No. 09-

In the Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

CORPORATE DISCLOSURE STATEMENT

Petitioner AT&T Mobility LLC, a limited liability company, has no parent company. Its members are all privately held companies that are either wholly owned subsidiaries of AT&T Inc., which is publicly traded, or are also limited liability companies whose members are wholly owned subsidiaries of AT&T Inc. No other publicly held corporation has a 10% or more ownership interest in AT&T Mobility LLC.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING THE PETITION 14
A. The Case Presents An Exceptionally Important Question As To Which The Lower Courts Are Divided 17
B. Review Is Warranted Because The Decision Below Conflicts With The FAA And This Court's Precedents 25
CONCLUSION 34

APPENDIX TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit, dated October 27, 2009 ..... 1a
APPENDIX B: Order of the United States District Court for the Southern District of California, dated August 11, 2008 ..... 17a
APPENDIX C: Petitioner AT&T Mobility LLC's 2006 Arbitration Provision 55a
APPENDIX D: Cases Enforcing Agreements to Arbitrate on an Individual Basis 63a

TABLE OF AUTHORITIES

Page(s)

CASES

14 Penn Plaza LLC v. *Pyett*,
129 S. Ct. 1456 (2009) 28

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 4, 29

American Express Co. v. *Italian Colors Rest.*, No. 08-1473 (U.S.) 16

Aral v. *EarthLink, Inc.*,
36 Cal. Rptr. 3d 229 (Ct. App. 2005) 19

Armendariz v. *Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) 5

Belton v. *Comcast Cable Holdings, LLC*,
60 Cal. Rptr. 3d 631 (Ct. App. 2007) 6

Cal. Grocers Ass'n v. *Bank of Am.*,
27 Cal. Rptr. 2d 396 (Ct. App. 1994) 6

Caley v. *Gulfstream Aerospace Corp.*,
428 F.3d 1359 (11th Cir. 2005) 22

Circuit City Stores, Inc. v. *Adams*,
532 U.S. 105 (2001) 4

Cohen v. *DirecTV, Inc.*,
48 Cal. Rptr. 3d 813 (Ct. App. 2006) 19

Cruz v. Cingular Wireless, LLC, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-C (11th Cir.) 23

Discover Bank v. *Super. Ct.*,
113 P.3d 1100 (Cal. 2005) .....*passim*

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517 U.S. 681 (1996) 5, 27

TABLE OF AUTHORITIES—continued

Page(s)

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Douglas v. *U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007) 18

EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 4

First Options of Chicago, Inc. v. *Kaplan,* 514 U.S. 938 (1995) 26

Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005) 23

Francis v. *AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009)..... 16

Gatton v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Ct. App. 2007) 19

Gay v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007) 20, 21

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 22, 28

Green Tree Fin. Corp. v. *Bazzle*, 539 U.S. 444 (2003) 26

Hall St. Assocs., L.L.C. v. *Mattel, Inc.*, 128 S. Ct. 1396 (2008) 26, 32

Homa v. *American Express Co.*, 558 F.3d 225 (3d Cir. 2009) 20

Iberia Credit Bureau, Inc. v. *Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) 4, 5, 22, 30

TABLE OF AUTHORITIES—continued

Page(s)

Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. *Super. Ct.*, 34 Cal. Rptr. 3d 659 (Ct. App. 2005) 19

Klussman v. *Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005) 19

Lowden v. *T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir.), *cert. denied*, 129 S. Ct. 45 (2008) 15, 19

Makarowski v. *AT&T Mobility, LLC*, 2009 WL 1765661 (C.D. Cal. June 18, 2009) . 7, 16

Marin Storage & Trucking, Inc. v. *Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645 (Ct. App. 2001) 6

Masters v. *DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) 19

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 26

Meadows v. *State*, 849 S.W.2d 748 (Tenn. 1993) 21

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 27, 29

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 32

Murphy v. *Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120 (Ct. App. 2007) 18

Oestreicher v. *Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) 18

Olvera v. *El Pollo Loco, Inc.*, 93 Cal. Rptr. 3d 65 (Ct. App. 2009) 18

TABLE OF AUTHORITIES—continued

Page(s)

Pendergast v. Sprint Nextel Corp., __ F.3d __, 2010 WL 6745 (11th Cir. Jan. 4, 2010) 23
Perry v. *Thomas*, 482 U.S. 483 (1987) 4, 31
Preston v. *Ferrer*, 128 S. Ct. 978 (2008) .....*passim*
Pyburn v. *Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001) 21
Sanchez v. *W. Pizza Enters., Inc.*, 90 Cal. Rptr. 3d 818 (Ct. App. 2009) 18
Schnuerle v. Insight Commc'ns Co., No. 2008-SC-000789 (Ky.) 23
Shroyer v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007) 14, 15
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 2, 14, 15, 29
Stolt-Nielsen S.A. v. *Animal Feeds Int'l Corp.*, No. 08-1198 (U.S.) 16
Strawn v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009) 16
T-Mobile USA, Inc. v. *Laster*, 128 S. Ct. 2500 (2008) 16
T-Mobile USA, Inc. v. Lowden, 129 S. Ct. 45 (2008) 16
Tijerina v. *Am. First Real Estate Servs., Inc.*, 2008 WL 4855815 (C.D. Cal. Nov. 6, 2008) 18
Van Slyke v. *Capital One Bank*, 503 F. Supp. 2d 1353 (N.D. Cal. 2007) 18
Volt Info. Scis., Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 26, 27

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

U.S. Const. art. VI, cl. 2 .....*passim*
9 U.S.C. § 2 .....*passim*
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1332(d) 22
Fed. R. Civ. P. 11(b) 8
CAL. BUS. & PROF. CODE §§ 17200 *et seq.* 10
CAL. BUS. & PROF. CODE §§ 17500 *et seq.* 10
CAL. CIV. CODE § 1670.5(a) 5
CAL. CIV. CODE §§ 1750 *et seq.* 10
CAL. CODE CIV. PROC. § 116.221 9
CAL. CODE REGS. tit. 18, § 1585(a)(4) 10
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Page(s)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner AT&T Mobility LLC ("ATTM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 584 F.3d 849. The order of the district court denying ATTM's motion to compel arbitration (*id.* at 17a-54a) is unreported, but is available at 2008 WL 5216255.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. App., *infra*, 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution (Art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT

This petition presents a recurring issue of extraordinary importance to the continued viability of tens of millions of arbitration agreements in the State of California (and elsewhere in the country): whether, consistent with the FAA, a State may condition the enforceability of an arbitration agreement on the availability of class-wide arbitration when that procedure is not necessary to ensure that parties to the agreement are able to vindicate their claims. This Court received briefing and heard argument on the broader question whether States may ever superimpose class procedures on arbitration in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), but could not answer it because the issue had not been presented below. Since then, the need to resolve this issue has increased significantly.

Class-wide arbitration affords none of the benefits of traditional, individual arbitration—it is at least as burdensome, expensive, and time-consuming as litigation—while multiplying the risks enormously because judicial review is so limited. For that reason, hundreds of millions of arbitration agreements require that arbitration proceed on an individual basis.

Most States that have addressed the validity of such agreements have upheld their enforceability, at least when the agreement in question neither imposes substantial costs on the non-drafting party nor limits that party's remedies. Under California law, by contrast, agreements to arbitrate on an individual basis are unenforceable in the consumer context—even when the arbitration provision ensures that the consumer is able to vindicate his or her claims on an individual basis. And the Ninth Circuit has held in this and other cases that the FAA does not preempt that rule because it applies equally to agreements to litigate on an individual basis.

The Ninth Circuit's decision thus effectively invalidates tens of millions of arbitration agreements in California. Moreover, in other cases the Ninth Circuit has extended the impact of its holding to claims by citizens of States other than California, meaning that tens of millions of additional contracts can be avoided by the simple expedient of filing class actions in district courts within this largest of federal circuits. The question whether the FAA preempts state-law rules barring agreements to arbitrate on an individual basis is thus of exceptional importance.

The present case is an ideal vehicle for resolving that long-percolating issue. The courts below found that the Concepcions were "essentially guaranteed" to obtain full relief under ATTM's arbitration provision. App., *infra*, 10a n.9; *see also id.* at 39a-42a. They thus invalidated that provision not because it precluded the Concepcions from vindicating their own claims, but because it precluded them from serving as the agents for the vindication of claims of third parties. Accordingly, no case could better present the question whether the FAA allows States

to superimpose favored procedures—in this case, class actions—on arbitration when those procedures are not necessary to ensure that the parties to the arbitration are able to vindicate their claims. Review by this Court is warranted.

1. The Federal Arbitration Act. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). In preserving the benefits of arbitration, "Congress * * * had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). Indeed, because it "allow[s] parties to avoid the costs of litigation," arbitration benefits individuals with "smaller" claims, such as employees (*Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)), or "the typical consumer" who otherwise 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).

Section 2 of the FAA commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). "That is, as a matter of federal law, arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts." *Iberia Credit*

Bureau, Inc. v. *Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (emphasis in original).

This Court has identified "fraud, duress, [and] unconscionability" as examples of such state-law grounds. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). But the fact "[t]hat a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration to special scrutiny." *Iberia Credit Bureau*, 379 F.3d at 167.

In particular, the fact that a state-law rule may apply to both arbitration and judicial proceedings is not enough to bring it within Section 2's savings clause. See *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008) (holding that the FAA preempted a California law that imposed an administrative exhaustion requirement for certain disputes even though that requirement applied to both judicial and arbitral proceedings).

2. California's Unconscionability Law And Its Unique Test For Contracts Requiring That Disputes Be Resolved On An Individual Basis. Under California law, courts "may refuse to enforce" any contract found "to have been unconscionable at the time it was made," or sever or "limit the application of any unconscionable clause" in order "to avoid any unconscionable result." CAL. CIV. CODE § 1670.5(a). The proponent of unconscionability must prove both "procedural" and "substantive" unconscionability. *Armendariz* v. *Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). Procedural unconscionability focuses on the fairness of the

contracting process, and substantive unconscionability focuses on whether the contract "shock[s] the conscience" (*Belton* v. *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 649-650 (Ct. App. 2007)) or is one that a person would have to be "under delusion" to accept (*Cal. Grocers Ass'n* v. *Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994) (internal quotation marks omitted)).

Under California's "sliding scale" approach to unconscionability, if "the procedural unconscionability, although extant, [is] not great," the party attacking the term must prove "a greater degree of substantive unfairness." *Marin Storage & Trucking, Inc.* v. *Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 656-657 (Ct. App. 2001).

In the particular context of agreements to resolve disputes on an individual basis, however, the California Supreme Court has adopted a three-part test that bears no resemblance to the foregoing generally applicable unconscionability principles. Under that novel test, such an agreement is unenforceable if it "[(i)] is found in a consumer contract of adhesion [(ii)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(iii)] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005).

