No. 09-35563

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYGRACE A. CONEFF, *et al.*,
Plaintiffs – Appellees,

v.

AT&T CORP.,
Defendant,
and

NEW CINGULAR WIRELESS SERVICES INC, f/k/a AT&T Wireless Services, Inc., *et al.*,
Defendants – Appellants.

Appeal from an Order of the United States District Court
for the Western District of Washington, No. 2:06-cv-00944-RSM

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

New Cingular Wireless Services, Inc. f/k/a AT&T Wireless Services, Inc. is a non-governmental corporate entity and a wholly-owned subsidiary of AT&T Mobility LLC f/k/a Cingular Wireless LLC.

AT&T Mobility LLC has no parent company. Its members are all privately held companies that are wholly-owned subsidiaries of AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in AT&T Mobility LLC.

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JURISDICTIONAL STATEMENT

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2)(A) because at least one plaintiff is from a state different than one defendant—the putative class consists of citizens of all 50 states and the District of Columbia, while defendants-appellants AT&T Mobility LLC ("ATTM") and New Cingular Wireless Services, Inc. are citizens of Delaware and Georgia[1]—and the aggregate claims of the putative class exceed $5 million. ER2163-67.

The district court denied defendants' motion to compel arbitration on May 22, 2009. ER5. Defendants timely filed a notice of appeal on June 10, 2009. ER1. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B), which authorizes an immediate appeal from the denial of a motion to compel arbitration.

ISSUES PRESENTED

The plaintiffs-appellees are current and former customers of ATTM f/k/a Cingular Wireless LLC ("Cingular") from Alabama, Arizona, California, Florida, Illinois, Missouri, New Jersey, Washington, and Virginia.[2] Their wireless service

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[1] ATTM f/k/a Cingular Wireless LLC is a Delaware limited liability company and New Cingular Wireless Services, Inc. f/k/a AT&T Wireless Services, Inc. is a Delaware corporation; each has its principal place of business in Georgia. ER 2166-67. Although AT&T Corporation was formerly named as a defendant, plaintiffs subsequently removed it from the operative complaint. ER1216.

[2] In October 2004, Cingular Wireless Corporation (a holding company) acquired AT&T Wireless Services, Inc., which was renamed New Cingular Wireless Services, Inc., and immediately sold to Cingular Wireless LLC. ER1044-45. In January 2007, Cingular Wireless LLC was renamed AT&T Mobility LLC.

agreements each contain a choice-of-law provision selecting the law of the state of the customer's billing address or wireless phone number's area code. The agreements also require the parties to pursue their disputes in individual arbitration or small claims court. Under the ATTM arbitration provision that the district court found applicable here, the customer arbitrates for free, can recover all damages that a court could award, and may choose whether arbitration will be conducted in person (in the county of his or her billing address), by telephone, or by mail. ER25, 2115-17. In addition, if the arbitrator awards a customer more than ATTM's last written settlement offer, ATTM must pay the customer at least $5000, plus double attorneys' fees, in lieu of any smaller award. ER2117.

Despite their arbitration agreements, plaintiffs filed several class-action lawsuits against ATTM and one of its predecessors, AT&T Wireless Services, Inc. ("AWS"). After the cases were consolidated, ATTM moved to compel arbitration of each named plaintiff's claims. The district court denied the motion, holding that Washington law governs each named plaintiff's contention that ATTM's arbitration provision is unconscionable, and that the provision is unconscionable under Washington law. ATTM's appeal presents three issues:

(1) Whether, with respect to the 14 named plaintiffs who are not from Washington (out of a total of 17 plaintiffs), the law of those plaintiffs' respective

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ER1045.

home states governs their unconscionability challenges to their arbitration agreements;

(2) Whether ATTM's unprecedentedly consumer-friendly arbitration provision is unconscionable under Washington law;

(3) If so, whether Washington law is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

STATEMENT OF THE CASE

Plaintiffs filed six separate putative nationwide class-action lawsuits against ATTM and AWS in the U.S. District Court for the Western District of Washington, and one such action in the U.S. District Court for the Northern District of California. ER1208. All seven lawsuits were consolidated before one judge in the Western District of Washington. Defendants moved to compel arbitration under 9 U.S.C. § 4. Doc 133. After the district court denied that motion, defendants filed this interlocutory appeal under 9 U.S.C. § 16(a). ER1.

STATEMENT OF FACTS

A. The Plaintiffs' Lawsuits.

The named plaintiffs in the consolidated putative class action are residents of nine different states: Alabama, Arizona, California, Florida, Illinois, Missouri, New Jersey, Washington, and Virginia. ER1567, 2163-66. Plaintiffs, who had received wireless service from AWS, allege that, after ATTM (then Cingular) merged with AWS in October 2004, it deliberately degraded AWS's network and

introduced a monthly fee for users of older technology phones to induce AWS customers to switch to ATTM's network. ER2170. The plaintiffs who switched to ATTM's network allege that when they did so, they were required to pay $36 in fees, buy new phones, and enroll in less favorable calling plans. ER2170. Other plaintiffs allege that they paid early termination fees to cancel their service. ER2164-66. Still other plaintiffs allege that they retained their older technology phones and remained on AWS's legacy network until their contractual commitment period expired, and then cancelled their service. ER2164-65.

On behalf of a putative nationwide class, plaintiffs assert claims under the consumer protection acts of 14 states, the Federal Communications Act (47 U.S.C. §§ 201 et seq.), and several common-law doctrines. ER2176-81. They seek damages (including treble and punitive damages), restitution, declaratory and injunctive relief, and attorneys' fees and costs. ER2182.

Plaintiffs acknowledge that their service agreements with AWS and ATTM require them to arbitrate these claims. But they allege that AWS's and ATTM's arbitration provisions are "unconscionable under State and Federal law" because the provisions forbid class arbitration; they request declaratory and injunctive relief against enforcement of the provisions. ER2172, 2182.

B. ATTM's 2006 Arbitration Provision.

Plaintiffs each entered into one or more wireless service agreements with AWS or ATTM that contained an arbitration provision. In the fall of 2006, ATTM

(then Cingular) revised its arbitration provision substantially. The revision was immediately posted on ATTM's web site. Invoking the change-in-terms provisions in its customers' contracts, ATTM sent the revised arbitration provision to its then-current customers in December 2006. ER1051. ATTM also has made the provision available to former customers, including former AWS customers. ER1051. The district court found that plaintiffs had conceded that the 2006 arbitration provision "controls in this case." ER7. Like the earlier AWS and ATTM arbitration provisions, ATTM's 2006 provision requires that arbitration be conducted on an individual basis. ER2115.

The 2006 provision reflects the second major revision of ATTM's arbitration provision. *See generally Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 255-57 (Ill. 2006) (discussing ATTM's first- and second-generation provisions). Like other early consumer-arbitration provisions, the original arbitration provision (implicitly) required consumers to pay an equal share of arbitration fees; required that arbitration be kept confidential; and precluded arbitrators from awarding punitive damages. ER1604-05. Because some customers contended—and some courts held—that these features made it impossible to arbitrate small claims on an individual basis, ATTM and other companies revised their early arbitration agreements to address that concern.

ATTM introduced its second-generation arbitration provision in Spring 2003. This provision specified that ATTM would pay the entire cost of arbitrating

any non-frivolous claim; required ATTM to pay the customer's attorneys' fees whenever the arbitrator awarded the customer the amount of his or her demand or more; did not require the parties to keep the results of the arbitration confidential; and eliminated the prohibition against awarding punitive damages. ER2090-91. Many courts upheld second-generation arbitration provisions, concluding that such provisions are not unconscionable merely because they require that arbitration be conducted on an individual basis.[3] But other courts, including this one, have invalidated ATTM's and other companies' second-generation provisions, concluding that those provisions still did not go far enough to make individual arbitration a realistic means of resolving small claims. *See*, *e.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) (applying Washington law), *cert. denied*, 129 S. Ct. 45 (2008); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (en banc).

In late 2006, in an effort to respond to decisions like these that had rejected

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[3] For example, a Missouri trial court and the U.S. District Court for the Eastern District of Pennsylvania upheld ATTM's second-generation arbitration provision. *See Blitz v. AT&T Wireless Servs., Inc.*, 2005 WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005); *Weinstein v. AT&T Mobility Corp.*, 2008 WL 1914754 (E.D. Pa. Apr. 30, 2008). Likewise, the Florida District Court of Appeal and two federal district courts upheld an arbitration provision that AWS used in 2003. *See Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005); *Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752 (S.D. Ill. July 18, 2008); *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685 (N.D. W. Va. 2005); *see also, e.g.*, *Pleasants v. Am. Express Co.*, 541 F.3d 853 (8th Cir. 2008) (upholding arbitration agreement under Missouri law); *Jenkins v. First Am. Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005).

second-generation arbitration provisions, ATTM further revised its dispute-resolution procedures. ATTM's 2006 arbitration provision includes the following pro-consumer features (ER2115-17):

- **$5,000 minimum award if arbitral award exceeds ATTM's settlement offer:** If the arbitrator awards the customer more than ATTM's "last written settlement offer before an arbitrator was selected," ATTM must pay the customer $5,000, or the jurisdictional maximum of the small claims court in the county of the customer's billing address, or the amount of the arbitral award, whichever is greater;[4]

- **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last settlement offer, then ATTM "will … pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[5]

- **Cost-free arbitration:** "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";[6]

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[4] In two of the nine states in which named plaintiffs reside, the jurisdictional limit for small claims court exceeds $5,000: The limit in California is $7,500 (CAL. CIV. CODE § 116.220(c)), and the limit in Illinois is $10,000 (Ill. Sup. Ct. R. 281).

