Appellants' Br. 4-6, 21-22. But most of what these declarants say—such as their encomia on the virtues of class actions (*see* Appellants' Br. 4-5)—is irrelevant to the legal issue presented here. *See* page 42, *infra.* And although it may be true that Mr. Maier would not take on a case for a Cingular customer despite the availability of attorneys' fees under the Revised Provision (CP 1585), that self-serving assertion does not prove the counterintuitive proposition that no other competent attorney in Washington would take on such a case. *See*, *e.g.*, RP 10 (transcript of hearing in which superior court rejected Maier's assertion (*see* CP 1584) that in practice attorneys' fees would not be readily available under the Revised Provision). Thus, nothing in either of these declarations should cause this

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against Cingular (and they would receive an award of attorneys' fees if they were to recover the amount of their demands or more), plaintiffs cannot validly contend that a class action is necessary for the vindication of their own rights. Rather, it is evident that they want 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 basis of an argument (and an unfounded one at that) that someone else's rights can't be adequately vindicated. Plaintiffs' desire to raise the rights of other consumers cannot trump the "strong federal policy favoring arbitration" (*Waffle House*, 534 U.S. at 290). If plaintiffs disagree with the policy choice Congress has made, the forum for their disagreement is in Congress, not the courts. *See, e.g.*, *Rosen*, 799 N.E.2d at 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").

Court to ignore the holdings of cases such as *Iberia*, *Jenkins*, and *Billups* that cost-shifting provisions such as those in the Revised Provision adequately protect consumers' ability to obtain redress for even small claims.

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 5, *supra*. 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:

> [T]here isn't any showing here of financial inability to go to a forum to resolve disputes. In fact, there are two forums [open] to Cingular customers. The first forum is a small claims court. ¶ Now, I know that high-powered lawyers don't go to small claims court, but lots of regular people do. And the reason that small claims court exist[s] is because this court is concerned to make sure that consumers have a place to go to litigate their disputes. Small claims court is available in every courthouse, it's cheap, and we apply all the law that's available to consumers in any other court action, including significant protections like the Consumer Protection Act[,] in small claims court.

RP 10. In fact, the unrebutted 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 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. App. 1996).

For precisely this reason, 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 n. 19. And in *Jenkins*, 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 judi-

> cial 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.

Jenkins, 2005 WL 388269, at *10 (quoting AAA, *Consumer Due Process Protocol* (available at http://www.adr.org/protocols)).

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Thus, there is nothing unconscionably "one-sided" about the Revised Provision. The fact that both parties are precluded from arbitrating claims on a class-wide basis is irrelevant, given the various ways in which that provision protects plaintiffs' ability to obtain redress for even the smallest of claims.

3. Cingular's revised arbitration provision is not an exculpatory clause.

Plaintiffs also make the hyperbolic argument that, by precluding class actions, the Revised Provision somehow exculpates Cingular entirely from liability for any potential misdeed. Plaintiffs go so far as to state that "Cingular wants to make sure that none of its consumers are able to bring any disputes in any forum." *See* Appellants' Br. 19-29. This argument is absurd on its face, and essentially would require the court to disregard the arbitral forum entirely, rather than treat it as a favored method of dispute resolution (as the law requires).[11]

[11] Plaintiffs suggest that "[t]he U.S. Supreme Court has stated repeatedly that arbitration

In any event, this argument is simply a different way of phrasing plaintiffs' earlier argument that the arbitration provision is one-sided. *See* Appellants' Br. 19 ("In the *Zuver* case, the court noted that one-sided non-mutual terms are substantively unconscionable precisely when they effectively block one party from 'access to a significant legal recourse.'") (quoting *Zuver*, 103 P.3d at 767). Thus, our discussion above (at pages 24-30) of the various ways in which Cingular's arbitration provision makes it easy for consumers to obtain redress for small claims—by paying all costs of arbitration, by reimbursing consumers for their attorneys' fees in the event the arbitrator awards them the amount of their claim or more, and by authorizing both parties to proceed in small claims court—is equally applicable here.[12]

Nothing in the additional cases plaintiffs cite in this section of their brief demonstrates that the arbitration provision at issue in ***this*** case operates to exculpate Cingular in any way, as none of these cases involved an

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must allow a party to 'effectively vindicate' its rights." Appellants' Br. 20 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985), and *Gilmer*)). But they ignore *Gilmer*'s holding that a class-action prohibition does not prevent the vindication of statutory rights, so long as the remedies afforded by the statute remain available in arbitration. *See* page 17, *supra*.