3. ATTM's Arbitration Provision. ATTM, which was known as Cingular Wireless until January 2007, provides wireless service to over 80 million subscribers, with over 10 million in California alone. The wireless service agreements between ATTM and

its customers long have required the parties to resolve any disputes they may have in individual arbitration. The agreements expressly prohibit arbitrators from conducting class-wide proceedings. See App., *infra*, 3a, 57a, 61a.

ATTM has revised its arbitration provision over time in order to make individual arbitration a realistic and effective dispute-resolution mechanism for consumers. The version at issue in this case was promulgated in late 2006.[1] A veteran district judge in one of the Nation's busiest districts recently observed that this version of ATTM's arbitration clause "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) (enforcing provision in an individual lawsuit).

The arbitration provision affords customers fair, inexpensive, and convenient procedures and, in addition, provides them with affirmative incentives to pursue even small claims on an individual basis.

The procedural safeguards include:

- **The AAA Rules Apply:** Arbitration is conducted under the American Arbitration Association's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Convenience:** Arbitration takes place "in the county * * * of [the customer's] billing address,"

[1] The arbitration provision is set forth in Appendix C. See App., *infra*, 55a-62a.

and 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."

- **Cost-free arbitration for non-frivolous claims:** "[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))";[2]
- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration; and
- **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including punitive damages and injunctions) that a court could award.

The special incentives to pursue claims through individual arbitration include:

- **$7,500 minimum recovery if arbitral award exceeds ATTM's last settlement offer:** If the arbitrator awards a California customer relief that is greater than ATTM's last "written settlement offer made before an arbitrator was selected" but less than $7,500, ATTM will pay the

[2] Even if 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. App., *infra*, 21a n.2.

customer $7,500 rather than the smaller arbitral award;[3]

- **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last written 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";[4] and
- **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]."

Moreover, ATTM has made its arbitration procedures easy to use. A customer need only fill out and mail a one-page Notice of Dispute form that ATTM has posted on its web site. App., *infra*, 22a-23a.

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[3] Under the 2006 provision, the amount of the minimum payment is tied to the jurisdictional maximum of the customer's local small claims court. App., *infra*, 60a. In California, the jurisdictional limit for small claims court is $7,500. CAL. CODE CIV. PROC. § 116.221. In 2009, ATTM revised this aspect of its arbitration provision to make the minimum payment a uniform amount—$10,000—across the country. See http://www.att.com/disputeresolution.

[4] This contractual right to double attorneys' fees "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." App., *infra*, 61a. Thus, a customer who does not qualify for this contractual award is entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

ATTM's legal department generally responds to a notice of dispute with a written settlement offer. *Id.* at 23a. If the dispute is not resolved within 30 days, the customer may invoke the arbitration process by filling out a one-page Demand for Arbitration form (also available on ATTM's web site) and sending copies to the AAA and to ATTM. To further assist its customers, ATTM's web site includes a layperson's guide on how to arbitrate a claim. *Ibid.*

4. The Concepcions' Lawsuit. Customers of most wireless carriers, including ATTM, typically purchase cell phones and subscribe to wireless service as a bundled transaction, in which the phone is free or steeply discounted in exchange for a commitment to subscribe to service for a specified term (usually one or two years). App., *infra*, 18a-19a.

The respondents, Vincent and Liza Concepcion, are ATTM customers who filed a putative class action against ATTM in the United States District Court for the Southern District of California. App., *infra*, 20a. They allege that they entered into a bundled transaction for wireless service and free or heavily discounted phones. *Id.* at 18a-19a. California requires that sales tax be paid on the full retail value of a phone when it is sold as part of a bundled transaction. CAL. CODE REGS. tit. 18, §§ 1585(a)(4), (b)(3). Despite this requirement, the Concepcions allege that when ATTM charged them sales tax based on the full retail price of phones that were free or discounted, it violated California's unfair competition and false advertising laws (CAL. BUS. & PROF. CODE §§ 17200 *et seq.*; *id.* §§ 17500 *et seq.*) and Consumer Legal Remedies Act (CAL. CIV. CODE §§ 1750 *et seq.*).

App., *infra*, 17a-18a; ER 363-370.[5] They also allege that ATTM committed fraud and unjustly enriched itself. ER 370-372.

5. Proceedings In The District Court. ATTM responded to the Concepcions' complaint by moving to compel arbitration. The Concepcions opposed ATTM's motion, contending principally that ATTM's arbitration provision is unconscionable under California law because it requires arbitration on an individual (as opposed to class-wide) basis. App., *infra*, 30a-35a. The district court agreed, holding that, despite its pro-consumer features, the provision failed *Discover Bank*'s three-pronged test for such provisions. *Id.* at 35a, 42a-46a.

In applying the first element of this test, the court found that the Concepcions' arbitration agreement was a "contract of adhesion." App., *infra*, 35a. Although the court therefore deemed the agreement to be procedurally unconscionable, it held that the agreement "is on the low end of the spectrum of procedural unconscionability." *Id.* at 36a (internal quotation marks omitted).

The district court next held that the Concepcions could not satisfy the second element of the test—*i.e.*, that "predictably small amounts of damages" are at issue. App., *infra*, 36a-42a. The court explained that, although ATTM's arbitration provision "does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration." *Id.* at 37a. Because ATTM has committed to pay all arbitration costs and

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[5] "ER __" refers to the Excerpts of Record in the court of appeals.

makes special premiums available in arbitration, the district court found that the provision "prompts ATTM to *accept liability*"—and to offer to settle for many times the customer's actual damages—"during the *informal claims process*" that precedes arbitration, "even for claims of questionable merit." *Id.* at 39a (emphasis in original). Indeed, "under the revised arbitration provision, nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full." *Id.* at 40a-41a.

"In contrast," the court found, "consumers who are members of a class do not fare as well." *Id.* at 41a. The court cited "studies that show [that] class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3%) bother to file a claim when the amount they would receive is small," and noted that the Concepcions "do not dispute these statistics." *Ibid.*

The court observed that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Id.* at 42a. The court thus concluded that ATTM's revised arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims (*id.* at 39a) and "is an adequate substitute for class arbitration as to this prong of *Discover Bank*" (*id.* at 42a).

The district court nonetheless held that ATTM's arbitration provision is unenforceable under California law because ATTM had not satisfied the third element of the *Discover Bank* test. As the district

court interpreted that aspect of *Discover Bank*, ATTM was required to demonstrate that "the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism." App., *infra*, 45a. The court noted that ATTM had submitted evidence that it dispensed over $1.3 billion in credits in one year to resolve customers' disputes. *Id*. at 44a. But, reversing the ordinary burden of proof in unconscionability challenges, the court held that ATTM had not shown that its arbitration provision was an adequate substitute for class actions in deterring ATTM from engaging in wrongdoing of the nature alleged by the Concepcions. *Ibid*.[6] The court proceeded to hold that, although the Concepcions "arguably would be better off" in arbitration, "[f]aithful adherence to California's stated policy of favoring class litigation and [class] arbitration to deter alleged fraudulent conduct * * * compels the Court to invalidate" ATTM's revised arbitration provision. *Id*. at 46a & n.10.

Finally, the district court rejected ATTM's argument that "the FAA preempts any holding that ATTM's arbitration provision is unenforceable under California law." App., *infra*, 46a n.11.

6. The Ninth Circuit's Decision. The Ninth Circuit affirmed, holding that ATTM's arbitration provision is unconscionable under the California Supreme Court's *Discover Bank* test because it requires customers to arbitrate small consumer claims on an individual basis. App., *infra*, 2a. The panel recog-

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[6] In so holding, the court merely accepted, at face value, the Concepcions' assertion that class actions are necessary for deterrence.

nized that ATTM's provision "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim." *Id.* at 10a n.9. It thereby effectively acknowledged that requiring the Concepcions to arbitrate under this provision does not shock the conscience. But the panel continued that "the problem with [the provision] under California law—as we read that law—is that not *every* aggrieved customer will file a claim." *Ibid.* (emphasis added).

The panel rejected ATTM's FAA preemption argument, declaring that its earlier decision in "*Shroyer* [v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007)] controls this case because [ATTM] makes the same [preemption] arguments we rejected there." App., *infra*, 11a. In *Shroyer*, Judge Reinhardt, joined by Judges Nelson and Rymer, held that the FAA does not preempt the *Discover Bank* rule because, in their view, "class proceedings will [not] reduce the efficiency and expeditiousness of arbitration in general." 498 F.3d at 990. The *Shroyer* court also maintained that the *Discover Bank* rule "is simply a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* at 987.

The panel further held that this Court's recent decision in *Preston* did not "undercut[] the rationale of *Shroyer*." App., *infra*, 16a.

REASONS FOR GRANTING THE PETITION

In *Southland*, this Court ordered briefing and argument on the question whether, "if State law required" "superimposing class-action procedures on a contract arbitration," the state law "would conflict with the [FAA] and thus violate the Supremacy

Clause." 465 U.S. at 8. The Court ultimately concluded that it could not decide the issue because the appellant "did not contend in the California courts that, and the State courts did not decide whether, State law impos[ing] class action procedures was preempted by federal law." *Ibid.*

Since then, this issue has become "one of the most important—and controversial—issues in modern day class action litigation." Angela C. Zambrano *et al.*, *Wavering Over Consumer Class Actions*, 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. 4, 4 (2008). Literally hundreds of decisions have addressed the enforceability of provisions requiring that arbitration be conducted on an individual basis. Courts applying the laws of 26 States (and the District of Columbia) have held that such provisions are fully enforceable under state law, at least when the arbitration agreement neither imposes high arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration. On the other hand, a few state courts—led by the California Supreme Court—have effectively held that class-action prohibitions in arbitration provisions are categorically unenforceable when the claims are "predictably small." And the Ninth Circuit has determined that such state-law rules "superimposing class-action procedures on a contract arbitration" (*Southland*, 465 U.S. at 8) are not preempted by the FAA. See App., *infra*, 11a-16a; *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1219-1222 (9th Cir.), *cert. denied*, 129 S. Ct. 45 (2008); *Shroyer*, 498 F.3d at 987-991.