[5] This premium is a "supplement" to any "right to attorneys' fees and expenses [that the customer] may have under applicable law," so even if an arbitrator were to award a customer less than ATTM's last settlement offer, the customer could recover attorneys' fees to the same extent as if his or her claim had been brought in court. ER2117.

[6] In the event that an arbitrator concludes that a consumer's claim is frivolous, the AAA's consumer arbitration rules would cap a consumer's arbitration costs at $125 for any claim smaller than $10,000. ER2158.

- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an award [from the customer]";

- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration;

- **No confidentiality requirement:** The parties need not keep the arbitration confidential;

- **Full remedies available:** The arbitrator can award the same remedies to individual consumers (including punitive damages and injunctions) that a court could award;

- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;

- **Conveniently located hearing:** Arbitration will take place "in the county … of [the customer's] billing address";

- **Customer's choice of in-person, telephonic, or no hearing**: For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator";[7]

- **Customer may reject future changes**: Customers may reject any future changes in the arbitration provision (other than a change in the address at which customers must send ATTM a notice of dispute).

C. ATTM's Dispute-Resolution Process In Practice.

These pro-consumer features of ATTM's arbitration provision give

[7] Under the AAA rules that would otherwise apply, either party could insist on a hearing in cases involving claims of $10,000 or less. For claims exceeding $10,000, a hearing would be held unless both parties agreed to forgo it. ER2158.

customers tremendous leverage over ATTM in the event of a dispute. The provision makes arbitration so quick and convenient that any customer complaint may be arbitrated. And because the provision requires ATTM to pay the full cost of arbitration and potentially at least $5,000 and double attorneys' fees to the customer, ATTM's customer service representatives have a strong economic incentive to accommodate any reasonable request. As a result, the vast majority of customer disputes are resolved to the customer's satisfaction without the need to invoke the formal arbitration process. ER2087.[8]

It is only if a customer either does not communicate with the customer care department or is dissatisfied with its proposed resolution that the arbitration provision comes directly into play. The first step of the process is to provide ATTM's legal department with notice of the dispute. ER1052. That is as simple as sending a letter to ATTM or filling out and mailing the one-page Notice of Dispute form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). ER1052.

If ATTM and the customer cannot resolve the dispute within 30 days, the customer may begin the arbitration process. ER2116. To do so, the customer need only fill out a one-page Demand for Arbitration form and send copies to the AAA

[8] For example, in November 2007, ATTM's representatives dispensed about $116 million in credits for customer concerns and complaints. ER1053. Over the preceding 12 months, customers received over $1 billion in manual credits. ER1053.

and to ATTM. Customers may either obtain a copy of the demand form from the AAA's web site (at http://www.adr.org) or use the simplified form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). ER1052, 2116. To assist its customers further, ATTM has posted on its web site (at (http://www.att.com/arbitration-information) a layperson's guide on how to arbitrate a claim. ER1052.

D. Defendants' Motion To Compel Arbitration.

Invoking the 2006 arbitration provision, defendants moved to compel plaintiffs to pursue their disputes in individual arbitration or small claims court. Doc 133. In response to plaintiffs' allegations that their arbitration agreements are unconscionable, defendants argued that each plaintiff's unconscionability challenge should be evaluated under the law of his or her home state in accordance with the choice-of-law provisions in the plaintiffs' AWS and ATTM wireless service agreements. Those choice-of-law provisions select the law of the state of the customer's billing address or wireless telephone number.[9] Defendants argued that the 2006 arbitration provision was fully enforceable under the laws of the nine states in which the various named plaintiffs reside. In support, defendants submitted evidence that ATTM's dispute-resolution process works for

[9] AWS's choice-of-law provision specifies that the applicable "laws of the state associated with the Number" will govern. ER1605. ATTM's provision specifies that "[t]he law of the state of your billing address shall govern this Agreement except to the extent that such law is preempted by or inconsistent with applicable federal law." ER1112.

consumers—including declarations from lawyers from the relevant states who testified that they would be willing to represent consumers invoking ATTM's dispute-resolution procedures. ER1219-64, 2023-69. Defendants also submitted a declaration from law professor Richard Nagareda, whose scholarship focuses on aggregate dispute resolution. ER2070. Professor Nagareda testified that he has "never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims" on an individual basis. ER2073.

The district court nonetheless denied the motion to compel arbitration. First, the court held that Washington law governed all of the named plaintiffs' unconscionability challenges, including those of plaintiffs from other states. The court concluded that Washington law would apply to all of the plaintiffs in the absence of a choice-of-law clause, and that "the parties' express contractual choice-of-law" was ineffective on public policy grounds. ER10.

Second, the court held that ATTM's 2006 arbitration provision is substantively unconscionable under Washington law. ER20. Relying on "declarations of several consumer lawyers across the country" who stated that they would not represent the named plaintiffs in individual actions—and leaving aside the contrary declarations of many other lawyers who stated that they would bring claims under ATTM's arbitration clause—the court held that "the cost of pursuit would be prohibitively expensive for a customer proceeding on an individual

basis." ER16. The court stated further that class actions are needed to "[c]urb[] fraudulent business practices." ER19. The court concluded that the "class waiver provision[]" in ATTM's 2006 arbitration provision is "substantively unconscionable" because it "contravenes Washington's fundamental public policy favoring the availability of class actions as a mechanism for enforcing a consumer's rights." ER20.

Finally, the court rejected ATTM's argument that the FAA preempts any holding that its arbitration provision is unconscionable under Washington law as foreclosed by this Court's decisions in *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), and *Lowden*, 512 F.3d 1213. ER20-22.

STANDARD OF REVIEW

"A district court's decision concerning the appropriate choice of law is reviewed de novo." *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). "The validity … of an arbitration clause [is] reviewed de novo." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc).

SUMMARY OF ARGUMENT

Plaintiffs' contracts specify that the law of their respective home states govern their agreements with ATTM and that any disputes with ATTM must be resolved through arbitration on an individual basis or in small claims court. The district court nonetheless denied ATTM's motion to compel arbitration, refusing to enforce the choice-of-law provisions in the contracts of the non-Washington

plaintiffs and holding that the requirement that arbitration be conducted on an individual basis is unenforceable under Washington law. Both of these conclusions are erroneous.

1. The district court erred in concluding that Washington law governs the unconscionability challenges of the non-Washington plaintiffs. Those plaintiffs' contracts select the law where they live—a choice of law that, under Washington conflicts-of-laws principles, is fully enforceable. For starters, even in the absence of a contractual choice of law, Washington would select the law of the home state of each named plaintiff—a result that is unsurprising, because most reasonable consumers would expect that their home state's law governs their contracts. The district court believed otherwise because it assumed that form cell phone contracts have "no place" of contracting, negotiation, or performance—an assumption directly at odds with well-established case law. Furthermore, even if Washington law would otherwise apply, the choice-of-law provisions in the plaintiffs' service agreements are enforceable because it offends no legitimate Washington policy to apply the law of the home states of non-Washington plaintiffs to those plaintiffs' unconscionability challenges. Moreover, the district court failed to recognize the equally long-standing principle that a consumer's home state typically has a materially greater interest in the enforceability of its citizens' contracts than does the state in which the defendant happens to be located—especially when the contract is formed and the subject matter of the

contract (wireless service) is to be performed predominantly in that state. These errors necessitate reversing the district court's order and remanding with instructions to apply the law of each plaintiff's home state to determine the enforceability of that plaintiff's arbitration agreement.

2. The district court also erred in holding that ATTM's 2006 arbitration provision is substantively unconscionable under Washington law. It is true that the Washington Supreme Court refused to enforce an earlier version of ATTM's arbitration provision, in part because it prohibited class arbitration. *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (en banc). But that court made clear that Washington law does not impose a categorical rule barring agreements to arbitrate on an individual basis. Such agreements are invalid under Washington law only when they serve to prevent the plaintiff from vindicating his or her claims.

After the district court issued its order, the Washington Supreme Court expressly held that the prospect of a $5,000 award is sufficient to provide customers with an incentive to pursue a claim. *Torgerson v. One Lincoln Tower, LLC*, 210 P.3d 318, 323 (Wash. 2009) (en banc). It accordingly held that a damages limitation of $5,000 was not unconscionable under *Scott*. *Id*. That holding confirms that the requirement that arbitration be conducted on an individual basis in ATTM's 2006 provision does not run afoul of *Scott*.

Under that provision, if an arbitrator awards any Washington customer more

than ATTM's last settlement offer, ATTM must pay the customer at least $5,000, plus double attorneys' fees. This novel feature of ATTM's arbitration provision affirmatively encourages consumers to pursue their disputes with ATTM in individual arbitration. Just as importantly, it also impels ATTM to resolve those disputes to the customers' satisfaction. Indeed, the district court itself implicitly acknowledged that the arbitration provision creates irresistible economic incentives for ATTM to accept liability for any remotely colorable small consumer claim. These incentives are at least as strong, if not stronger, than the incentives in *Torgerson*. Hence, the class waiver in ATTM's arbitration provision is fully enforceable under generally applicable principles of Washington law.