[12] Plaintiffs' assertion that no Cingular customer in Washington has brought an arbitration against Cingular in the past six years (Appellants' Br. 21-22) is beside the point, as (a) "there are hundreds of small claims filed against Cingular," and (b) "Cingular regularly receives notices of intent to arbitrate from customers pursuant to the arbitration clause in their contracts. The majority of these claims are settled or the customer is otherwise satisfied prior to proceeding to arbitration." CP 1725 (Decl. of Michael Cross ¶¶ 2, 4).

arbitration provision that rendered arbitration as cost-free and convenient as the Revised Provision at issue here.

For example, although plaintiffs cite *Leonard v. Terminix International Co.*, 854 So. 2d 529 (Ala. 2002), as support for their argument, the arbitration provision at issue in that case mandated a procedure involving costs to the consumer that were "so great in comparison to the potential recovery that the injured person [was] effectively precluded from a remedy." *Id.* at 537. A federal district court in Alabama recently distinguished *Leonard* on precisely this basis, explaining:

> *Leonard* is distinguishable from the present case for several reasons. First, [the Defendant] has agreed to pay the Plaintiff's administrative fees associated with arbitration. Therefore, unlike *Leonard*, the Plaintiff may not have to pay any money out of her own pocket to initiate the arbitration proceeding. Second, the Plaintiff has brought suit under a federal statute that awards costs and attorneys fees should she assert a successful claim. Unlike the plaintiffs in *Leonard*, the Plaintiff need not worry about having her damages reduced by the amount of her costs or attorneys fees. Third, *Leonard* was based in part on the fact that the arbitration clause barred the plaintiff from recovering "indirect, special, or consequential damages." Here, [the Defendant's] arbitration clause does not limit any of the substantive remedies available to the Plaintiff * * *. As a result of these significant factual differences, the court concludes that *Leonard*'s holding is not applicable to this case [and] that [the Defendant's] arbitration clause's prohibition on class actions is not unconscionable under Alabama law.

Billups, 294 F. Supp. 2d at 1276-1277 (alterations and citations omitted).[13]

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[13] *See also, e.g.*, *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-1264 (M.D. Ala. 2003) (upholding class-action prohibition in arbitration agreement that per-

Similarly, another of plaintiffs' cases—*Jenkins* v. *First American Cash Advance of Georgia, LLC*, 313 F. Supp. 2d 1370 (S.D. Ga. 2004) (cited in Appellants' Br. at 26-27)—involved an arbitration provision that neither committed the defendant to pay the full cost of arbitration nor obliged it to pay a reasonable attorneys' fee in the event the customer were to prevail. Nonetheless, because the agreement provided that the defendant would pay attorneys' fees when required to by law, the court of appeals ***reversed*** the lower court's refusal to compel arbitration. *See Jenkins*, 2005 WL 388269; pages 24-25, *supra*. The remainder of plaintiffs' cases are similarly distinguishable.[14]

Finally, plaintiffs' argument misses the critical point that class ac-

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mitted the plaintiff to request that the defendant "advance any filing, administrative and hearing fees" and explaining that, "unlike *Leonard*, the Plaintiff may not have to pay any money out of her own pocket to initiate the arbitration proceeding").