This important and frequently recurring issue is fully ripe for resolution. Moreover, this case is a bet-

ter vehicle for resolving the issue than any previous case.[7] Both courts below expressly acknowledged that ATTM's arbitration provision will enable customers to vindicate any claims they may have. See App., *infra,* 10a n.9; *id*. at 42a.[8] Yet both courts also concluded that the arbitration provision is nonetheless unenforceable under California law because it prevents respondents from bringing a class action to

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[7] We are aware that the Court is holding the petition in *American Express Co.* v. *Italian Colors Restaurant*, No. 08-1473, pending its decision in *Stolt-Nielsen S.A.* v. *Animal Feeds International Corp.*, No. 08-1198. That petition raises a somewhat different issue, as the Second Circuit's decision refusing to enforce the requirement that arbitration be conducted on an individual basis was based on federal law, not state law. In any event, that case involved a finding that the respondents could not vindicate their antitrust claims on an individual basis. Here, by contrast, both courts below acknowledged that the Concepcions not only could vindicate their claims on an individual basis, but in fact likely would fare better under ATTM's arbitration provision than as representative plaintiffs in a class action. See pages 12, 14, *supra*.

The present case also is a better vehicle for resolving the preemption issue than *T-Mobile USA, Inc.* v. *Laster*, 128 S. Ct. 2500 (2008), and *T-Mobile USA, Inc.* v. *Lowden*, 129 S. Ct. 45 (2008), in which this Court recently denied certiorari. In both of those cases, the arbitration clause did not allow for recovery of statutory attorneys' fees and accordingly did not provide a realistic means of vindicating small claims on an individual basis.

[8] See also *Makarowski*, 2009 WL 1765661, at *3 (ATTM's arbitration clause "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen"); *Strawn* v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009) (ATTM's arbitration clause is "unusually consumer-centered"); *Francis* v. *AT&T Mobility LLC*, 2009 WL 416063, at *5 (E.D. Mich. Feb. 18, 2009) (ATTM's clause is "fair" to consumers).

vindicate the rights of others. In other words, both courts held that California's policy favoring class actions trumps the FAA's policy of enforcing private agreements to resolve disputes in a less expensive, less time-consuming, and less adversarial manner than litigation. That holding turns the Supremacy Clause on its head and is impossible to reconcile with this Court's FAA precedents. The time has come to resolve this issue and to put an end to the efforts of California and some other States to exalt their policy preferences for class actions over those of Congress in enacting the FAA.

A. The Case Presents An Exceptionally Important Question As To Which The Lower Courts Are Divided.

There can be little doubt that the issue presented here is an important one. In holding that the FAA does not preempt California's requirement that arbitration provisions allow for class-wide arbitration even when consumers have sufficient incentives to vindicate claims on an individual basis, the Ninth Circuit authorized the invalidation of tens of millions of arbitration contracts in that State. Moreover, the Ninth Circuit's preemption holding applies to contracts governed by the laws of all of the other States in that Circuit, thus permitting invalidation of tens of millions of additional arbitration agreements. To make matters worse, the Ninth Circuit has held in another case that claims by out-of-state customers against California-based companies may be adjudicated under the law of California—even when their contracts call for applying the law of the States in which the customers reside. The upshot is that the Ninth Circuit has permitted California to override the laws of the many other States that have held

that provisions requiring arbitration to take place on an individual basis are enforceable, invalidating tens of millions of additional contracts. Finally, the Ninth Circuit's narrow understanding of FAA preemption, which is at the root of all of these problems, deepens the confusion in the lower courts over when States may refuse to enforce agreements that require arbitration to proceed on an individual basis.

1. The Ninth Circuit's holding that California may refuse to enforce even arbitration provisions like ATTM's, which concededly provide consumers with sufficient incentives to pursue relief on an individual basis, means that no arbitration provision that requires individual arbitration can survive in California. As a result, the Ninth Circuit's decision condemns not just the arbitration provisions in the contracts of some 10 million ATTM customers, but also those in tens of millions of other contracts. Indeed, even before the Ninth Circuit had invalidated ATTM's provision, dozens of federal and state courts applying California law had refused to enforce agreements to arbitrate on an individual basis in the contracts of other wireless carriers, Internet providers, franchisors, computer manufacturers, credit card issuers, mortgage lenders, and major employers.[9]

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[9] See, *e.g.*, *Oestreicher* v. *Alienware Corp.*, 322 F. App'x 489 (9th Cir. 2009) (computer sales agreement); *Douglas* v. *U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007) (long-distance telephone service agreement); *Tijerina* v. *Am. First Real Estate Servs., Inc.*, 2008 WL 4855815 (C.D. Cal. Nov. 6, 2008) (mortgage agreement); *Van Slyke* v. *Capital One Bank*, 503 F. Supp. 2d 1353 (N.D. Cal. 2007) (credit cardholder agreement); *Discover Bank* v. *Super. Ct.*, *supra* (same); *Olvera* v. *El Pollo Loco, Inc.*, 93 Cal. Rptr. 3d 65 (Ct. App. 2009) (employment agreement); *Sanchez* v. *W. Pizza Enters., Inc.*, 90 Cal. Rptr. 3d 818 (Ct. App.
(footnote continued on next page)

And because the Ninth Circuit's erroneous view of FAA preemption is binding throughout that Circuit, that means that eight other States are free to impose blanket bans on agreements to arbitrate on an individual basis. That concern is real: The Ninth Circuit already has expressed the view that Washington law tracks California law on the enforceability of arbitration provisions that preclude class-wide arbitration. See *Lowden*, 512 F.3d at 1218-1219. More troubling still, the Ninth Circuit recently held that California law governs the enforceability of such provisions in the contracts of customers of California-based businesses *even when those contracts choose the law of the customer's home state*. *Masters* v. *DirecTV, Inc.*, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009).

Taken together, the decision below and *Masters* mean that no arbitration provision between a California-based company and its customers throughout the country is enforceable unless it allows for class-wide arbitration. Thus, not only has California (with an assist from the Ninth Circuit) thwarted the policies of the FAA, but it also has trumped the law of the 25 States (and the District of Columbia) that deem contracts prohibiting class-wide arbitration to be enforceable so long as the customer is able to vin-

2009) (same); *Murphy* v. *Check 'N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120 (Ct. App. 2007) (same); *Gatton* v. *T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Ct. App. 2007) (wireless service agreement); *Cohen* v. *DirecTV, Inc.*, 48 Cal. Rptr. 3d 813 (Ct. App. 2006) (satellite television service agreement); *Klussman* v. *Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005) (credit cardholder agreement); *Aral* v. *EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005) (Internet provider service agreement); *Indep. Ass'n of Mailbox Ctr. Owners, Inc.* v. *Super. Ct.*, 34 Cal. Rptr. 3d 659 (Ct. App. 2005) (franchise agreement).

dicate his or her own rights in individual arbitration. See Appendix D, *infra*. Review is essential now to reaffirm that the FAA precludes States from superimposing procedures on arbitration that are not necessary to ensure that the parties to the arbitration can vindicate their claims.

2. The Court's intervention is warranted for the additional reason that the lower courts are in disarray as to whether and, if so, when, the FAA preempts state-law limitations on class waivers in arbitration provisions.

To begin with, the decision below conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). The *Gay* court held that the FAA preempts Pennsylvania's rule that provisions waiving the right to bring a class action are unconscionable. *Id.* at 392-395. It explained that "whatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. To the extent, then, that [Pennsylvania cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract," they are preempted by Section 2 of the FAA. *Id.* at 394 (citations, alterations, and internal quotation marks omitted; emphasis in original).

To be sure, a subsequent panel of the Third Circuit has distinguished this holding (erroneously, we believe) on the ground that Pennsylvania's rule is limited to arbitration provisions in violation of Section 2 of the FAA, and then held that New Jersey law is not preempted because it applies equally to arbitration provisions and contracts that bar judicial class actions. See *Homa* v. *American Express Co.*,

558 F.3d 225, 229-230 (3d Cir. 2009). Nevertheless, there is little reason to believe that the Third Circuit would jettison *Gay* entirely the next time a case governed by Pennsylvania law is before it. And there is not much likelihood of that happening any time soon anyway, because, whenever the defendant does business nationally, savvy plaintiffs' lawyers will avoid the risk by filing suit in a federal court within the Ninth Circuit, where *Gay* has no force and the preemption ruling in this case governs.

The Ninth Circuit's holding also squarely conflicts with the holding of the Tennessee Court of Appeals that the "Supremacy Clause * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action." *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001). Because the Tennessee Supreme Court denied the plaintiff's petition for review in *Pyburn* and ordered the court of appeals' decision published (*id.* at 351), "the bench and bar of [Tennessee]" may rely upon that decision "as representing the present state of the law with the same confidence and reliability as the published opinions of the [Tennessee Supreme] Court." *Meadows* v. *State*, 849 S.W.2d 748, 752 (Tenn. 1993).

Moreover, the development of a more pronounced disagreement among the lower courts is highly unlikely. Courts generally would have no need to reach the FAA preemption issue unless they first were to conclude that the applicable state law would bar enforcement of the arbitration provision. But 25 States and the District of Columbia already have held that provisions that require arbitration to be conducted on an individual basis are enforceable so long as ar-

bitration is free or inexpensive and individual remedies (including statutory fee-shifting awards) are not limited, so a preemption ruling is unlikely in cases governed by the law of those States.[10]

Nine of the remaining 25 States are in the Ninth Circuit, where the holding in the present case is binding for all cases brought in federal court or removed under the Class Action Fairness Act, 28 U.S.C. § 1332(d). In addition, consumer class actions are rare in nine of the 16 other States.[11] It therefore

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[10] These cases are collected in Appendix D to this Petition. See App., *infra*, 63a-69a. Among these cases are two from federal courts of appeals that, though deciding the issue under State unconscionability law, went on to explain that provisions requiring arbitration to be conducted on an individual basis are consistent with the goals of the FAA. See *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding that an agreement to arbitrate on an individual basis was not unconscionable under Georgia law and explaining that a prohibition of class arbitration is "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*") (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)); *Iberia Credit Bureau*, 379 F.3d at 174 (holding that an early version of ATTM's arbitration provision was not unconscionable under Louisiana law merely because it required individual arbitration and explaining that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims") (quoting *Gilmer*, 500 U.S. at 31).

[11] States in this category include Indiana, Iowa, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, Rhode Island, and Wyoming. A recent study of decisions involving state consumer-protection statutes found that, in 2007, these nine States combined to account for only approximately 5% of such decisions nationwide. See Searle Civil Justice Institute, *State Con-*

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is not clear when—if ever—a court applying the law of one of these States would confront the FAA preemption issue. That is especially true given the ability of class-action plaintiffs to bring claims within the Ninth Circuit against virtually any company doing business on a nationwide basis.[12]

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sumer Protection Acts: An Empirical Investigation of Private Litigation Preliminary Report 25 tbl. 1 (Dec. 2009), *at* http://www.law.northwestern.edu/searlecenter/uploads/CPA_Proof_113009_final.pdf. By contrast, California alone accounted for over 22 percent. See *ibid.* Indeed, even though it is broadly acknowledged that the enforceability of class-action waivers in arbitration agreements is the most significant unresolved issue in consumer litigation (see page 24 & note 13, *infra*), there are still no appellate cases addressing this issue under the law of eight of these nine States. The issue is currently pending before the Kentucky Supreme Court. See *Schnuerle* v. *Insight Commc'ns Co.*, No. 2008-SC-000789 (Ky.).