3. Moreover, the FAA would preempt any contrary interpretation of Washington law. We recognize that this Court recently rejected ATTM's preemption arguments in a case involving California unconscionability law. *See Laster v. AT&T Mobility LLC*, __ F.3d __, 2009 WL 3429559 (9th Cir. Oct. 27, 2009). We respectfully disagree with the Court's holding in *Laster* and intend to seek Supreme Court review. But whatever ultimately happens in *Laster*, *Torgerson* establishes that the prospect of a $5,000 recovery is sufficient incentive to pursue a claim in court and that the district court's holding that ATTM's 2006 provision runs afoul of *Scott* is therefore an arbitration-specific rule that is precluded by Section 2 of the FAA.

ARGUMENT

I. THE LAW OF PLAINTIFFS' HOME STATES GOVERNS THE ENFORCEABILITY OF THEIR AGREEMENTS TO ARBITRATE.

Each plaintiff's contract contains a choice-of-law clause selecting the law of the plaintiff's home state (determined by the customer's billing address or the area code of his or her wireless phone number). *See* page 10, *supra*.[10] The district court recognized that the choice of law might make an outcome-determinative difference in its resolution of the motion to compel arbitration, concluding that "there is a split of authority" over the enforceability of agreements to arbitrate on an individual basis and that "Virginia, Illinois, and Alabama" in particular—the home states of several plaintiffs—enforce such agreements. ER9-10. (The court did not consider the laws of the other relevant states—Arizona, California, Missouri, and New Jersey—some of which also undeniably would enforce ATTM's 2006 arbitration provision.[11])

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[10] Steven Knott is from Alabama; Harold Melendez is from Arizona; Marygrace Coneff, Jennie Bragg, Kelly Petersen, Stephen Papaleo, Jeff Haymes, and Christine, Joanne, and Alex Aschero are from California; Addie Christine Lowry is from Florida; Devin Gilker and Andrew Rudich are from Illinois; Liesa Krausse is from New Jersey; Michelle Johns is from Virginia; and Amy Frerker and Steven and S. Leonard Shulman are from Washington. ER1057, 1089, 2163-66. Although plaintiffs allege that Gina Franks is from Washington, her ATTM billing address is in Missouri. ER1567. Plaintiffs allege that Jeff Haymes is from Arizona (ER2165), but because his cell phone numbers had California area codes (ER1049), and he never switched to ATTM (ER2165), his AWS contract selects California law.

[11] *See*, *e.g.*, *Cicle v. Chase Bank USA*, 583 F.3d 549, 556-57 (8th Cir. 2009)

The district court nonetheless held that Washington law governed the unconscionability challenges of all the plaintiffs, including the fourteen plaintiffs from eight states other than Washington. In so doing, the district court acknowledged that, under Washington's choice-of-law principles, Section 187 of the *Restatement (Second) of Conflicts of Laws* controlled, but it misapplied those principles in refusing to enforce the choice-of-law provisions in the plaintiffs' contracts. ER10. Under Washington law, such provisions must be enforced "unless all three of these conditions are met": (i) "without the provision, Washington law would apply"; (ii) "the chosen state's law violates a fundamental public policy of Washington"; and (iii) "Washington's interest in the determination of the issue materially outweighs the chosen state's interest." *McKee v. AT&T Corp.*, 191 P.3d 845, 851 (Wash. 2008) (en banc) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)); *see also* ER10.[12] As we discuss below, not

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(enforcing agreement to arbitrate on individual basis under Missouri law); *Pleasants v. Am. Express Co.*, 541 F.3d 853, 857-59 (8th Cir. 2008) (same); *Davis v. Dell, Inc.*, 2007 WL 4623030, at *7 (D.N.J. Dec. 28, 2007) (same under New Jersey law); *Jones v. The Chubb Inst.*, 2007 WL 2892683, at *4 (D.N.J. Sept. 28, 2007) (same); *Virgil v. Sears Nat'l Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002) (same under Arizona law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E. 2d 886, 891 (Ill. App. Ct. 2003) (same). *But see Laster*, 2009 WL 3429559 (holding that ATTM's 2006 arbitration provision is unconscionable under California law).

[12] Section 187(2)(b) of the *Restatement* provides that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied" unless "application of the law of the chosen state would be contrary to a

one of the conditions required by *Restatement* Section 187 is met here; in holding to the contrary that ***all*** three of these conditions are present, the district court erred. Accordingly, the court's order should be reversed with directions for the court to consider the enforceability of ATTM's 2006 arbitration provision under the laws of each plaintiff's home state.

A. Even Without A Choice-Of-Law Clause, The Law Of The Plaintiffs' Home States Would Govern Their Unconscionability Challenges.

First, the district court was wrong to hold that, in the absence of a choice-of-law provision in the parties' contracts, Washington law would apply to the unconscionability challenges of the non-Washington plaintiffs. The Washington Supreme Court has confirmed that to determine which law applies to contract issues, such as "the validity of [an] agreement [to arbitrate on an individual basis]," "Washington applies the 'most significant relationship' test from [Section 188 of] the *Restatement*." *McKee*, 191 P.3d at 851. In applying this test, the district court improperly failed to conduct a plaintiff-by-plaintiff analysis, misapplied the five factors that are relevant under Section 188, and erroneously included the factors for resolving choice-of-law questions arising out of tort issues in its analysis.

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fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

1. The district court improperly lumped all of the named plaintiffs together in analyzing choice of law.

The district court concluded that, without a choice-of-law clause, Washington law would apply to ***all*** of the named plaintiffs because one defendant (the former AWS) and ***at least one*** named plaintiff were from Washington. ER12. This "one size fits all" approach to choice of law is directly contrary to the precedents of the U.S. Supreme Court and this Court.

The reason that choice-of-law analysis requires a plaintiff-by-plaintiff inquiry is simple: Otherwise, a plaintiff who determines that the law of her home state is less favorable than the law of the state where a defendant is located could alter the law governing her claims simply by adding another plaintiff from the defendant's home state. If a plaintiff's decision to sue alone or jointly affected the law governing her claims, the resulting arbitrariness would violate due process. As the Supreme Court has held, due process requires that a state have "significant contact" to "the claims asserted by ***each*** member of the plaintiff class," not just to the claims of one or several named plaintiffs. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (emphasis added). Accordingly, the district court's approach of aggregating all of the named plaintiffs together for purposes of choice of law was improper. Courts instead "'must apply an ***individualized*** choice of law analysis to ***each*** plaintiff's claims.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001) (emphasis added) (quoting *Castano v. Am.*

Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) (quoting in turn *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).[13] *Accord*, *e.g.*, *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (district court erred because it "did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member"); *Spence v. Glock, Ges. m.b.H.*, 227 F.3d 308, 311-13 & n.5 (5th Cir. 2000) (same).

Indeed, the district court's approach cannot be squared with this Court's decision in *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718 (9th Cir. 2007), which involved the choice of law for determining the enforceability of the arbitration agreements entered into by members of a putative nationwide class of AWS's customers. As this Court explained, that inquiry "would necessitate a state-by-state review of contract conscionability jurisprudence." *Id.* at 728. Although the named plaintiff and two defendants were from California (*see id.* at 721 n.1), the *Lozano* Court held that the enforceability of the arbitration agreements of the putative class members could not be determined by applying the

[13] In *Zinser*, a product-liability action, this Court rejected the application of the law of the manufacturers' home state to the claims of a putative nationwide class of consumers. 253 F.3d at 1188. As the Court explained, California's choice-of-law rules—which mirror the *Restatement* rules that Washington follows (*see id.* at 1187)—"require[] comparison of each non-forum state's law and interest with California's law and interest *separately* … to *each* claim upon which certification is sought." *Id.* at 1188 (emphasis in original; internal quotation marks omitted).

law of a single state; rather, the district court would be required to examine variations in state unconscionability law in assessing AWS's defense that its customers' arbitration agreements precluded them from participating in the putative class action (*see id.* at 728). The same is true here. The fact that some named plaintiffs are from Washington supports applying Washington law to ***those*** plaintiffs' unconscionability challenges, but that has no bearing whatever on whether Washington law may be applied to plaintiffs from ***other*** states.

2. The district court misapplied the applicable *Restatement* factors.

The district court also misapplied the factors that, under Section 188 of the *Restatement*, are relevant to determining the law applicable to contract issues such as the "validity of an [arbitration] agreement." *McKee*, 191 P.3d at 383. The Section 188 factors, which are "evaluated according to their relative importance with respect to the particular issue," are: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." RESTATEMENT, *supra* § 188(2).

The district court held that the first four factors are "neutral." In its view, "there is simply no place of contracting [and] no place of negotiation of the contract" because "Defendants sent the [service agreements] to customers who

were existing [AWS] customers, and there is no evidence that the Plaintiffs repeatedly communicated with Defendants to either change or otherwise modify their plans." ER11. The court added that there is "no place of performance, and no central location of the subject matter of the contract, … as Defendants undoubtedly have satellite towers all across the country, and customers often use their phones in multiple states. Indeed, wireless phone use is a nation-wide practice." ER11.