[14] *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177-1178 (9th Cir. 2003) (in addition to class-action waiver, arbitration provision provided that employee must bear one half of the costs of arbitration and that the arbitrator could require the employee to reimburse the employer for the entire costs of arbitration should his claim be denied); *Ting*, 319 F.3d at 1151 (customer was required to split arbitrator's fees); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1176 (N.D. Cal. 2002) (customers were required to split costs of arbitration, which were likely to exceed $5,000); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (customer had to bear costs of arbitration that "would be approximately ten times the cost of bringing a similar action in State court"); *In re Knepp*, 229 B.R. 821, 838 (N.D. Ala. 1999) (arbitration provision required debtor "to pay initial fees for arbitration ranging from $500.00 to $7,000.00 and daily costs of hundreds of dollars when the court system will provide the same dispute resolution with the same degree of or even greater expertise for free" and precluded the award of attorneys' fees); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (arbitration provision precluded punitive damages and other statutorily mandated remedies); *Eagle v. Fred Martin Motor Co*., 809 N.E.2d 1161, 1173-1177 (Ohio Ct. App. 2004) (customer was required to pay "prohibitive costs" to arbitrate); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-281 (W. Va. 2002) (arbitration provision required parties to share costs of arbitration and precluded the award of punitive damages).

tions are only ***one*** of a ***number*** of routes that exist for the effective and expeditious vindication of small claims. There are at least two ***other*** obvious routes for a consumer to obtain relief for a relatively small claim: an action in small claims court or an individual arbitration. Although a contract that purported to bar a consumer from pursuing ***all three*** of these methods of obtaining redress very well might be unconscionable (even if it still authorized individual litigation in a court of general jurisdiction), a voluntary contractual agreement to bar just one of these—in particular, to bar class actions or class arbitration—is not. As one federal court recently observed, "[a] court must be wary of finding a contract unconscionable where the plaintiff is left with some place to go because denial of a specific remedy or forum is substantively different from denial of any means of enforcement whatsoever." *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1321 (M.D. Ala. 2004) (quoting *Roberson v. Money Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1526 (M.D. Ala. 1997)).[15]

Thus, this Court should reject plaintiffs' argument that the Revised

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[15] *See also* Jonathan R. 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.").

Provision is unconscionable because it somehow “exculpates” Cingular from liability for wrongdoing.

C. A Rule That Class-Action Prohibitions In Arbitration Agreements Are Substantively Unconscionable Under Washington Law Would Be Preempted By The Federal Arbitration Act.

Even if Washington did have a rule of law that class-action waivers in arbitration provisions are substantively unconscionable, federal law would nonetheless preempt that rule.

Article VI of the United States Constitution directs that the laws of the United States “shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. CONST. art. VI., cl. 2; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Because of this, federal law preempts inconsistent state laws. Preemption may occur by any of three means:

> State action may be foreclosed by ***express*** language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative ***field***, or by implication because of a ***conflict*** with a congressional enactment.

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L.Ed.2d 532 (2001) (citations omitted; emphasis added).

Here, both express and conflict preemption would preclude this Court from enforcing a rule that class-action waivers in arbitration provisions are substantively unconscionable.

1. Section 2 of the FAA would expressly preempt any rule deeming class-action prohibitions in arbitration provisions to be categorically unenforceable.

The rule for which plaintiffs argue—that class-action waivers in arbitration agreements are categorically unconscionable—not only is unsupported by Washington law, but also 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 v. Thomas 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987) (citations 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).

As the Washington Supreme Court recently emphasized, this principle means that "courts may not refuse to enforce arbitration agreements under state laws that apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate." *Zuver*, 103 P.3d at 759 (quotation marks, alterations, and citations omitted; emphasis in original); *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct.

1652, 134 L.Ed.2d 092 (1996).

Washington 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. Accordingly, under Section 2 of the FAA, Washington is not free to declare arbitration provisions to be unconscionable merely because they happen to prohibit class actions. Any such effort is expressly preempted.

Grasping at straws to escape the express preemptive force of the FAA, plaintiffs assert that "Washington law does not generally permit stronger parties to write one-sided contracts that immunize themselves even if they violate the law." Appellants' Br. 34. But as we have discussed above, that is simply not the effect of the arbitration provision at issue in this case. *See* pages 24-30, *supra*.

Furthermore, Section 2 of the FAA 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 Fifth Circuit recently explained in upholding the version of Cingular's arbitration provision that was in plaintiffs' original WSAs:

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 Zuver*, 103 P.2d at 759 ("courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate") (quotation marks, alterations, and citations omitted; emphasis in original); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

Because this is precisely what plaintiffs urge this Court to do by claiming that the class-action prohibition in Cingular's arbitration provision is unconscionable, the FAA expressly preempts their attack.