[12] The remaining seven States are Florida, Massachusetts, New Jersey, New Mexico, North Carolina, Pennsylvania, and Wisconsin. As noted above, the Third Circuit has opined that Pennsylvania law barring provisions that require individual arbitration is preempted. The Eleventh Circuit recently certified to the Florida Supreme Court the question whether a requirement that disputes be arbitrated on an individual basis in Sprint's service agreements with its customers either is unconscionable under Florida law or violates Florida's public policy. See *Pendergast v. Sprint Nextel Corp.*, __ F.3d __, 2010 WL 6745 (11th Cir. Jan. 4, 2010). Until the Eleventh Circuit did so, the law had appeared clear that ATTM's arbitration is enforceable under Florida law. See *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008) (rejecting argument that requirement that disputes be arbitrated on an individual basis in ATTM's arbitration provision violates Florida public policy), *appeal pending*, No. 08-16080-C (11th Cir.); *Fonte* v. *AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025-1026 (Fla. Dist. Ct. App. 2005) (requirement that disputes be arbitrated on an individual basis in arbitration provision of one of

(footnote continued on next page)

This Court granted certiorari in *Preston* in the absence of any conflict among the lower courts. That case involved a limited, industry-specific incursion on the FAA's policy mandating the enforcement of arbitration agreements. See *Preston*, 128 S. Ct. at 981 (arbitration of disputes between entertainers and talent agencies).

Here, by contrast, there is broad agreement that "the enforceability of an express class action waiver in a consumer arbitration agreement" is "[o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court." Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775, 775 (2005). Prominent members of the plaintiffs' bar describe it as "one of the most hotly contested issues in all of consumer and employee litigation." F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 393 (2009).[13]

ATTM's predecessors neither is unconscionable nor violates Florida's public policy).

[13] See also, *e.g.*, Zambrano *et al., supra,* 27 No. 12 BANKING & FIN. SERVS. POL'Y REP. at 4 ("the enforceability of class action waivers has become one of the most important—and controversial—issues in modern day class action litigation"); Erin Holmes, *Ross v. Bank of America,* 24 OHIO ST. J. DISP. RESOL. 387, 387-388 (2009) (enforceability of agreements to arbitrate on an individual basis is "an important issue in consumer litigation"); Marc J. Goldstein, *The Federal Arbitration Act and Class Waivers in Consumer Contracts: Are These Waivers Unenforceable?*, 63 DISP. RESOL. J. 55, 55-56 (2008) (enforceability of such agreements is "[o]ne of the most important issues facing" companies); Kathleen M. Scanlon, *Class Arbitration Waivers:*

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The fact that the present case affects a far broader cross-section of the economy is further reason to grant review now rather than waiting years for the possibility that the existing split will materially deepen.

B. Review Is Warranted Because The Decision Below Conflicts With The FAA And This Court's Precedents.

The Ninth Circuit's holding that the FAA does not preempt California's public policy prohibiting parties from agreeing to arbitrate disputes on an individual basis is irreconcilable with three different strands of this Court's FAA jurisprudence.

First, this Court's decisions establish that the entire point of the FAA is to enable parties to contract out of the procedural accoutrements of litigation and to tailor the features of arbitration, especially the procedures, to their needs. These cases reject the Ninth Circuit's view that the States are free to impose whatever procedures they want and for whatever reason, so long as those procedures are equally applicable in litigation.

Second, this Court's decisions further establish that Section 2's savings clause applies only to generally applicable principles of state contract law. Here, in holding that arbitration agreements that preclude class actions are unconscionable even when they ensure that the parties can vindicate their claims on an individual basis, the Ninth Circuit severely distorted

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The "Severability" Doctrine and Its Consequences, 62 DISP. RESOL. J. 40, 44 (2007) (enforceability of such agreements is "an extremely important issue in the consumer and employment contexts").

generally applicable unconscionability principles to create a new rule that is applicable only to dispute-resolution provisions (virtually all of which are arbitration provisions). In so doing, the court below ran afoul of Section 2.

Third, this Court has emphasized repeatedly that the FAA embodies a powerful federal policy favoring arbitration as a means of dispute resolution. By holding that the States are free to condition enforcement of arbitration provisions on the availability of class-wide arbitration, the Ninth Circuit has endorsed the functional equivalent of a ban on consumer arbitration provisions. That is because class arbitration eliminates all of the benefits of traditional, individual arbitration, while multiplying the risks exponentially. Businesses will give up on arbitration entirely rather than accept that lose-lose proposition. Needless to say, a state rule that would lead to the wholesale abandonment of arbitration conflicts with the purposes of the FAA and cannot be permitted to stand.

1. This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trustees*, 489 U.S. 468, 479 (1989); see also *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 453 (2003) (plurality op.); *First Options of Chicago, Inc.* v. *Kaplan,* 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995). To accomplish that end, Section 2 of the FAA provides that "written" arbitration agreements in contracts "evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Section 2 of the FAA does contain an exception: It authorizes courts to decline to enforce arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract," which the Court has interpreted to include such "generally applicable contract defenses" as "fraud, duress, or unconscionability." *Casarotto*, 517 U.S. at 686-687. But that exception is necessarily a narrow one.

This Court has never held or even hinted that a state policy favoring a particular procedural device could come within Section 2's savings clause so long as that policy applies to both litigation and arbitration. To the contrary, the Court has squarely held that, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract *the rules under which that arbitration will be conducted*." *Volt*, 489 U.S. at 479 (citation omitted; emphasis added). The Court has specifically identified "procedure" as one of the "features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, just last Term the Court reiterated that "the recognition that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select

arbitration." *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1471 (2009) (emphasis added).

Precisely because the entire purpose of arbitration is to provide a less expensive, less time-consuming, and less adversarial alternative to litigation, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve" federal statutory claims. *Ibid.* Rather, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," there is no basis for refusing to enforce his or her arbitration agreement according to its terms. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (internal quotation marks omitted; second alteration in original). That is so even if "the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal quotation marks omitted).

The holding below—that Section 2's savings clause authorizes California to condition enforcement of arbitration provisions on the availability of the class-action device *even when a class action is not necessary to vindicate the plaintiff's claims*—is irreconcilable with these precedents.

The Ninth Circuit was of the view that the FAA allows States to impose whatever procedures they want—for whatever policy reasons they want—so long as the procedures apply equally to cases in court and cases in arbitration. But that narrow reading of the FAA's preemptive force is foreclosed by this Court's recent decision in *Preston*. That case involved a provision of the California Talent Agents Act ("TAA") that required disputes under that Act to be submitted to California's Labor Commissioner in

the first instance—prior to either litigation or arbitration.[14]

Noting that "[t]he FAA's displacement of conflicting state law is now 'well-established,'" the Court held that "the FAA supersedes" the California statute. *Preston*, 128 S. Ct. at 983, 987 (quoting *Allied-Bruce*, 513 U.S. at 272). As the Court observed, "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 986 (quoting *Mitsubishi Motors*, 473 U.S. at 633). That objective "would be frustrated" by the TAA, the Court explained, because "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." *Ibid.*

Here, as in *Preston* (and *Southland*), California has insisted on superimposing its own preferred procedures on a contractual arbitration. In *Preston*, the respondent contended that enforcing his arbitration agreement without the overlay of the TAA's exhaustion requirement "would undermine the Labor Commissioner's ability to stay informed of potentially illegal activity * * * and would deprive artists protected by the TAA of the Labor Commissioner's ex-

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[14] The TAA did contain an exemption to this exhaustion requirement for arbitration agreements between talent agents and their customers if the agreements provided for notice to the Labor Commissioner and an opportunity to attend the hearing. But the Court found this exemption to be "of no utility" to the petitioner, who "would have been required to concede a point fatal to his claim for compensation—*i.e.*, that he is a talent agent, albeit an unlicensed one—and to have drafted his contract in compliance with a statute that he maintains is inapplicable." *Preston*, 128 S. Ct. at 985.

pertise." 128 S. Ct. at 986. This time the proffered rationale is that the agreement to arbitrate on an individual basis interferes with the state policy of using class actions to "deter" corporate misconduct. But as in *Preston*, a state policy that has nothing to do with whether the parties to the dispute can effectively resolve that dispute through arbitration is not a valid basis for adding procedural layers to which the parties did not agree.

Indeed, if the rule were otherwise the States' ability to superimpose procedures on arbitration would not end with class actions—or with the consumer context. For example, a State just as easily could assert that the use of arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights. It accordingly could condition enforcement of arbitration agreements on the requirement that the arbitration decision be published. The scope of the procedures that States could impose on arbitration would be limited only by their imagination, as it is always possible to identify a policy basis for any preferred procedure. In the end, arbitration would be converted into litigation, and the FAA would be rendered a nullity. See *Iberia Credit Bureau*, 379 F.3d at 175-176 ("[T]he plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself. If every arbitration were required to produce a publicly available, 'precedential' decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.").

2. The Ninth Circuit's decision—and the California cases it purports to apply—also run headlong into this Court's precedents holding that Section 2 of the FAA prohibits courts from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 128 S. Ct. at 985; see also *Perry*, 482 U.S. at 492 n.9. As noted above, under generally applicable California law, a contractual term must shock the conscience in order to be substantively unconscionable. Moreover, if the degree of procedural unconscionability is low, the degree of substantive unconscionability must be high for the term to be deemed unenforceable. See pages 5-6, *supra*.

An arbitration provision that "a reasonable consumer may well prefer" (App., *infra*, 42a) cannot legitimately be said to be conscience shocking. And it certainly is not so extremely conscience shocking as to make up for it being "on the low end of the spectrum of procedural unconscionability," as the district court found ATTM's arbitration provision to be. *Id.* at 36a.

Thus, it is only by applying a version of unconscionability law that is "not applicable to contracts generally" (*Preston*, 128 S. Ct. at 985), but instead is aimed directly at agreements to resolve disputes, that the courts below could deem ATTM's arbitration provision unenforceable. If allowed to stand, California's distortion of unconscionability doctrine in the context of agreements to arbitrate on an individual basis would enable Section 2's exception to swallow its rule, as States could deem "unconscionable" any arbitration clause that fails to provide for particular favored procedures (such as trials by jury,

plenary discovery, motion practice, or written rulings).

3. Finally, this Court has recognized that the FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural* policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). The California rule favoring class actions above all else irreconcilably conflicts with the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable" (9 U.S.C. § 2) and the federal policy favoring arbitration because businesses will give up on arbitration altogether rather than subject themselves to the risk of a class arbitration.