These conclusions are mistaken as a matter of law. As cases applying the *Restatement* have made clear, form contracts like the service agreements governing the named plaintiffs have a "place of contracting" and a "place of negotiation" within the meaning of Section 188—the state in which the customer decided to subscribe to cell phone service and accepted the terms of service.[14] As the

[14] *See*, *e.g.*, *In re Jamster Mktg. Litig.*, 2008 WL 4858506 (S.D. Cal. 2008) (Section 188 factors for a form cell phone contract all "weigh in favor of applying the law of plaintiffs' residence"); *Heiges v. JP Morgan Chase Bank, N.A.*, 521 F. Supp. 2d 641, 646 (N.D. Ohio 2007) (under Section 188, "Ohio is the appropriate forum" because the form credit card agreement "was applied for and signed in Ohio"); *Henry v. Gateway, Inc.*, 979 A.2d 287, 288-89 (Md. 2009) (under Section 188, form contract for purchase of computer was governed by the law of Maryland, where consumer "accepted the contract terms" by using his computer to "electronically agree[] to it" and where the contract would be performed, "in terms of payment of the purchase price and receipt of the computer"); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 740 (Ct. App. 2005) (under Section 188, when Delaware bank mailed form credit card agreements to California cardholders, "the contract was made in California" and therefore governed by California law); *Discover Bank v. Shea*, 827 A.2d 358, 364 (N.J. Super. Ct. 2001) (under Section 188, a bank's form cardholder agreement is governed by the law of the state where

Restatement explains, the place of contracting is where the "last act necessary … to give the contract binding effect" occurs, and the place of negotiation is where the parties "agree on the terms of their contract." RESTATEMENT, *supra* § 188, cmt. e. For example, each AWS phone was packaged with a booklet that contained the terms of the service agreement and notified the customer that activating and using the phone constituted acceptance of the terms. ER1561, 1582. Thus, the place of contracting and negotiation is, for each plaintiff, his or her home state because that is where the plaintiff accepted AWS's terms of service by activating and using their phones. Moreover, the plaintiffs who switched their service to ATTM did so by signing new contracts—either physically in a local ATTM store or electronically by accepting the terms using a telephone keypad or computer. ER1562. These events, too, almost certainly took place in plaintiffs' home states. *See also* FCC 06-142, *Eleventh Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* (Sept. 29, 2006) ¶ 173, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf (explaining that Economic Areas designated by Commerce Department, which "include[], as far as possible the place of work and the place of residence of [the area's] labor force," "would seem to capture the market where the average person would shop for and purchase his or her mobile phone most of the time—near

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the customer "entered into" and "accepted" his agreement and "receives his bills and makes his payments").

home, near the workplace, and all of the places in between").[15]

In addition, each plaintiff's home state also is the place of performance and location of the subject matter of the contract. The district court reasoned that the plaintiffs' ability to use their phones in multiple states on AWS's and ATTM's nationwide networks (ER11) means that, in effect, the contract is performed either everywhere or nowhere. But that result is contrary to the *Restatement*'s explanation that, for "contract[s] for the rendition of services"—such as the wireless services rendered to plaintiffs—the important state is the one "where the contract requires the services, ***or a major portion of the services***, be rendered." RESTATEMENT, *supra* § 196 (emphasis added). Common sense suggests that AWS's and ATTM's performance—*i.e.*, the provision of wireless service—predominantly occurs in plaintiffs' home states. Indeed, as Congress recognized in the Federal Mobile Telecommunications Sourcing Act, a cell phone "customer's place of ***primary use***" of wireless services is where the customer lives or works. 4

[15] The district court noted, in passing, that AWS drafted its arbitration provision in Washington. ER12. But the place of contracting and negotiation is where a consumer entered into a form contract, not where the form was drafted. *See* note 14, *supra*. The point of looking to these factors is to protect the parties' "legitimate expectations" as to governing law. RESTATEMENT, *supra* § 188 cmt. b. Thus, residents of Seattle and Miami who each get jobs working at a local McDonalds would expect that their employment contracts are governed, respectively, by the laws of Washington and Florida—not Illinois, where McDonalds is headquartered and the form employment contract probably was drafted. In any event, the relevant arbitration provision here is not AWS's but ATTM's. ATTM is headquartered in Georgia, not Washington. ER2167.

U.S.C. § 122(a) (emphasis added). Moreover, performance of a contract is a two-way street: The plaintiffs, too, must perform under the contract by paying their bills, which they generally do from their home states. *See*, *e.g.*, ER1584.

Accordingly, the first four factors under Section 188 all point to the home state of each plaintiff. The laws of those states should be applied: Even when only the "place of negotiating the contract and the place of performance" are the same, "the local law of [that] state will usually be applied." RESTATEMENT, *supra* § 188(3).

Moreover, the last Section 188 factor—the place of the parties' domiciles or places of business—also points to the plaintiffs' home states. Arguably, that factor could point to as many as three states for each plaintiff: (i) the customer's home state, (ii) Washington (the headquarters of the former AWS); and (iii) Georgia (the headquarters of ATTM, which is AWS's successor and with which many plaintiffs entered into separate agreements).[16] But the *Restatement* makes clear that the plaintiffs' home state trumps: The contacts "are evaluated according to their relative importance with respect to the particular issue," and when the issue is a

[16] Although AWS was a Delaware corporation and ATTM is a Delaware limited liability company, and the fifth Section 188 factor also enumerates the parties' place of incorporation, the Restatement specifies that "a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state." RESTATEMENT, *supra*, § 188 cmt. e. Although AWS offered and ATTM offers service in Delaware, neither company has been headquartered there during the relevant time period.

"contract rule designed to protect [a] party against the unfair use of superior bargaining power"—here, the plaintiffs' invocation of state unconscionability law as a defense to enforcement of their agreements to arbitrate—the "state where [that] party … is domiciled has an obvious interest in" applying its law. RESTATEMENT, *supra* § 188(2) & cmt. c.

Both the Washington Supreme Court and this Court have addressed similar issues and have rejected the approach taken by the district court. For example, in the context of a telecommunications service contract, the Washington Supreme Court has confirmed that, if "the place of contracting, … negotiation … [and] performance, the location of the subject matter, and the residence of" the consumer are the same, the law of that state applies in the absence of a choice-of-law clause. *McKee*, 191 P.3d at 852. When—as here—Washington's "only tie to this litigation" under Section 188 "is that it is the state of incorporation" of one defendant, that factor is insufficient to overcome the others. *Id*. And that is doubly true for the plaintiffs who switched their service to ATTM, which is a Delaware limited liability company with its principal place of business in Georgia. ER 2166-67. Washington has no ties at all to those plaintiffs' separate arbitration agreements with ATTM.

This Court recently reached similar conclusions in a case involving the enforceability of an arbitration clause in T-Mobile's wireless service agreement. *In re Detwiler*, 305 F. App'x 353 (9th Cir. 2008). In *Detwiler*, this Court held that,

under Washington's choice-of-law principles as expressed in *McKee*, Florida law governed a Florida customer's challenge to her arbitration agreement because Florida was "the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the residence of" the customer. *Id.* at 355. The district court purported to distinguish *Detwiler* on the ground that the T-Mobile customer in that case had entered into multiple service agreements with T-Mobile. ER12. But many of the plaintiffs in this case—including plaintiff Lowry, a Florida resident, also had multiple agreements with AWS or ATTM. ER1571-73. Moreover, like ATTM and AWS, T-Mobile has a nationwide network and uses form contracts, and like AWS, T-Mobile "is headquartered in Washington." *Detwiler*, 305 F. App'x at 355. On those facts—materially identical to the facts here—this Court enforced the choice-of-law clause in T-Mobile's contract and concluded that Florida law applied to a Florida customer's challenge to her arbitration agreement. *Id.* For the same reasons, each plaintiff's unconscionability challenge would be governed by the law of his or her home state in the absence of a choice-of-law clause.