2. Even if Washington had a general prohibition against contractual class-action waivers, as applied to arbitration provisions that rule would conflict with the objectives of the FAA and be preempted.

Even if Washington did have an across-the-board rule that the presence of a class-action waiver is grounds for revoking ***any*** contract containing it—a rule that because of its generality would not be expressly preempted by Section 2 of the FAA—if applied in the arbitration context, such a rule would nonetheless "stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in en-

acting the FAA and therefore would be preempted under basic principles of conflict preemption. *United States v. Locke*, 529 U.S. 89, 109, 120 S. Ct. 1135, 146 L.Ed.2d 69 (2000) (quotation marks and citation omitted); *accord State v. Grimes*, 111 Wn. App. 544, 551, 46 P.3d 801 (2002).[16]

a. 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., at 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, at 13 (1982). The U.S. Supreme Court, too, has recognized the superior "simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. Washington courts also have observed that the "purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system."

[16] As plaintiffs implicitly acknowledge (at 31), 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.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000). 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. By contrast, plaintiffs' assertion that, to establish conflict preemption, "Cingular must demonstrate that Washington law is hostile to arbitration" (Appellants' Br. 42) is insupportable, as their failure to cite any cases suggests.

Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 765-766, 934 P.2d 731 (1997) (citation 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* 513 U.S. 265, 280-81, 115 S. Ct. 834, 130 L.Ed.2d 753 (1995)), 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 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) an interlocutory appeal 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 ex-

tensive 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.[17]

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. As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place.

Nothing could more clearly "frustrate the purpose" (*Livadas v. Bradshaw*, 512 U.S. 107, 116, 114 S. Ct. 2068, 129 L.Ed.2d 93 (1994)) 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 arbitra-

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[17] *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).

tion provision that was included in plaintiffs' original WSAs, "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31); *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.

b. Plaintiffs' primary response to our preemption argument is to present an exhaustive recitation of case law characterizing class actions as an important route to vindicate the rights of consumers. *See* Appellants' Br. 36-39. That discussion is entirely beside the point.

We do not deny that, in appropriate cases, class actions can be useful or important. But as we discussed above, class actions are only ***one*** of ***a number*** of routes that exist for the effective and expeditious vindication of small claims. *See* page 34, *supra*. Arbitration, too, is a well-established route for the vindication of small claims. Indeed, despite their panegyric on the virtues of the class action, plaintiffs cannot and do not claim that Washington has a generally applicable prohibition against waivers of class

actions. Thus, the fact that class actions may at times be appropriate in no way implies that parties should be required to conduct ***arbitrations*** on a class-wide basis, especially because the net result would be to undermine entirely the reasons arbitration is favored in the first place.

c. Plaintiffs' assertion that "there is nothing about arbitration that ***requires*** that it be conducted on an individual basis" (Appellants' Br. 40 (emphasis added)), though true, is beside the point.

As Judge Posner has explained, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). Thus, there is nothing in the FAA that ***precludes*** parties from affirmatively agreeing to arbitrate on a class-wide basis—even though that would, for all intents and purposes, convert arbitration into litigation. That is the reason why the Supreme Court has held that arbitrators must determine whether the parties to an arbitration agreement ***intended*** to allow for class-wide arbitration. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003). And it also is why the American Arbitration Association administers a class arbitration docket. *See* Appellants' Br. 40-41.

However, the fact that parties have the option to ***agree*** to arbitrate on

a class-wide basis in no way negates our point that grafting the class-action mechanism onto arbitration would undermine the benefits for which arbitration exists in the first place. *See* pages 39-42, *supra*. Plaintiffs' repeated assertion (at 8, 40, 42, 43) that Cingular is anti-arbitration because it will not submit to class-wide arbitration misses the point that class-wide arbitration is nothing other than full-blown litigation with limited judicial review. It is hardly anti-arbitration to refuse to breathe life into that Frankenstein's monster.