To begin with, class arbitration involves the same massive stakes as a judicial class action and is every bit as burdensome, expensive, and time-consuming—if not more so.[15] Indeed, class arbitration is the quintessential example of arbitration "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).

At the same time, class arbitration fails to provide many of the key protections offered to defen-

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[15] Class arbitration may *add* procedural complexity. For example, the AAA's class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a "class determination award," the parties may move to vacate or confirm that interim award in the district court. See generally AAA, *Policy on Class Arbitrations*, *at* http://www.adr.org/Classarbitrationpolicy.

dants litigating a class action in court. For one thing, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the narrowest known to law." *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Consistent with the "national policy favoring arbitration," the FAA provides only "the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs.*, 128 S. Ct. at 1405. Accordingly, an arbitrator's errors regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can rarely, if ever, be disturbed by a court. Moreover, even if the business wins a class-wide arbitration, it can have no assurance of finality because absent class members may contend that they were not afforded the due process protections necessary to make a class-wide award binding on them. Because arbitrators designated by contracts between private parties are not bound by the U.S. Constitution's due process clauses (see Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 187 n.5 (2006) (citing cases)), courts may well embrace such an argument. See also Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea*, 7 CLASS ACTION LITIG. REP. (BNA) 768, 771 (2006) (noting that because of the "deferential standard of review" of arbitrators' decisions there is "no assurance that the 'class' arbitration proceedings would be binding on absent class members").

Given the risks entailed in *class* arbitration and the absence of any offsetting benefits, no reasonable

defendant would willingly subject itself to this worst-of-both-worlds scenario. Indeed, in response to prior decisions of the Ninth Circuit refusing to find California's policy favoring class actions preempted by the FAA, the nation's largest cable company, Comcast Corp., has already abandoned arbitration in California.[16] Accordingly, California's rule conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration is in all practical sense a ban on consumer arbitration agreements. As such, California's rule—and the Ninth Circuit's rejection of ATTM's preemption challenge to that rule—cannot be reconciled with the FAA's policy of promoting arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[16] See Comcast Agreement for Residential Services § 13.k, *at* http://www.comcast.net/terms/subscriber/ ("IF YOU ARE A COMCAST CUSTOMER IN CALIFORNIA, COMCAST WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE UNLESS WE HAVE NOTIFIED YOU OTHERWISE.").

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JANUARY 2010

APPENDICES

APPENDIX A

United States Court of Appeals,

Ninth Circuit.

Jennifer L. LASTER; Andrew Thompson; Elizabeth Voorhies, on behalf of themselves and all others similarly situated and on behalf of the general public, Plaintiffs,
and
Vincent Concepcion; Liza Concepcion, Plaintiffs-Appellees,
v.
AT & T MOBILITY LLC, Defendant-Appellant.

No. 08-56394.

Argued and Submitted Sept. 17, 2009.
Filed Oct. 27, 2009.

Before: MARY M. SCHROEDER, STEPHEN REINHARDT and CARLOS T. BEA, Circuit Judges.

BEA, Circuit Judge:

This case involves a class action claim that a telephone company's offer of a "free" phone to anyone who signs up for its service is fraudulent to the extent the phone company charges the new subscriber sales tax on the retail value of each "free" phone.

The phone company demanded the plaintiffs' claims be submitted to individual arbitration, pointing to the arbitration clause of the written agreement, which arbitration clause requires arbitration, but bars class actions. Because this is an action in-

voking diversity of citizenship jurisdiction, the plaintiff-subscribers point to California contract law, which they claim renders both the arbitration clause and the class action waiver unconscionable, hence, unenforceable.

At first blush, it seems we decided the invalidity of an arbitration agreement banning class actions in *Shroyer v. New Cingular Wireless Services*, *Inc.*, 498 F.3d 976(9th Cir. 2007). But, the phone company points to a new wrinkle: unlike the arbitration clause in Shroyer, this arbitration clause provides for a "premium" payment of $7,500 (the jurisdictional limit of California's small claims court) if the arbitrator awards the customer an amount greater than the phone company's last written settlement offer made before selection of an arbitrator. Hence, says the phone company, the arbitration clause is not an artifice that has the practical effect of rendering it immune from individual claims.

We will find, on second blush, the new "premium" payment does not distinguish this case from *Shroyer*, and that under California law, the present arbitration clause is unconscionable and unenforceable. Further, we will also find no merit to the phone company's claim the Federal Arbitration Act (FAA) preempts California unconscionability law.

Thus, we will affirm the district court's order.

I. Factual and Procedural History

In February 2002, Vincent and Liza Concepcion signed a Wireless Service Agreement (WSA) with

AT & T Mobility[1] (AT & T) for cellular phone service and the purchase of new cell phones. The Concepcions received the cell phones without charge for the devices themselves because they agreed to a two-year contract term. However, AT & T charged them $30.22 total in sales tax for the two phones,[2] calculated as 7.75% of both phones' full retail value. The Concepcions continued to renew their WSA through the filing of this lawsuit.

The WSA included both an arbitration clause, which required any disputes to be submitted to arbitration, and a class action waiver clause, which required any dispute between the parties to be brought in an individual capacity. In December 2006, AT & T revised the arbitration agreement to add a new premium payment clause. Under this clause, AT & T will pay a customer $7,500[3] if the arbitrator issues an award in favor of a California customer that is

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[1] The original contract was with Cingular Wireless. In November of 2005, AT & T acquired Cingular Wireless and renamed the company AT & T Mobility (AT & T) on January 8, 2007.

[2] The Concepcions allege they were actually charged $149.99 for a Motorola phone, and $0.00 for a Nokia phone. If so, at a sales tax rate of 7.75%, the amount of sales tax charged on the "free" Nokia phone is but $18.60. For purposes of the present appeal, the disparity in their pleadings is inconsequential. If anything, it makes the predictable recovery in an individual claim smaller and more likely to have the practical effect of making the arbitration clause unconscionable.

[3] The agreement specifically provides for a premium payment in the amount of "the maximum claim that may be brought in small claims court in the county of your billing address." In California, the maximum claim is $7,500. Cal. Code Civ. Proc. § 116.221.

greater than AT & T's last written settlement offer made before the arbitrator was selected.

On March 27, 2006, before the premium payment clause was added, the Concepcions filed a complaint in the United States District Court for the Southern District of California. The Concepcions alleged the practice of charging sales tax on a cell phone advertised as "free" was fraudulent. In September 2006, the district court consolidated the Concepcions' case with the *Laster* case, a putative class action addressing the same issues. In March 2008, after the premium payment clause was added, AT & T filed a motion to compel the Concepcion plaintiffs to submit their claims to individual arbitration under the revised arbitration agreement. The district court denied the motion. It held that the class waiver provision of the arbitration agreement is unconscionable under California law and that California unconscionability law is not preempted by the Federal Arbitration Act. AT & T timely appealed.

II. Jurisdiction and Standard of Review

This is an interlocutory appeal from the denial of a motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(1)(B). We review the denial of a motion to compel arbitration de novo. *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 981 (9th Cir. 2007).

III. Discussion

A. AT & T's class action waiver is unconscionable under California law.

The district court did not err when it held AT & T's class action waiver was unconscionable under California law, and thus unenforceable. Under

the Federal Arbitration Act, arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable." *Shroyer*, 498 F.3d at 981 (internal citations omitted).

To be unenforceable under California law, a contract provision must be both procedurally and substantively unconscionable. *Id.* at 981. Procedural unconscionability generally takes the form of a contract of adhesion, that is, a contract drafted by the party of superior bargaining strength and imposed on the other, without the opportunity to negotiate the terms. *Id.* at 982. Substantive unconscionability focuses on overly harsh or one-sided contract terms. *Id.* Both elements of unconscionability need not be present to the same degree; California courts use a sliding-scale: the more substantively unconscionable the contract term, the less procedurally unconscionable it need be to be unenforceable and vice versa. *Id.* at 981-82.

The California Supreme Court addressed the unconscionability of class action waivers in arbitration agreements for the first time in *Discover Bank v. Sup. Ct.*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005), holding that class action waivers were at least sometimes unconscionable under California law. 30 Cal. Rptr. 3d 76, 113 P.3d at 1108. Class actions, the court reasoned, serve the important policy function of deterring and redressing wrongdoing, particularly where a company defrauds

large numbers of consumers out of individually small sums of money.[4] *Id.* at 1105. Class action waivers pose a problem because, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 1106. In this way, the class action waiver allows the company to insulate itself from liability for its wrongdoing and the policy behind class actions is thwarted. *Id.* at 1109. With this in mind, the *Discover Bank* court held:

> when the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least . . . the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

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[4] As the California Supreme Court has emphasized, "Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. . . . But as [the cases] of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights." *Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1109.

Id. at 1110 (internal quotations omitted). The reasoning behind this rule is pretty easy to grasp. As we explained in *Shroyer*: "when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." 498 F.3d at 986.

We have interpreted *Discover Bank* as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable: (1) is the agreement a contract of adhesion; (2) are disputes between the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money. *Id.* at 983. In *Shroyer*, we noted that "there are most certainly circumstances in which a class action waiver is unconscionable under California law despite the fact that all three parts of the *Discover Bank* test are not satisfied." *Id.* Because we hold that the class action waiver at issue satisfies all three parts of the test, as was true in *Shroyer*, "it is unnecessary to explore those circumstances here." *Id.*

1. *AT & T's class action waiver is unconscionable under the three-part Discover Bank test.*

    a. AT & T's WSA is a contract of adhesion.

As we noted in *Shroyer*, a contract of adhesion under California law is a standardized contract imposed on the subscribing party without an opportunity to negotiate the terms. *Id.* The Concepcions were

given the standardized WSA without the opportunity to negotiate the terms. Thus, under California law, it is a contract of adhesion.

b. The dispute involves predictably small amounts of damages.

In both *Shroyer* and *Discover Bank* the damages at issue were found to be "predictably small." The plaintiffs in *Shroyer* sued under cell phone contracts, claiming damages in the "hundreds of dollars" range based on the cost of obtaining new cell phone service with other companies. 498 F.3d at 984. In *Discover Bank*, the plaintiff sought to recover a $29 fee charged for late credit card payments that were claimed not to be late. 30 Cal. Rptr. 3d 76, 113 P.3d at 1104. Each court determined that these amounts were small enough to satisfy the second prong of the *Discover Bank* test. *See Shroyer*, 498 F.3d at 984; *Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1110. Here, the damages are $30.22[5] for the sales tax charged on cell phones AT & T advertised were "free." This is comparable to the amount of damages in *Discover Bank*, and well below the hundreds of dollars found predictably small in *Shroyer*.

c. The Concepcions alleged AT & T carried out a scheme deliberately to cheat large numbers of consumers out of small sums of money.