3. The district court improperly considered the factors governing the choice of law for tort issues.

In addition to misapplying the factors under *Restatement* Section 188, the district court improperly gave great weight to a factor "outside of those listed in" Section 188—specifically, by focusing on "'the state in which *the* [allegedly]

fraudulent conduct arises.'" ER11 (quoting *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (emphasis added by court)); *see also id.* (citing *Ito Int'l Corp. v. Prescott, Inc.*, 921 P.2d 566, 571 (Wash. Ct. App. 1996)). That factor is part of the *Restatement*'s choice-of-law test for analyzing ***tort*** claims. *See* RESTATEMENT, *supra* § 145 ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties," considering, among other things, "the place where the conduct causing the injury occurred"); *see also Kelley*, 251 F.R.D. at 551 (applying "general tort principles" under *Restatement* Section 145).[17]

The district court justified its reliance on a factor in Section 145 by stating that "Washington's choice-of-law analysis is a 'messy test.'" ER13. In fact, however, Washington law is crystal clear on the subject: When, as here, the issue is what law applies to the plaintiffs' contention that their arbitration agreements are

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[17] In *Ito International*, a securities fraud case, the court did not specify whether it was applying the tort or contract choice-of-law rule, but cited at least three decisions involving the tort rule. *See* 921 P.2d at 571 (citing *Haberman v. WPPSS*, 744 P.2d 1032, 1066 (Wash. 1987) (applying Section 145 of the *Restatement*); *Williams v. State*, 885 P.2d 845, 848 (Wash. Ct. App. 1994) (similar); and *In re Badger Mountain Irr. Dist. Secs. Litig.*, 143 F.R.D. 693, 700 (W.D. Wash. 1992) (similar)). In any event, the defendant's location in *Prescott* was far from the only Restatement factor pointing to Washington: The largest purchaser was a Washington corporation; the subject of the transaction was a building in Seattle; and the out-of-state purchasers were solicited through "selling and marketing activity occurr[ing] in Seattle," including a "cocktail party" in Seattle. 921 P.2d at 571.

unconscionable, *Restatement* Section 188 furnishes the relevant factors, because unconscionability is a contract-law doctrine. As the Washington Supreme Court unambiguously held in *McKee*, in the absence of a choice-of-law clause, Section 188 provides the framework for determining "which state's law should apply to determine the validity of the [arbitration] agreement" alleged to be "unconscionable because … [it] prohibit[s] class actions." 191 P.3d at 850-51; *see also Detwiler*, 305 F. App'x at 355 (applying *McKee* and *Restatement* §§ 187 and 188).[18] In any event, because the two cases that the district court relied upon—*Kelley* and *Ito International*—predate *McKee*, they no longer are good law.

Moreover, even if tort choice-of-law principles did govern, they would point to Georgia rather than Washington law. If, as plaintiffs allege, ATTM degraded AWS's network in order to force customers to switch to ATTM's network, that alleged conduct would have resulted from decisions made at ATTM's headquarters in Atlanta (ER2166-67), not the former Washington headquarters of AWS.[19]

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[18] Likewise, this Court has held that, under Montana's choice-of-law principles—which also adopt the *Restatement*—Section 188 governs the determination of the law applicable to an unconscionability challenge to an arbitration agreement in the absence of a choice-of-law clause. *See Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937-38 (9th Cir. 2001).

[19] The district court pointed to two declarations by AWS executives submitted to the FCC in support of the Cingular-AWS merger. ER12. These declarations necessarily describe the AWS network and operations before the merger was consummated. There is no evidence that the declarants continued to control AWS operations after the merger, when the alleged dismantling of the AWS network occurred, let alone that they did so from Washington.

ATTM's arbitration provision is unquestionably enforceable under Georgia law, which provides that an agreement to arbitrate on an individual basis is not "substantively unconscionable" when, as here, "'the opportunity to recover attorneys' fees is available'" in arbitration. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1222 (11th Cir. 2007) (quoting *Jenkins*, 400 F.3d at 878).

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In short, the district court erred in concluding that Washington law would apply to the claims of each named plaintiff in the absence of a choice-of-law provision. On this basis alone, the district court's order denying arbitration must be reversed with respect to the non-Washington plaintiffs.

B. Washington Does Not Have A Fundamental Policy Of Policing Out-Of-State Arbitration Agreements.

The district court's choice-of-law analysis is mistaken for the independent reason that Washington does not have a fundamental policy against enforcement of the arbitration agreements of citizens of other states. As an initial matter, even if Washington law were applicable to all plaintiffs, ATTM's 2006 arbitration provision would be fully enforceable because—for the reasons we explain below (*see* Section II.A, *infra*)—it enables customers to fully vindicate their rights. Thus, upholding the arbitration agreements of the non-Washington plaintiffs under the laws of their home states could not conceivably intrude upon any Washington policy, much less one that is "fundamental." RESTATEMENT, *supra* § 187(2)(b).

But even assuming that the provision is unenforceable under Washington law, that fact would not preclude the application of the law of the home states of the non-Washington plaintiffs. Contrary to the district court's assumption, Washington policy has nothing to say about the enforceability of the arbitration agreements entered into by ***non-residents*** in their ***home states***. As the Washington Supreme Court has observed, Washington's public policy is at stake "when ***a [Washington] citizen's*** ability to assert a private right of action is significantly impaired." *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024 (Wash. 2007) (en banc) (emphasis added). Indeed, *McKee* emphasized that *Dix* invalidated a contract invoked "against Washington citizens." 191 P.3d at 852. Out-of-state transactions taking place in other states are completely different. *See Wash. Mut. Bank, F.A. v. Super. Ct.*, 15 P.3d 1071, 1080 (Cal. 2001) (applying *Restatement* Section 187 and observing that "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may … result in the exclusion of nonresident consumers from a California-based class action"). Indeed, the Washington Supreme Court has suggested that there is "a high degree of uncertainty" as to whether a claim under Washington's consumer-protection act could be pursued on behalf of a nationwide class of consumers ***even when the class members have all agreed to Washington choice-of-law clauses***. *See Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.3d 351, 361 (Wash. 2001) (en banc) (upholding adequacy of class settlement in part because of uncertainty that Washington law could apply to

nationwide class).

C. Washington Does Not Have A Materially Greater Interest Than Plaintiffs' Home States In Determining The Validity Of Their Arbitration Agreements.

The district court also held that Washington has a materially greater interest in applying its law to the non-Washington plaintiffs' arbitration agreements than do the states in which those plaintiffs live. ER14. This too was error.

Washington may well have the primary interest in applying its law to disputes involving ***its*** "consumers" (*McKee*, 191 P.3d at 852) or (arguably) non-residents' contracts that are "signed in … Washington" (*Granite Equip. Leasing Corp. v. Hutton*, 525 P.2d 223, 226-27 (Wash. 1974) (en banc); *Cox v. Lewiston Grain Growers, Inc.*, 936 P.2d 1191, 1196 (Wash. Ct. App. 1997)). By the same token, however, ***other states*** have stronger interests in regulating their ***own*** consumers' in-state agreements. As one court has put it, a state's "interest in determining the rights of its citizens in contracts with out-of-state actors outweighs whatever interest Washington has in regulating contracts its [corporate] citizens enter into abroad." *McGinnis v. T-Mobile USA, Inc.*, 2008 WL 2858492, at *3 (W.D. Wash. July 22, 2008).[20]

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[20] *See also*, *e.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225, 232-33 (3d Cir. 2009) (state where consumer "resid[es] and was physically located … during all of his dealings with" the defendant bank has "a materially greater interest than" the state in which the bank is incorporated "in the enforceability of a class-arbitration waiver" in the consumer's contract); *In re DirecTV Early Cancellation Fee Litig.*, 2009 WL 2912656, at *5 (C.D. Cal. Sept. 9, 2009) ("when consumers enter into

The district court implicitly rejected the reasoning of these courts, concluding that the "only connection" that the eight other states had to the lawsuit was "that the individually-named Plaintiffs reside there." ER14. But, as discussed above (at Section I.A.2, *supra*), the plaintiffs' home states also were the place of contracting, negotiation, and performance. The district court also assigned outsized importance to Washington's "interest in regulating the conduct of businesses that reside in [the] state." ER14. To begin with, the relevant arbitration provision is that of ATTM, which is not headquartered or incorporated in Washington. But even assuming that AWS's agreement were relevant, a state's interest in regulating its resident corporations is hardly "strong enough to

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standardized contracts with businesses for goods and services to be delivered to the consumer's home state, the consumer's [rather than the business's] home state is the state with the greater interest"); *In re Jamster Mktg. Litig.*, 2008 WL 4858506, at *3, *6 (S.D. Cal. Nov. 10, 2008) ("plaintiffs fail to identify any legitimate and cognizable interest California has concerning transactions occurring outside its borders and involving non-California residents"); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1069 (N.D. Cal. 2007) ("California has a materially greater interest" in applying its law to determine enforceability of Texas business's arbitration agreement "based on the fact that California residents are invoking California consumer protection laws to seek recovery for allegedly defective products shipped into California"), *aff'd*, 322 F. App'x 489 (9th Cir. 2009); *In re Ford Motor Co. Ignition Switch Prods. Liability Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (rejecting application of law of defendant's home state to nationwide class and noting that "[e]very plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws"); *Discover Bank v. Super. Ct.*, 36 Cal. Rptr. 3d 456, 462 (Ct. App. 2005) ("California has no greater interest in protecting other states' consumers than other states have in protecting California's.").

overcome [another state's] unquestionable interest in the welfare of its citizen[s]." *McGinnis*, 2008 WL 2858492, at *4 (internal quotation marks and alterations omitted). In fact, the Washington Supreme Court confirmed this principle in *McKee*, recognizing that a state's interest in applying its law merely because it is the defendant's "state of incorporation" is "limited" and "materially outweigh[ed]" by the interest of the state where the consumers reside and entered into their contracts. 191 P.3d at 852.[21] Indeed, it is a "basic principle of federalism" that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). And because "[s]tate consumer-protection laws vary considerably, … courts must respect these differences rather than apply one state's law to sales in other states with different rules." *Bridgestone/Firestone*, 288 F.3d at 1018; *see also White v. Ford Motor Co.*, 312 F.3d 998, 1017-18 (9th Cir. 2002) (while two states may approach regulation of product safety differently, "[n]either state is entitled, in our federal republic, to impose its policy on the other").