In fact, the only authority plaintiffs cite that at all supports the argument that class actions are not inherently inconsistent with the streamlined nature of arbitration is the November 2004 decision by JAMS, "one of the largest providers of alternative dispute resolution services in the United States" (Appellants' Br. 41), not to enforce class-action waivers in arbitration agreements. *See* Appellants' Br. 41 (citing JAMS Press Release). That decision was as short-lived as it was wrong-headed. On March 10, 2005—barely four months after announcing that decision—JAMS withdrew it, explaining that it was doing so because many believed that its "initial statement of the policy suggested * * * that JAMS had deviated from its core value of neutrality." *See* JAMS Press Release, March 10, 2005 (available at http://www.jamsadr.com). It noted that "[r]ecent court decisions on the validity of class action preclusion clauses have varied by

jurisdiction" and indicated that as a result it would "always apply the law on a case by case basis in each jurisdiction." *Id.* The fact that JAMS changed courses so quickly and dramatically is a telling indication of the bankruptcy of plaintiffs' contentions.

D. Cingular's Arbitration Provision Is Not Procedurally Unconscionable.

Plaintiffs' procedural unconscionability argument should not delay the Court for long. As the Washington Supreme Court has explained, "to determine whether [plaintiffs' contracts are] procedurally unconscionable we look to the following circumstances surrounding their transaction to determine whether [they] lacked meaningful choice: the manner in which the contract was entered, whether [they] had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print." *Zuver*, 103 P.3d at 760 (quotation marks, alterations and citations omitted); *see also Adler*, 103 P.3d at 782 (same).

Plaintiffs contend that four factors demonstrate procedural unconscionability here.[18] Alone or together, however, these factors do not suf-

[18] Plaintiffs' additional claim that "the presence of one-sided terms, such as Cingular's class-action ban, in a contract of adhesion, such as Cingular's arbitration clause, is sufficient to render its formation void for procedural unconscionability" (Appellants' Br. 44) is nonsense. Nothing about the ***specific terms*** in the contract goes to the method by which the contract was ***formed***, the relevant question for a procedural-unconscionability analysis. *See Johnson v. Cash Store* , 116 Wn. App. 833, 843, 68 P.3d 1099 (2003) ("procedural unconscionability relates to impropriety during the process of forming a

fice.[19]

First, plaintiffs claim that the WSAs—and the Revised Provision amending those WSAs—are contracts of adhesion. *See* Appellants' Br. 44. Cingular has never disputed this; in fact, 99 percent of all contracts in this country are form contracts. *See* John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000). But it is well established under Washington law that "the fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable." *Zuver*, 103 P.3d at 760; *see also Luna*, 236 F. Supp. 2d at 1175; RP 13.

Second, plaintiffs claim to "have introduced uncontradicted evidence showing that the terms of the original arbitration clause were well-concealed in a 'maze of fine print'" (Appellants' Br. 45). 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." RP 14.[20]

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contract"); *see also*, *e.g.*, *Zuver*, 103 P.3d at 760. Rather, the one-sided nature of contractual terms is relevant to ***substantive*** unconscionability.

[19] It is an open question under Washington law whether procedural unconscionability alone, without proof of substantive unconscionability, can ever be sufficient to render a contract unenforceable. *Adler*, 103 P.3d at 782. We submit that the question should be answered in the negative for the reasons summarized by the Washington Supreme Court in *Adler*. *See id.* If this Court agrees, it need not address the merits of plaintiffs' procedural unconscionability argument.

[20] Plaintiffs 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

That conclusion is well supported by the facts here. In particular:

- The front of plaintiffs' WSAs contained multiple cross-references to the Terms and Conditions printed on the back of that one-page form, and plaintiffs explicitly acknowledged having "read and underst[ood] [the] agreement and the terms and conditions." *See* page 3, *supra*.

- The ***very first paragraph*** on the back of the WSA refers to—and only to—the arbitration provision contained on that page. *See* CP 345, 349. Indeed, the Fifth Circuit recently relied in part on the prominence of this all-capital-letters notification to reject an argument that a materially identical version of Cingular's WSA was procedurally unconscionable. *Iberia*, 379 F.3d at 172 n. 14 ("the first paragraph of the Cingular contract specifically adverts to the arbitration clause, the only provision given such prominent billing").