The Concepcions alleged in their complaint that AT & T was fraudulently advertising the phones were free, all the while knowing AT & T would charge consumers sales tax on such phones. This is

[5] Or $18.60, *see supra* note 2.

sufficient to satisfy the third-prong of *Discover Bank*. *See id.* at 984, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

d. Conclusion

Because all three prongs of the *Discover Bank* test are met, AT & T's class action waiver is unconscionable under California law.

2. AT & T's premium payment provision does not negate the unconscionability of the class action waiver under California law.

AT & T contends the premium payment provision of its revised arbitration agreement[6] prevents the class action waiver from being substantively unconscionable. AT & T reasons that the potential for the premium payment overcomes the problem of predictably small damages identified in *Discover Bank* and *Shroyer*. AT & T submits an award of $7,500 should provide individual customers an adequate incentive to pursue initially small damage claims with higher potential, against the company. AT & T contends that this incentive-laden scheme actually punishes it should it make low-ball offers in settlement, and it removes any claim of immunity from liability for its allegedly fraudulent conduct; therefore *this* class waiver is not unconscionable. However, this is incorrect. The *Discover Bank* rule focuses on whether damages are predictably small, and in the end, the

[6] The provision provides for a contractual payment of $7,500 if a customer receives an arbitration award greater than the amount of AT & T's last written settlement offer, made before an arbitrator was chosen.

premium payment provision does not transform a $30.22 case into a predictable $7,500 case.

The $7,500 premium payment is available only if AT & T does not make a settlement offer to the aggrieved customer in a sum equal to or higher than is ultimately awarded in arbitration, and before an arbitrator is selected. This means that if a customer files for arbitration[7] against AT & T, predictably, AT & T will simply pay the face value of the claim before the selection of an arbitrator to avoid potentially paying $7,500. Thus, the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.[8] We held in *Shroyer* that a claim worth a few hundred dollars did not provide adequate incentive for a customer to bother pursuing individual arbitration. 498 F.3d at 986. The $30.22 at issue here is even less of an incentive to file a claim. As a result, aggrieved customers will predictably not file claims-even if the odds are that after the letter-

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[7] AT & T puts much stock in the argument that, while a customer might not be bothered to arbitrate or litigate small damage claims, a customer would be willing to pursue a small damage claim through AT & T's informal claims process. However, were this the case it would not affect the outcome. We must determine only whether the premium provides adequate incentive to pursue individual *arbitration*, not informal resolution. *See Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1110 ("[n]or do we agree . . . that small claims litigation, government prosecution, or *informal resolution* are adequate substitutes [for the class action mechanism].") (emphasis added).

[8] The problem with small damage claims is not that the monetary cost of arbitrating is greater than the potential recovery, but that a person normally will not find it worth the time or the hassle to try to recover such a small amount, even if that person spends no money to hire an attorney or to invoke the arbitration process. *See Shroyer*, 498 F.3d at 986.

writing and arbitrator-choosing, they will get a $30.22 offer-thereby "greatly reduc[ing] the aggregate liability" AT & T faces for allegedly mulcting small sums of money from many consumers. *See id.* The premium payment provision has no effect on this conclusion,[9] nor do any of the other provisions of AT & T's revised arbitration clause.[10] The actual damages a customer will recover remain predictably small, thus under the rationale of *Discover Bank* and *Shroyer*, AT & T's class action waiver is in effect an exculpatory clause, hence substantively unconscionable.

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[9] The provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim. Although 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.

[10] In addition to the $7,500 premium payment, the revised arbitration agreement also provides: double attorney's fees in the event the arbitrator awards the customer more than AT & T's last written settlement offer before the arbitrator was selected; AT & T will pay all arbitration costs and fees unless the arbitrator determines that the claim was frivolous or brought for an improper purpose; AT & T will not seek attorney's fees if it prevails; either party may bring a claim in small claims court; the arbitration is not confidential; full court remedies, including punitive damages and injunctions, are available; arbitration will be conducted pursuant to AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, the arbitration will take place in the county of the customer's billing address, and that the customer can choose between an in-person, telephonic, or no hearing at all for claims of less than $10,000.

B. The Federal Arbitration Act does not preempt California unconscionability law.

The Federal Arbitration Act does not expressly or impliedly preempt California law governing the unconscionability of class action waivers in consumer contracts of adhesion. The FAA "does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause." *Shroyer*, 498 F.3d at 987. *Shroyer* controls this case because AT & T makes the same arguments we rejected there.

1. The FAA does not expressly preempt California law.

The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, if a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general, that state-law principle is preempted by the FAA. *Shroyer*, 498 F.3d at 987. However, "because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA." *Id.* at 988 (internal quotations omitted).

AT & T contends the *Discover Bank* rule abandons the sliding-scale approach of California general unconscionability law and is therefore a "new rule" applicable only to arbitration agreements. This contention is incorrect. As we explained in *Shroyer*, "[t]he rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applica-

ble to contracts generally in California." 498 F.3d at 987. Essentially, the *Discover Bank* test applies the general sliding-scale approach to unconscionability in the specific context of class action waivers. The best way to read *Discover Bank* in light of the sliding-scale approach is that, if a contract clause is, in practice, exculpatory, as long as there is any degree of procedural unconscionability, the element of substantive unconscionability is generally adequate, as a matter of law. *See Discover Bank*, 30 Cal. Rptr. 3d 76, 113 P.3d at 1109 (holding that exculpatory clauses are substantively unconscionable, and when contained in procedurally unconscionable adhesive contracts, "generally unconscionable").

Moreover, in *Shroyer*, we already rejected the argument that *Discover Bank* subjects "arbitration clauses to special scrutiny." *Id.* at 987, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. AT & T is making the same preemption arguments already rejected in *Shroyer*. As a panel, we are bound by a prior panel's determination of law. *General Const. Co. v. Castro*, 401 F.3d 963, 975 (9th Cir. 2005). *Shroyer* controls, therefore California law is not expressly preempted by the FAA.

2. The FAA does not impliedly preempt California law.

Neither does the FAA impliedly preempt California unconscionability law. A state law is impliedly preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Shroyer*, 498 F.3d at 988. Determining whether California's unconscionability principles stand as an obstacle to the FAA first requires identification of the purposes and objectives underlying the federal Act. *Id.* at 988-89. In *Shroyer*,

we identified two purposes: first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims. *Id.* at 989.

In *Shroyer*, we held that California unconscionability law did not stand in the way of either of these identified purposes. *Id.* at 989-91. As to "reversing hostility to arbitration and placing arbitration agreements on the *same footing* as ordinary contracts," this is not "frustrated or undermined in any way by a holding that class arbitration waivers in contracts of adhesion, like class action waivers in such contracts are unconscionable." *Id.* at 990. Rather, "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Id.* We further explained, "the fact that § 2 expressly permits a court to decline enforcement of an arbitration agreement on grounds . . . such as unconscionability, strongly suggests that Congress did not contemplate that implied preemption principles would be applied to mandate the opposite result." *Id.* at 989-90.

As to the second purpose identified, we rejected the "contention that class proceedings will reduce the efficiency and expeditiousness of arbitration in general." *Id.* at 990. For these reasons, we held that "applying California's generally applicable contract law to refuse enforcement of the unconscionable class action waiver in this case does not stand as an obstacle to the purposes or objectives of the Federal Arbitration Act, and is, therefore, not impliedly preempted." *Id.* at 993.

Here, AT & T makes the same arguments regarding conflict preemption that we rejected in *Shroyer*. *Compare* Opening Br. at 51-53 (arguing that class proceedings would hinder a speedy resolution, place extra burdens on the arbitral process, and lead to companies abandoning arbitration altogether) *with Shroyer*, 498 F.3d at 989 (noting that appellant argued class proceedings would hinder the "speed, simplicity, cost savings, informality, and reduced adversariality" of arbitration and lead to companies abandoning arbitration). AT & T even admits the court in *Shroyer* "rejected a similar argument." Opening Br. at 49. However, AT & T attempts to distinguish this case from *Shroyer* by contending that a recent Supreme Court case, *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), supercedes *Shroyer*'s reasoning on this point.

Preston, an attorney, performed services for Ferrer regarding Ferrer's role as "Judge Alex" on a Fox television network program. 128 S. Ct. at 982. Preston filed an arbitration demand seeking fees allegedly owed him by Ferrer under their contract. *Id.* Ferrer responded by petitioning the California Labor Commissioner to declare the entire contract invalid under the California Talent Agencies Act (TAA). *Id.* Ferrer contended that Preston was acting as a talent agent without the license required by the TAA, thus rendering their entire contract void. *Id.*

Preston responded by filing a motion to compel arbitration. *Id.* The trial court denied the motion to compel arbitration, and the denial was affirmed on appeal, on the ground the TAA vested primary exclusive jurisdiction in the California Labor Commissioner to determine who was or was not a talent agent. *Id.* The U.S. Supreme Court granted certiorari

and reversed, noting that *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) "largely, if not entirely, resolves the dispute before us." *Id.* at 984. According to the Court in *Preston*, *Buckeye* held that when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not a federal or state court. *Id.* at 981. Thus, in *Preston*, the Supreme Court held that because Ferrer's allegation that Preston was acting as an unlicensed talent agent was a challenge to the validity of the contract as a whole, as opposed to the validity of the arbitration clause itself, the TAA's attempt to lodge primary jurisdiction in another forum was superceded by the FAA. *Id.* at 984, 987. The Court expressly recognized, however, that attacks on the validity of the entire contract are distinct from attacks aimed solely at the arbitration clause. *Id.* at 984. Thus, by its terms, *Preston* is inapplicable to our case because the Concepcions are not challenging the validity of the service contract with AT & T as a whole, but only the validity of the arbitration agreement. Likewise, nothing in *Preston* undercuts the rationale of *Shroyer* that the FAA does not impliedly preempt California unconscionability law, because the plaintiffs in *Shroyer* were also challenging only the validity of the arbitration agreement. Because *Shroyer* still controls, California unconscionability law is not impliedly preempted by the FAA.

IV. Conclusion

We affirm the district court's denial of AT & T's motion to compel arbitration.

AFFIRMED.

APPENDIX B

United States District Court,
Southern District of California.

Jennifer L. LASTER, et al., Plaintiffs,
v.
T-MOBILE USA, INC., et al., Defendants.

No. 05cv1167 DMS (AJB).
Aug. 11, 2008.

ORDER:

(1) DENYING ATTM'S MOTION TO COMPEL ARBITRATION AS TO THE CONCEPCION PLAINTIFFS; and

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS WITH PREJUDICE

DANA M. SABRAW, District Judge.