In sum, Washington has no interest—much less a materially greater

[21] This conclusion becomes all the more obvious if it is imagined that the forum state has affirmatively sought to protect its resident businesses by, for example, providing blanket immunity from law suits. In such circumstances, no court would hold that the forum state's interest in shielding its local businesses trumps the interest of the plaintiff's home state in protecting its consumers. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("[w]e do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers").

interest—in overriding the legitimate policy choice of the ***non-Washington plaintiffs***' home states to enforce agreements to arbitrate on an individual basis.

II. ATTM'S ARBITRATION PROVISION IS ENFORCEABLE UNDER WASHINGTON LAW.

Even if the district court were correct that Washington law governs the enforceability of each plaintiff's arbitration agreement, the court erred in holding that ATTM's 2006 arbitration provision is substantively unconscionable under Washington law. Under Washington law, the issue of substantive unconscionability arises when "a clause or term in the contract is alleged to be one-sided or overly harsh." *Torgerson*, 210 P.3d at 323. The proponent of unconscionability bears the burden of proving that a contract term is substantively unconscionable. *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 759 (Wash. 2004) (en banc). "However, such unfairness must truly stand out. 'Shocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Torgerson*, 210 P.3d at 323. Those terms in no way describe ATTM's arbitration provision.

To the contrary, ATTM's 2006 provision is uniquely pro-consumer. As Judge Feess recently observed in the context of an individual action, "ATTM's arbitration agreement contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009). The court below nonetheless

deemed ATTM's 2006 arbitration provision to be substantively unconscionable for two principal reasons. ER16. First, the court concluded that it would be "impractical" and "prohibitively expensive for a customer proceeding on an individual basis" to pursue claims against ATTM, thus causing the arbitration provision to "exculpat[e]" ATTM "from any potential liability." ER16, 18. Second, the court determined that class actions are a "necessary" procedural device to "[c]urb fraudulent business practices" and to "vindicate the public's rights." ER19.[22] These rationales do not stand up to scrutiny.

A. ATTM's 2006 Arbitration Provision Does Not Prevent Any Plaintiff From Vindicating His Or Her Substantive Rights.

The district court erred in holding that ATTM's 2006 arbitration provision operated to exculpate ATTM from liability to the named plaintiffs.

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[22] The district court also asserted that "recent jurisprudence" disfavors agreements to arbitrate on an individual basis. ER20. In fact, numerous recent cases from around the country have upheld such agreements—particularly ones that do not limit the consumer's remedies in individual arbitration. *See* notes 3, 11, *supra* (citing cases); *see also*, *e.g.*, *Cronin v. CitiFinancial Servs., Inc.*, 2009 WL 2873252 (3d Cir. Sept. 9, 2009); *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770 (Ohio App. Sept. 17, 2009); *Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), appeal pending, No. 08-16080-C (11th Cir.); *Coffey v. Kellogg Brown & Root*, 2009 WL 2515649 (N.D. Ga. Aug. 13, 2009); *Anglin v. Tower Loan of Miss., Inc.*, 2009 WL 2163482 (S.D. Miss. June 4, 2009); *Easter v. Compucredit Corp.*, 2009 WL 499384 (W.D. Ark. Feb. 27, 2009); *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009); *Eaves-Lanos v. Assurant, Inc.*, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008); *Stephens v. Wachovia Corp.*, 2008 WL 686214 (W.D.N.C. Mar. 7, 2008).

1. ATTM's 2006 arbitration provision satisfies *Scott*'s standard for enforceability.

As the district court acknowledged (ER15), not all agreements to arbitrate on an individual basis are unconscionable under Washington law. In *Scott*, the Washington Supreme Court stated that "only … class waivers that *prevent* vindication of rights secured by the [Washington Consumer Protection Act (CPA)] are invalid" and added that it "can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable." 161 P.3d at 1009 n.7.

The *Scott* court invalidated an earlier ATTM (then Cingular) arbitration provision that provided customers with free arbitration, concluding that it would not be "worth the time, energy, and stress to pursue such individually small claims" as the $45 monthly overcharge alleged in that case. 161 P.3d at 1002, 1007. The court also held that, although the earlier provision made attorneys' fees available under certain circumstances, that too was inadequate. Specifically, the court interpreted the earlier clause (i) to provide for an attorneys' fee award "only if the plaintiffs recover at least the full amount of their demand"—meaning fees might be unavailable if the consumer was a prevailing party under fee-shifting statutes such as the Washington CPA—and (ii) to allow an arbitrator to issue a reduced attorneys' fee award when the "amount in controversy" is small. *Id.* at

1007. The court therefore concluded that the provision failed to "ensure that a remedy is practically available." *Id.* Applying *Scott*, this Court subsequently invalidated T-Mobile's provision because the provision required individual arbitration, but required customers to pay $25 in arbitration costs and did not permit an award of punitive damages or attorneys' fees. *Lowden*, 512 F.3d at 1215-16, 1219.

ATTM's revised 2006 arbitration provision addresses the problems identified in *Scott* and *Lowden*, and therefore presents the type of "situation[] where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable." *Scott*, 161 P.3d at 1009 n.7. The revised provision makes arbitration convenient for customers by allowing them to choose to arbitrate in person near where they live or work, by telephone, or by mail. It also makes arbitration cost-free for customers and places no limits on the types of recoverable damages—including statutory attorneys' fees. ER2115-17. More importantly, it requires ATTM to pay customers who receive an arbitral award that exceeds ATTM's last settlement offer at least $5,000, plus double attorneys' fees. ER2117. These affirmative incentives "make it worth the time, energy, and stress" for customers and their lawyers to pursue even small claims in arbitration if ATTM fails to make a satisfactory settlement offer. *Scott*, 161 P.3d at 1007.

The district court did not suggest that a potential recovery of $5,000, plus

double attorneys' fees, would be too small to fall outside of the holding in *Scott*. Nor would any such contention be tenable: Subsequent to issuance of the order in this case, the Washington Supreme Court rejected the argument that a provision of a real estate contract that limited an individual buyer's potential recovery to $5,000 was unconscionable under *Scott*. *See Torgerson*, 210 P.3d at 323. The plaintiffs in that case argued that the "provision limiting remedies 'exculpates the Developers from liability and effectively prevents the Buyers from pursuing valid claims for breach of contract compensatory damages.'" *Id.* (quoting plaintiffs' brief). The Washington Supreme Court disagreed, holding that the $5,000 limitation was "not so insignificant a sum as to foreclose legal action" under *Scott*. *Id.* It follows that the potential windfall of a $5,000 premium payment, plus double attorneys' fees, under ATTM's 2006 provision is likewise "not so insignificant a sum as to foreclose legal action." Accordingly, that provision is fully enforceable under Washington law.

The district court nonetheless deemed the potential recoveries available under ATTM's provision to be illusory and therefore gave them "no weight." ER17. Having removed them from the calculus, the court held that "the cost of pursui[ng]" plaintiffs' actual claims, which "rang[ed] from $4.99 to $175," "would be prohibitively expensive for a customer proceeding on an individual basis." ER16. As we next explain, both steps in this analysis were incorrect.

2. The district court erroneously disregarded the premiums potentially available to the named plaintiffs under ATTM's 2006 arbitration provision.

To begin with, the district court mistakenly believed that the premiums, though "laudable," would not incentivize customers to pursue claims because customers could recover them "*only upon the condition that* 'the arbitrator awards the customer more than [ATTM's] last written settlement offer before an arbitrator was selected.'" ER17-18 (emphasis in original). For this reason, in the court's view, ATTM could avoid paying the premiums by offering to settle for an amount that, although less than $5,000, would "remain[] significantly higher than the nominal claims that the individuals are bringing in this case." ER18.

That reasoning turns the unconscionability analysis on its head. As another federal court put it, "[i]f ATTM resolves its customer's claims through prompt payment, and does so for fear of being subjected to its … Premium, the Premium has served a noble purpose, even if no customer ever actually receives it." *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008), *aff'd*, 2009 WL 3429559 (9th Cir. Oct. 27, 2009); [23] *accord Francis*, 2009 WL 416063,

[23] The *Laster* court concluded that ATTM's arbitration provision "is an adequate substitute for class arbitration" (2008 WL 5216255, at *12), but nevertheless held that the provision was unenforceable under California law because ATTM had not proven that its dispute-resolution system deters misconduct as effectively as class actions (*id.* at *12-*14). This Court affirmed, explaining that, although the "provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim, … the problem with it under California law—as we read that law—is that not every

at *9.

For the same reason, the district court was mistaken in trivializing the premiums just because relatively few customers actually find it necessary to initiate the formal arbitration process. ER18. As the court itself recognized, ATTM has an incentive to settle virtually every dispute in order to avoid paying the premiums and the costs of fully subsidizing each individual arbitration, which alone can run into the thousands of dollars.[24] In practice, this incentive works: ATTM dispenses over $100,000,000 per month in credits—amounting to over $1 billion a year—to resolve customer complaints without the need for arbitration. ER1053. Thus, it is a good thing that there are relatively few formal arbitrations, and the district court was misguided in stating that ATTM's premiums "are not having their intended effect." ER18.