- The arbitration provision is in the same font size as the remainder of the contract. *See Luna*, 236 F. Supp. 2d at 1176 (rejecting procedural unconscionability argument where "[a]ll terms [were] in the same sized typeface").

- Finally, the arbitration provision begins with the bold, all-capitalized title: "**INDEPENDENT ARBITRATION**." *See* page 4, *supra*. "Placement of essential terms in capital letters weighs against a finding of procedural unconscionability." *Luna*, 236 F. Supp. 2d at 1176.

Third, plaintiffs argue that, because "nearly every other major wireless phone provider in Washington requires mandatory arbitration," they were denied a meaningful choice over whether to assent to the contract. Appellants' Br. 45-46. This Court has already implicitly rejected this argument in the past. *See Tjart*, 107 Wn. App. at 889, 898-899 (finding that

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its contents and to assent to them * * *." *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 897, 28 P.3d 823 (2001).

arbitration provision in securities agreement was not procedurally unconscionable even though all securities companies require arbitration). The Court should do so again, now.

The unstated assumption underlying this argument is that plaintiffs somehow have a right to choose between a wireless carrier that includes an arbitration provision in its contracts and one that does not. They cite to—and we know of—no possible source of authority for this proposition. Of course, to the extent a ***specific*** arbitration provision is substantively unconscionable, a consumer could have that provision declared unenforceable. But a rule that an arbitration provision is unenforceable merely because every contract of that type includes an arbitration provision would plainly be animated only by anti-arbitration animus, and thus would be precluded by the FAA.

In any event, plaintiffs do not deny that there ***are*** some wireless providers that do not require arbitration. *See* Appellants' Br. 45 ("***nearly*** every") (emphasis added). Thus, this procedural-unconscionability argument is factually unsupported.

Fourth, plaintiffs object to the manner in which "Cingular's revised arbitration clause was sent to customers" (Appellants' Br. 46), arguing that "the overwhelming majority of consumers [would] never read the amendment" (*id.*). This, too, gets plaintiffs nowhere.

For starters, plaintiffs 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***. Here, Cingular did not unilaterally impose arbitration on plaintiffs in the midst of an ongoing contractual relationship. Rather, plaintiffs voluntarily entered into contracts with Cingular that contained an arbitration provision when they initially signed up for service with Cingular. Later, pursuant to a change-in-terms provision on those contracts, Cingular modified that provision to make it more consumer-friendly. As the superior court held, there is no evidence of fraud or duress in the making of those contracts. *See* RP 15.

Thus, this case is a far cry from the cases plaintiffs cite, such as *Szetela* and *Powertel*, in which the plaintiffs' only options were to accept the defendants' arbitration provisions, which had been unilaterally imposed on them ***after they already were customers***, or immediately to cease using the defendants' services. *See Szetela*, 97 Cal. App. 4th at 1096-97; *Powertel*, 743 So. 2d at 574-575. By contrast, the fact that Cingular modified its arbitration provision to make it more beneficial to consumers is not evidence of procedural unconscionability. *See, e.g.*, *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"); *Szetela*, 97 Cal. App. 4th at 1096-97, 1100.

In any event, the Revised Provision merely makes arbitration more consumer-friendly. Hence, it is totally illogical to suggest that Cingular had any reason to try to sneak it by its customers. And in fact it did not. As a review of the bill insert confirms, Cingular went to great lengths to ensure that customers ***would*** read the revised arbitration provision, specifying in a banner heading across the top in large-print, bold-face, capitalized letters: "**IMPORTANT INFORMATION CONCERNING YOUR CONTRACT**" and, following a brief explanation, including a second heading of equal prominence: "**ARBITRATION**," before setting forth the actual terms of the revised provision (CP 355 (emphasis in original)). It is hard to imagine how Cingular could have made the revised arbitration provision any more conspicuous, and plaintiffs provide no clues.

CONCLUSION

Assuming that the Court does not dismiss this appeal for lack of jurisdiction, it should affirm the superior court's order compelling plaintiffs to arbitrate their claims and staying litigation pending arbitration.

Respectfully submitted,

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