In this putative class action, Plaintiffs assert that Defendants-cellular phone companies and other entities involved with the sale of wireless telecommunication services-have engaged in the unfair and deceptive practice of charging consumers sales tax on the full retail value of cellular phones that were advertised as "free" or at substantial discounts, in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.,* and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq.* In addition, based on these alleged violations, Plaintiffs seek restitution under the

Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770, *et seq*.

Presently before the Court are two motions. First, Defendant AT & T Mobility LLC (formerly Cingular Wireless, abbreviated herein as "ATTM") moves to compel Plaintiffs Vincent and Liza Concepcion to arbitrate their claims, pursuant to an arbitration clause contained in their Wireless Service Agreement ("WSA"). (Doc. 128). In addition, Defendants T-Mobile USA, Inc., Omni Point Communications, Inc. dba T-Mobile, TMO CA/NC, LLC (collectively, "T-Mobile"); Cellco Partnership dba Verizon Wireless, Verizon Wireless LLC dba Verizon Wireless, Airtouch Cellular dba Verizon Wireless (collectively, "Verizon"); and Go Wireless, Inc. ("Go Wireless") move pursuant to Rule 12(b)(6) to dismiss with prejudice the Second Amended Complaint ("SAC"). (Doc. 78).

For the reasons discussed below, the Court denies Defendant ATTM's motion to compel arbitration, and denies Defendants' collective motion to dismiss Plaintiffs' UCL and FAL claims. Further, the Court grants Defendants' motion to dismiss Plaintiffs' CLRA restitution claim with prejudice.[1]

V. FACTUAL AND PROCEDURAL BACKGROUND

Defendants are engaged in the business of marketing and selling wireless telecommunications products, including cellular phones, accessories and service. These products often are sold as part of a

[1] Plaintiffs' motion to strike the declaration of Richard Nagareda is denied. [Doc. 145].

"bundled" transaction, whereby the consumer receives a free or significantly discounted cellular phone, in exchange for agreeing to a wireless service contract for a specified duration. However, when Defendants offer the free or substantially discounted phone as part of a bundled transaction, they generally charge consumers sales tax (approximately 7.75%) based on the full retail value of the phone. Plaintiffs contend this practice is improper because Defendants should not charge sales tax on a phone advertised as "free," and should not charge sales tax on the full retail value of a phone advertised at a substantial discount.

A. The Concepcion Plaintiffs and their Arbitration Agreement

In February 2002, Plaintiffs Vincent and Liza Concepcion, allegedly relying upon advertising by ATTM (then Cingular), entered into an agreement for cellular phone service and the purchase of cellular phones at a Cingular retail outlet in Carlsbad, California. In conjunction with the purchase of the service package, the Concepcions were not charged for the phone. (*Id.*) However, Defendants charged the Concepcions a total of $30.22 in sales tax, based on the full retail value of the phone.

The Concepcions' WSA incorporates a statement of "Terms and Conditions," which is a one-page, legal-sized paper with approximately 5/16-inch side margins, completely filled with terms printed in small font. Near the bottom of the page, within a paragraph limiting liability, the word "ARBITRATION" appears in bold, capital letters. The next sentence cautions the consumer to "read this paragraph carefully." It then provides that the customer and ATTM (then Cingular) are to "negotiate in good faith to set-

tle any dispute or claim arising from or relating to this Agreement. If CINGULAR and you do not reach agreement within 30 days, instead of suing in court, CINGULAR and you agree to arbitrate any and all disputes and claims . . . arising out of or relating to this Agreement." (Berinhout Decl., Exh. 11). In setting forth the terms of the arbitration, the agreement specifies, "CINGULAR and you agree that no Arbitrator has the authority to (1) award relief in excess of what this agreement provides; (2) award punitive damages or any other damages not measured by the prevailing party's actual damages; or (3) order consolidation or class arbitration." (*Id.*) However, under the agreement, "either party may bring an action in small claims court." (*Id.*).

The Concepcions renewed their wireless service on several occasions, including in May 2003 and February 2005. Each time, they agreed to ATTM's then-current Terms of Service. Each time, the Terms of Service contained a "change-in-terms" clause, which authorized ATTM to "change any terms, conditions, rates, fees, expenses, or charges regarding your service at any time" and explained that ATTM would "provide [its customers] with notice of such changes . . . either in [their] monthly bill[s] or separately." (*Id.,* Exh. 16).

On March 27, 2006, the Concepcions filed their Complaint in this Court. In May 2006, they again renewed their wireless service. In December 2006, ATTM revised its arbitration provision and mailed the revised version to all customers, including the Concepcions, in an envelope containing their monthly invoice. ATTM "slightly clarified" the language of the revised provision in January 2007, and included the new provision in the January, February,

and March 2007 bills. The revised version continues to require all disputes between ATTM and its customers to be resolved either in small claims court or through individual arbitration paid for by ATTM, rather than class-wide arbitration.[2] (*Id.,* Exh. 2). However, the new arbitration provision contains significant changes, as follows:

1. If the arbitrator issues an award in favor of a California customer that is greater than "[ATTM]'s last written settlement offer made before an arbitrator was selected" but less than $7,500, ATTM will pay the customer $7,500 rather than the smaller arbitral award. (The "Premium")

2. If the arbitrator awards a customer more than ATTM's last written settlement offer, then "[ATTM] will . . . pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the customer's] attorney reasonably accrues for investigating, preparing, and pursuing [his] claim in arbitration."

3. ATTM "agrees that it will not seek" attorneys' fees and expenses "if it prevails in arbitration," even though "under some laws [ATTM] might have a right to [such an award]."

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[2] The new arbitration provision, as well as the former provision, provide: 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))." Any such costs are capped at $125. (AAA Consumer Procedures § C-8).

4. Punitive damages may be awarded to the same extent such damages would be available in court.

5. For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a telephonic hearing, or a "desk" arbitration wherein the arbitration is conducted "solely on the bases of documents submitted to this arbitrator."

6. Arbitration will take place in the county of the customer's billing address.

(*Id.* Exh. 2). Accordingly, the new arbitration provision provides the customer, among other things, a $7,500 Premium and double attorneys' fees if the customer prevails in arbitration, a right to pursue punitive damages, venue convenient to the customer, and a choice of in-person, telephonic or "desk" (*i.e.,* submitted in writing) arbitration. In addition, ATTM agrees to waive recovery of its attorney's fees and costs if it prevails in arbitration.

According to ATTM, the "vast majority of disputes" never reach arbitration, because ATTM's customer service department resolves the disputes by phone or e-mail. For example, in 2007, ATTM provided over $1.3 billion in manual credits to resolve customer concerns and complaints. (Motion to Compel at 5, citing Berinhout Decl. ¶ 16). A customer whose concerns are not satisfactorily resolved can take the next step-as required by the arbitration provision-and provide ATTM's legal department with notice of the dispute. To begin this process, a customer may send a letter or fill out a one-page "Notice of Dispute" form that may be obtained from ATTM's

website. On the Notice of Dispute, the customer provides basic contact information, and a brief description of the nature of the dispute and the relief sought. (*Id.,* Exh. 8). ATTM generally responds to the Notice of Dispute form by making a settlement offer within 30 days of receiving the form. The process initiated by mailing the Notice of Dispute is fairly characterized as an "informal claims process." If the dispute is not resolved to the customer's satisfaction at this stage, the customer may submit a one-page "Demand for Arbitration" form to AAA and ATTM. The demand form is available on the websites of both AAA and ATTM. (*Id.*). Also posted on ATTM's website is a layperson's guide on how to arbitrate a claim. (*Id.,* Exh. 3). Between December 23, 2006 and February 8, 2008, ATTM received over 570 Notices of Dispute and Demands for Arbitration. (*Id.* at 5, citing Berinhout Decl. ¶ 19).

B. The Voorhies and Laster Plaintiffs

On November 14, 2004, relying upon Cingular's advertisement for a free phone, Elizabeth Voorhies entered into a bundled transaction to obtain a new cellular phone and wireless service from Cingular, through its authorized agent, Go Wireless, in Poway, California. (SAC ¶ 5). In conjunction with the purchase of the service package, Voorhies was not charged any amount for the phone. (*Id.*) However, Defendants charged Voorhies a total of $10.31 in sales tax, based on the retail value of the phone. (*Id.*)

On February 23, 2005, relying upon T-Mobile's advertized free phone, Jennifer Laster entered into a bundled transaction with T-Mobile at its Mission Valley Center Store in San Diego, California, whereby she purchased a new phone and activated cellular service. (SAC ¶ 3). At some time during the sales

transaction, Laster received a one-page transaction receipt which indicated, among other things, that while T-Mobile did not charge any amount for the phone, it was charging $28.22 for sales tax based on the full retail value of the phone. (*Id.* ¶ 22).

C. Procedural History

In May 2005, Laster, Voorhies, and an additional named Plaintiff, Andrew Thompson, each filed suits in the Superior Court of San Diego County. Subsequently, Laster's and Voorhies's cases were removed to this Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1711, *et. seq*. Thompson's case was dismissed without prejudice.

On August 12, 2005, Laster and Voorhies filed a First Amended Complaint against Defendants. They alleged for themselves and on behalf of all consumers who purchased a cellular phone as part of a bundled transaction, that Defendants' practice of advertising "free" or significantly discounted phones, while charging sales tax on the full retail value of the phones, constitutes misleading and unlawful business acts and practices under California's FAL, UCL and CLRA. On November 30, 2005, the Court addressed motions brought by Cingular and T-Mobile to compel Laster and Voorhies to arbitration, and motions by all Defendants to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court denied the motions to compel, finding the arbitration agreements to be procedurally and substantively unconscionable under California contract law. The Court further determined that the Federal Arbitration Act did not preempt California contract law. In addition, the Court granted the motions to dismiss the FAC as follows: The UCL and FAL claims were dismissed with leave to amend because

Plaintiffs failed to allege they relied upon the alleged misrepresentations in deciding to purchase Defendants' cell phones. (Order, Doc. 61 at 17). The CLRA claim was dismissed with prejudice because Plaintiffs failed to comply with the statutory notice requirement set forth in California Civil Code § 1782. (*Id.* at 18).

On December 22, 2005, ATTM and T-Mobile appealed the Court's order denying their motion to compel arbitration, and moved for a stay of proceedings pending appeal. (Doc. 65-68). The other Defendants joined in the motion. (Doc. 81, 83). On December 30, 2005, Plaintiffs filed a Second Amended Complaint. (Doc. 70, "SAC"). On January 19, 2006, Defendants filed the instant motion to dismiss the SAC, (Doc. 78), and on February 8, 2006, Plaintiffs opposed both the motion to dismiss and the motion to stay proceedings pending appeal. (Doc. 86, 88). On March 14, 2006, the Court granted the motion for stay pending appeal. (Doc. 98). On September 7, 2006, the Court briefly lifted the stay to consolidate *Concepcion v. Cingular Wireless LLC,* (Case No. 06cv0675) with the *Laster* case. The Court then reimposed the stay pending appeal on all consolidated actions. (Doc. 109).