To illustrate this point, assume that the premiums provided for in the arbitration provision were even higher—say, for example, $100,000. Such a change would cause the number of arbitrations to approach zero because ATTM

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aggrieved customer will file a claim." 2009 WL 3429559, at *4 n.9. ATTM respectfully disagrees with that reading of California law. But what matters for present purposes is that Washington law does not require proof that every potentially affected absent class member would file a claim. *See* Section II.B, *infra*.

[24] The bare minimum in arbitration costs that ATTM must pay—win or lose—if a customer selects an in-person hearing is $1,700: $750 in administrative fees, a $200 case service fee, and $750 in arbitrator fees. ER2158-59.

would have massive incentives to settle all complaints, even completely frivolous ones. It is only if ATTM were to reduce or eliminate the premium that it would have the incentive to start resisting more claims, leading to a greater number of arbitrations. Yet it cannot be the case that offering a substantial premium of at least $5,000 makes the arbitration provision less enforceable merely because it reduces the need for customers to file demands for arbitration.

3. The district court erred in assuming that plaintiffs' claims are ill-suited for arbitration.

In addition to disregarding the premiums available under ATTM's arbitration provision, the district court concluded that the underlying dispute is too complex for individual arbitration. ER17. That conclusion, too, is mistaken.

The district court incorrectly characterized the plaintiffs' "small claims" as "undoubtedly dwarfed by the legal complexity presented by the facts alleged in Plaintiffs' complaint," which "include claims that Cingular, a multi-billion dollar corporation, intentionally degraded [AWS's] pre-existing network" after the merger. ER16. Plaintiffs crafted those allegations because they wish to pursue a class-action lawsuit, a complex undertaking that requires them to plead and prove not only their own claims, but also to establish those claims by proof that is common to an entire putative class. If the individual claims were stripped of their class-wide allegations, however, they would boil down to the contention that a subscriber experienced unacceptably poor call quality. Straightforward individual

claims of that nature are the bread and butter of arbitration, in which consumers are spared the elaborate legal and evidentiary burdens that characterize class-wide litigation. *See generally* JOHN COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY ¶ 1.3.1, at 5 (2d ed. 1997) ("Arbitration, while having some of the evidential and procedural regularity of court adjudication, is conducted in a less formal and less rigorous setting, thereby enhancing the potential for more expeditious resolution.").

The notion that the difficulties of litigating a claim as a class-action lawsuit render the underlying individual claim too complex for individual arbitration was rejected by the district court in *Francis*. That case involved a customer's claim that he had been improperly charged for domestic calls at international rates. In opposing arbitration, the plaintiff argued that his claim would require him to incur "the 'seven figure' cost of discovery" into "AT&T's technical ability to determine the geographic source of wireless phone calls." 2009 WL 416063, at *7-*8. Although that might have been true of the class-action lawsuit he wished to pursue, the district court pointed out that no such obstacles existed in the context of individual arbitration. Rather, the customer could easily prove his claim in an informal arbitration using "his monthly itemized bills, and presumably his knowledge of where he and his wife were located when they sent or received the disputed calls." *Id.* at *8.

The same logic applies here. A run-of-the-mill complaint about poor call

quality is the sort of "consumer complaint" that is "particularly well suited for arbitration." COOLEY & LUBET, *supra*, ¶ 2.2.1 at 18.[25] As the Supreme Court has observed, one of the things that makes "arbitration" so "often … helpful to individuals, say, complaining about a product," is arbitration's "'simpler procedural and evidentiary rules,'" which make it easier to pursue a claim. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)). As numerous commentators have observed, "[t]hese harsh formalities of litigation and adjudication may fall particularly hard upon less sophisticated, less well-represented parties to a dispute"; consequently, "arbitration is better prepared to dispense fairness and justice because it is less bound by the letter of the law." Jeffrey Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 338 (Winter 2002/2003).[26]

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[25] The arbitration provider selected by ATTM's provision—the AAA—is a major nonprofit organization that routinely administers proceedings involving claims that would be too modest to pursue in court. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (reporting that "more than one-third of [the AAA's] claims involve amounts below $10,000"). In addition, the "Better Business Bureau and other organizations have been very successful for years in administering arbitration programs which handle and resolve large volumes of [consumer] disputes efficiently and cost effectively." COOLEY & LUBET, *supra*, at 20.

[26] *See also*, *e.g.*, Brooke Masters, *Investors v. Brokers: Meting Out Quick Justice in Murky World of Arbitration*, WASH. POST, July 15, 2003, at E1 (arbitrators can dispense "rough justice …. If they want to give an award to someone they feel was victimized, they'll find a way, even if prior cases don't

Moreover, in an individual arbitration, ATTM would not be engaged in a pitched legal battle with individual customers, as the district court mistakenly assumed. Because it would cost ATTM far more to resist those claims in individual arbitration under the terms of its arbitration provision than to resolve them to plaintiffs' satisfaction, it would be economically irrational for ATTM to take a scorched-earth approach in arbitration. Indeed, there is no reason to suppose that an arbitrator would permit it. Unlike in court, arbitrators "assume the inquisitorial model of civil law-oriented methodology" and take "an active role" in "making the record on which to base the award." 1 LARRY EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:5 (3d ed. 2008). Because arbitrators are active participants in the dispute-resolution process, they are not constrained by the procedural mechanisms that litigants are entitled to invoke in court to preclude or delay a decision-maker from reaching the merits of a dispute. Moreover, also unlike in court, where plaintiffs often do not have an opportunity to be heard as a

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clearly support their decision.") (internal quotation marks omitted); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 237-38 (1997) (noting that "arbitrators are occasionally willing to temper" the applicable "legal rules" with "considerations of commercial understanding, good business practice and notions of honorable behavior") (internal quotation marks omitted); Marc Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. 1503, 1514-15, 1531 (1996) ("investors today likely fare better in arbitration than they would in federal court" in part because "[a]rbitrators [are] not … bound by precise legal standards in their decisions" and thus may award damages "where no monetary remedy is provided for [alleged] misconduct under federal or state securities laws").

result of a pretrial motion, arbitrators generally do not permit "motions to dismiss or for summary judgment, regardless of how meritorious such a motion might be." J.S. "Chris" Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADV. 265, 267 (2008) (footnote omitted). As a result, arbitrators are more likely "to confront the equitable nuances of a dispute" at the hearing. Stempel, *supra*, 3 NEV. L.J. at 339.

The district court also assumed that it would be impossible to secure legal representation in arbitration under ATTM's arbitration provision. ER16-17. Even assuming that a customer would require the services of a lawyer in order to pursue such a simple claim in an informal individual arbitration, the district court erred in ignoring the many declarations submitted by attorneys (including two from Washington) who testified that they or their firms would represent ATTM customers under the terms of the 2006 provision. ER1219-64, 2023-69. These lawyers concluded that the provision offers "adequate monetary incentives for an attorney to investigate and arbitrate a claim" under ATTM's "provisions for speedy and effective claim management." ER2024, 2031.

Rather than considering these declarations, the district court instead relied upon on the testimony of plaintiffs' attorney declarants that ***they*** would "not represent the named Plaintiffs in individual actions, either in court or in arbitration." ER16-17. This testimony, even if credited, at most would show that ***some*** consumer lawyers would not represent ATTM's customers in individual

arbitration. It does not come close to negating ATTM's showing that ***other*** lawyers ***would.*** Thus, plaintiffs have not met their burden of proving that a remedy is not "practically available" to individual customers under the terms of ATTM's arbitration provision. *Scott*, 161 P.3d at 1007.

Moreover, plaintiffs' attorney declarants mischaracterized (or misunderstood) how the arbitration process works. They all assumed that individual arbitration entails the same "sophisticated litigation" that characterizes high-stakes class-action litigation. ER514, 637, 1002. But as discussed above, there is every reason to believe that individual arbitration would be a relatively modest, informal proceeding, rather than a multi-year slog through esoteric issues of class certification or telecommunications law. In addition, plaintiffs' declarants failed to appreciate that, even if a customer were to need a lawyer to handle certain legal complexities, an award of statutory attorneys' fees or the double-fee premium would not be reduced merely because the lodestar might exceed the value of the customer's claim. ER539, 611, 652.[27] Thus, the testimony that the district court

[27] Under both Washington's Consumer Protection Act and federal law, "reasonable" attorneys' fees need not be proportionate to the amount at stake. *Keyes v. Bollinger*, 640 P.2d 1077, 1084-85 (Wash. Ct. App. 1982); *accord DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985). Instead, fees are calculated on an hourly "lodestar" basis, with a "contingency adjustment" "to compensate for the possibility" that "litigation would be unsuccessful" and "no fee would be obtained." *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 204 (Wash. 1983) (quoting *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980)). ATTM's agreement to pay twice "reasonable" attorneys' fees would be governed

found "particularly compelling"—that most attorneys' "hourly charge would … exceed the entire amount in controversy" (ER17) is beside the point. Attorneys could, entirely consistently with their ethical obligations, represent individual ATTM customers on a contingency basis and seek an award of double attorneys' fees.

B. The District Court Erroneously Adopted A *De Facto* Categorical Rule Against Agreements To Arbitrate On An Individual Basis.

The district court also concluded that ATTM's arbitration provision is unconscionable because a "class-based remedy is the ***only*** effective method to vindicate the public's rights" and to "[c]urb[] fraudulent business practices." ER19 (internal quotation marks omitted; emphasis added). That rationale amounts to a presumption that ***all*** agreements to arbitrate on an individual basis are unconscionable. Applying California law, this Court reached a similar conclusion with respect to ATTM's 2006 provision in *Laster*. *See* 2009 WL 3429559, at *4. The *Laster* Court accepted that "[t]he provision does essentially guarantee that [ATTM] will make any aggrieved customer whole who files a claim." *Id.* at *4 n.9. It held, however, that "[a]lthough this is, in and of itself, a good thing, the problem with it under California law—as we read that law—is that not every aggrieved customer will file a claim." *Id.*

Whether or not this Court correctly understood ***California*** law, ***Washington***

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by these standards. ER2203.

law imposes no such categorical ban on agreements to arbitrate on an individual basis. Indeed, in *Scott* the Washington Supreme Court expressly disavowed any such *per se* rule. Instead, the court explained that an agreement to arbitrate on an individual basis is substantively unconscionable when "the cost of pursu[ing a claim in individual arbitration] outweighs the potential amount of recovery," because then "the ability to proceed as a class transforms a merely theoretically possible remedy into a real one." 161 P.3d at 1007. It went on to make clear that it "can certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable" and hence would be fully enforceable. *Id*. at 1009 n.7. In short, under Washington law, the unconscionability inquiry focuses on whether the plaintiffs themselves can vindicate their claims under "the facts of the particular case" before the court (*id.*), not on "hypothetical" situations involving other persons or the general public at large (*Sammy Enters. v. O.P.E.N. Am., Inc.*, 2008 WL 2010357, at *7 (Wash. Ct. App. May 12, 2008)).[28]

In any event, the district court's assumption that ATTM's dispute-resolution

[28] *Accord Pleasants*, 541 F.3d at 859 (under Missouri law, "whether other consumers have elected to arbitrate claims under other contracts is not material"); *Cline v. H.E. Butt Grocery Co.*, 79 F. Supp. 2d 730, 733 (S.D. Tex. 1999) (rejecting unconscionability challenge because "[p]laintiff offers no information as to … ***his*** ability to pay") (emphasis added); *West v. Henderson*, 278 Cal. Rptr. 570, 576 (Ct. App. 1991) (contract was not unconscionable merely because it might be unfair in other, "hypothetical situation[s]").

system is a materially inferior substitute for class-action litigation in deterring wrongdoing is unfounded. As discussed above, ATTM has a strong incentive to make generous settlement offers to any customer who complains—and in fact provides more than a billion dollars per year in credits to resolve such complaints. *See* page 9, *supra*. Few unlawful practices could long survive a wave of arbitrations for which ATTM would bear all of the costs. *See Cruz*, 2008 WL 4279690, at *4 (prevailing customers' ability to "disseminat[e] the information in the manner of their choosing" would rapidly bring an end to any 'alleged illegal practices"). Indeed, an "enterprising attorney" can "use prior, successful arbitration awards when bringing new claims that require identical presentations of proof, as well as make known to potential clients her many victories." *Carideo v. Dell, Inc.*, 520 F. Supp. 2d 1241, 1247 (W.D. Wash. 2007), *vacated*, 550 F.3d 846 (9th Cir. 2008).[29]

By contrast, the absent class members would not necessarily fare better were this class action to proceed. Plaintiffs have provided nothing beyond naked assertions to suggest that the putative class would be certified. In fact, about four-fifths of class actions are not certified; of the remaining 20%, the overwhelming majority settle, often for pennies on the dollar (with further reductions for class

[29] Although this Court vacated *Carideo* so that the district court could consider intervening authority (the decision in *McKee*), the district court's observation remains valid.

counsel's fees).[30] Studies of consumer class-action settlements confirm that few consumers bother to file a claim when the amount they would receive is small—as it often is.[31] The record below establishes that, in some cases, fewer than ***5%*** of class members ultimately received ***any recovery at all*** from class settlements. ER159. This figure is in line with "take rates" in other class actions.[32] And some

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[30] *See, e.g.*, Thomas Willging & Shannon Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635-36, 638 (2006); Jill Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997).

[31] *See, e.g.*, Cheryl Miller, *Ford Explorer Settlement Called a Flop*, The Recorder, July 13, 2009, at 1 (reporting that only 75 out of "1 million" class members—or 0.0075 percent—redeemed coupons in recent class action settlement, while "the deal generated attorney fees totaling $15.9 million"); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445-46 (2005) (noting that the redemption rate of class action coupons ranges from one to three percent); Christopher Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. REV. 991, 1035 (2002) (reporting a study of ten consumer class action settlements in which the redemption rates varied from 3 to 13.1 percent); *see also* Class Action Fairness Act of 2005, PUB. L. NO. 109-2, 119 STAT. 4, § 2(a)(3) (congressional finding that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed").

[32] *See, e.g.*, *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649-50 (7th Cir. 2006) (noting that only a "paltry three percent" of class members had filed claims under the settlement); *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement, yielding a take rate of under 0.06%); *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at *2 (N.D. Cal. Jan. 19, 2008) ("less than one percent of the class chose to participate in the settlement"); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007) ("only 337 valid claims were filed out of a possible class of 1,500,000," yielding a take rate of just over 0.02%), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

cases yielded even lower recovery rates. For example, in one class action, only 0.67% of class members received a payout. ER156. In another, only 0.70% of class members received any benefit. ER157. And in a third case, the take rate was ***zero*** because every filed claim was rejected—meaning that only the plaintiffs' counsel recovered under the settlement. ER156. In short, the vast majority of consumers receive little, if anything, from many class action settlements.

Moreover, unlike the blunt instrument of a class action, ATTM's dispute-resolution process facilitates make-whole relief that would otherwise be unavailable in the vast majority of consumer disputes that are inherently individualized. In these cases, absent ATTM's heavily subsidized method of resolving disputes, "the typical consumer who has only a small damages claim" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce*, 513 U.S. at 281. ATTM's arbitration provision makes it possible for consumers to pursue these disputes (indeed, it affirmatively encourages them to do so), while class actions would leave such disputes entirely unredressed. Accordingly, the district court erred in holding that ATTM's provision is an unconscionably inferior substitute for class actions in deterring wrongdoing by ATTM.

* * * * *

In sum, ATTM's 2006 arbitration provision resolves the Washington Supreme Court's concerns with the earlier provision, addressed in *Scott*, by

providing affirmative inducements to customers and their attorneys to pursue individual claims. As the district court itself found, ATTM's incentive is simply to pay customers the amount (or more) of their demand before arbitration is even necessary. ER18. Accordingly, ATTM's "class action waiver would not prevent a consumer from vindicating his or her substantive rights" and thus is not unconscionable under Washington law. *Scott*, 161 P.3d at 1009 n.7.

III. THE DISTRICT COURT'S INTERPRETATION OF WASHINGTON UNCONSCIONABILITY LAW IS PREEMPTED BY THE FAA.

ATTM's position is that the FAA preempts the transmogrification of state unconscionability doctrine to declare unenforceable an arbitration provision that provides consumers unprecedented incentives to pursue arbitration on an individual basis, merely because it precludes class actions. We recognize, however, that this Court has recently rejected that argument. *See Laster*, 2009 WL 3429559, at *5. ATTM will be asking the Supreme Court to review the decision in *Laster*. We accordingly raise the preemption issue here for purposes of preserving it in the event the Supreme Court grants review in *Laster* and reverses this Court's decision.

That said, the present case is distinguishable from *Laster* in one critical respect that mandates a finding of preemption whether or not *Laster* remains good law. As noted above (at page 14-15), the Washington Supreme Court has recently held—outside the arbitration context—that the prospect of a $5,000 recovery is

sufficient to motivate an individual to pursue a claim and, therefore, that a contractual limitation of damages to that amount is not exculpatory and hence not unconscionable. *Torgerson*, 210 P.3d at 323. Because Section 2 of the FAA forbids states from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally" (*Preston v. Ferrer*, 128 S. Ct. 978, 985 (2008)), any holding that ATTM's arbitration provision is unconscionable notwithstanding the $5,000 potential recovery it makes available would constitute precisely the kind of arbitration-specific application of state law that runs afoul of the FAA. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (Section 2 preempts even "general principle[s] of contract law, such as unconscionability" if "those general doctrines" are "employ[ed] … in ways that subject arbitration clauses to special scrutiny").

CONCLUSION

The Court should reverse the order of the district court.

Respectfully submitted,

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November 10, 2009

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-35563

I certify that:

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,961 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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DATED: November 10, 2009

MAYER BROWN LLP

s/ Evan M. Tager
Evan M. Tager
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STATEMENT OF RELATED CASES

Counsel for ATTM is aware of one related case pending in this Court: *Masters v. DirecTV*, Nos. 08-55830, 08-55825. *Masters* is an appeal from the denial of a motion to compel arbitration pursuant to a contract that contained a choice-of-law provision similar to the one at issue in this case. The conflicts-of-law analysis in that case may be relevant to the analysis in this case. That case was argued on November 2, 2009.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of November 2009, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have deposited the foregoing brief with a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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