On August 17, 2007, the Ninth Circuit Court of Appeals in *Shroyer v. New Cingular Wireless Services,* held that a class arbitration waiver in Cingular's standard contract for cellular phone services was unconscionable under California law and that the Federal Arbitration Act did "not preempt a holding that the waiver is unenforceable." 498 F.3d 976, 978 (9th Cir. 2007). Because the class arbitration waiver in *Shroyer* is substantively identical to the waiver provision that this Court found to be unconscionable in

Laster, the Court of Appeals ordered all parties to "file simultaneous letter briefs . . . discussing the effect, if any, of [*Shroyer*]" on the appeal. (Doc. 110). In response, on September 28, 2007, all Defendants save T-Mobile voluntarily dismissed their appeals. (Doc. 111).

In T-Mobile's remaining appeal, the Ninth Circuit affirmed this Court's order in an unpublished memorandum dated October 25, 2007. (No. 06-55010). On January 25, 2008, T-Mobile sought review of the Ninth Circuit's decision in the Supreme Court of the United States. (Doc. 114). This Court thereafter held a status conference on February 5, 2008, at which the previously imposed stay pending appeal was lifted. The Court granted the parties' request to supplement the motion to dismiss the SAC, which was heard on May 30, 2008. On May 27, 2008, the United States Supreme Court denied T-Mobile's petition for certiorari. (Doc. 151).

In the meantime, on March 13, 2008, ATTM filed a motion to compel the *Concepcion* Plaintiffs to individual arbitration, arguing they are subject to a class arbitration waiver that is substantively distinct from the waiver rejected by both this Court in *Laster* and the Ninth Circuit in *Shroyer*. (Doc. 127). All motions have been fully briefed, and oral argument was heard on the motions on May 30, 2008.

VI. DISCUSSION

A. Motion to Compel Arbitration

1. Legal Standard

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving transactions in interstate commerce. 9 U.S.C. § 1; *Moses H.*

Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Congress intended courts to construe commerce as broadly as possible. *Simula, Inc. v. Autoliv, Inc.,* 175 F.3d 716, 719 (9th Cir. 1999). Pursuant to Section 2 of the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether to compel a party to arbitration, a district court may not review the merits of the dispute; rather, the court must limit its inquiry to: (1) whether a valid agreement to arbitrate exists, and, if it does (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1130 (9th Cir. 2000). Finally, a court interpreting an arbitration agreement must give due regard to the federal policy favoring arbitration; ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *AT & T Techs. Inc. v. Comm. Workers of America,* 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("in the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.")

ATTM contends the Concepcions are bound by the terms of the arbitration agreement contained in their wireless service agreement, and therefore, this Court is not the proper forum to adjudicate their claims. The Concepcions argue the arbitration provision is not enforceable against them for two reasons: (1) the December 2006 revised arbitration provision does not apply because it was revised after the Con-

cepcions had filed the instant lawsuit, and (2) even if the revised provision is applicable, it (like the original provision) is unconscionable and thus, unenforceable under California law.

2. The Provision at Issue

Plaintiffs first argue the applicable class arbitration waiver is the one that existed at the beginning of this lawsuit in March 2006. Because that provision has been held to [be] unconscionable by this Court and the Ninth Circuit in *Shroyer,* Plaintiffs argue the Court must deny ATTM's motion to compel. ATTM argues the revised arbitration provision modified the original service contract between the parties and, as such, applies to the "existing claims" between the parties. The parties dispute whether the revised arbitration provision applies, as it purports to retrospectively modify the original service contract after the present litigation had already begun. (Reply at 1, citing Opp. at 1).

Both Federal and California law support ATTM's argument that the 2006 revision applies. Under the FAA, "an agreement in writing to submit to arbitration an *existing controversy* arising out of . . . a contract or transaction . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). Thus, several district courts have enforced revisions to an arbitration provision made after litigation has begun, so long as the terms of the agreement reflect that intent. *See, e.g. Enderlin v. XM Satellite Radio Holdings, Inc.,* 2008 WL 830262, at *7 (E.D. Ark., March 25, 2008) (collecting cases); *Goetsch v. Shell Oil Co.,* 197 F.R.D. 574, 577-79 (W.D.N.C. 2000) (compelling individual arbitration based on terms of provision that had been revised to add a class waiver after the commencement of litigation). ATTM's 2006

provision plainly applies to **"all disputes and claims** between us . . . including . . . claims that arose before this or any prior Agreement . . . [and] claims that are currently the subject of purported class action litigation in which you are not a member of a certified class . . . ." (Berinhout Decl. Exh. 1, at 2). (emphasis in original). Accordingly, under Federal Law, the revised arbitration agreement applies.

Plaintiffs argue the purported modification is ineffective because it was implemented through improper contact between Defendants and members of a class action, which this Court may regulate under Federal Rule of Civil Procedure 23(d). *See In re Currency Conversion Fee Antitrust Litigation,* 224 F.R.D. 555, 569 (S.D.N.Y. 2004). In *Currency Conversion,* the district court used its supervisory power under Rule 23(d) to refuse to enforce an arbitration provision that was retroactively imposed upon certain plaintiffs in a pending class action who were not subject to an arbitration agreement of any kind at the beginning of the litigation. Here, in contrast, the Concepcion Plaintiffs were not singled out for receipt of the revised agreement. Instead, ATTM included the revision in a mailing to all its customers. Moreover, unlike the plaintiffs in *Currency Conversion,* the Concepcion Plaintiffs agreed to arbitration at the time of the initial WSA. The revised agreement merely modified that provision.

Enforcing the modification is also consistent with California contract law. A "change-in-terms" provision authorizes a party to modify the terms of a contract unilaterally, as long as the exercise of that power is consistent with the covenant of good faith and fair dealing. *Badie v. Bank of Am.,* 67 Cal. App. 4th 779, 795-96, 79 Cal. Rptr. 2d 273 (1998). Here,

the initial WSA contained an arbitration clause and class action waiver, as did each and every WSA entered into by the Concepcions before the 2006 revision. This unilateral change did not add a new term; it merely modified an old one. *Compare Long v. Fidelity Water Sys.,* 2000 U.S. Dist. LEXIS 7827, *8 (N.D. Cal. 2000) (refusing to apply an after-the-fact arbitration clause when no such clause existed at the time litigation commenced). The terms of arbitration also were modified more favorably to Plaintiffs. As such, the modification is not unreasonable under California law.

3. Unconscionability

While federal policy favors arbitration agreements, federal courts rely on state law when addressing issues of contract validity and enforceability. *Ticknor v. Choice Hotels Int'l, Inc.,* 265 F.3d 931, 936-37 (9th Cir. 2001). Thus, generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Ticknor,* 265 F.3d at 937 (citing *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 686, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). On a motion to compel arbitration, the trial court does not determine whether the contract as a whole is unconscionable. Instead, the court is limited to determining whether the arbitration clause itself is unconscionable. *See Gray v. Conseco, Inc.,* 2000 WL 1480273 (C.D. Cal. 2000).

"Under California law, a contract provision is unenforceable due to unconscionability only if it is both procedurally and substantively unconscionable." *Shroyer,* 498 F.3d at 981 (citing *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d

76, 113 P.3d 1100 (2005)). Procedural unconscionability focuses on "oppression or surprise due to unequal bargaining power," and substantive unconscionability focuses on "overly harsh or one-sided results." *Id.* Procedural and substantive unconscionability, however, "need not be present in the same degree." *Id.* "California courts apply a sliding scale, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* (citations and internal quotations omitted). A party challenging an arbitration agreement has the burden of proving both procedural and substantive unconscionability. *Crippen v. Central Valley RV Outlet, Inc.,* 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189 (2004).

As discussed, both this Court and the Ninth Circuit in *Shroyer* addressed, and struck down, ATTM's first attempt at imposing a class arbitration waiver on its customers. In *Shroyer,* the court noted the Ninth Circuit previously struck down class waiver provisions in related situations. 498 F.3d at 981 (citing *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1176 (9th Cir. 2003) (class arbitration waiver in employment contract held unconscionable) and *Ting v. AT & T,* 319 F.3d 1126, 1150 (9th Cir. 2003) (class arbitration waiver in contract for telephone services held unconscionable)). Such contracts have been found to be procedurally unconscionable because of "the adhesive nature of the contract," and substantively unconscionable because of "the imposition of a one-sided and oppressive class action waiver provision." *Shroyer,* 498 F.3d at 981 (citations omitted). *See also Ingle,* 328 F.3d at 1176 (Circuit City's class arbitration waiver "is manifestly one-sided" given

that the company would never "bring a class proceeding against an employee").

Following *Ingle* and *Ting,* the California Supreme Court in *Discover Bank,* 36 Cal. 4th at 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, held that "at least in some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." The court in *Discover Bank* outlined the circumstances under which a class waiver provision in an adhesion contract may be subject to a finding of procedural and substantive unconscionability under California law:

> [W]hen the waiver is found in [a] consumer contract of adhesion in a setting in which disputes between the contacting parties predictably involve small amounts of damages, and when it is alleged that the a party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud . . . . (Civ. Code § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 162, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

Based on the above language, the Ninth Circuit and California courts have construed *Discover Bank* as providing a three-part inquiry to determine

whether a class waiver in a consumer contract is unconscionable: (1) whether the agreement is a consumer contract of adhesion drafted by a party of superior bargaining power; (2) whether the agreement occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages; and (3) whether it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Shroyer,* 498 F.3d at 983 (citations omitted). At the heart of this three-pronged inquiry is a concern that a party such as ATTM may "exempt" itself from wrongdoing through the imposition of a one-sided class waiver provision. As noted in *Discover Bank,* "class action waivers in such [consumer] contracts may . . . be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy."[3] 36 Cal. 4th at 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. The court in *Discover Bank* emphasized this point by stating: "[B]ecause . . . damages in consumer cases are often small and because '[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit,' . . . 'the class action is often the only effective way to *halt and redress* such exploitation.'" *Id.* (citation omitted) (emphasis added). "Fully aware that few customers will go to the time and trouble of suing in small claims

[3] The public policy referenced in *Discovery Bank* is embodied in California Civil Code § 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

court" or "pursuing other legal remedies," companies with superior bargaining power have "sought to create for [themselves] virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to [their] own rights." *Id.* at 159, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citing *Szetela v. Discover Bank,* 97 Cal. App. 4th 1094, 1100-01, 118 Cal. Rptr. 2d 862 (2002)). As noted in *Shroyer,* the court in *Discover Bank* "was concerned that when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation," *Shroyer,* 498 F.3d at 986 (original emphasis), and thus class litigation or arbitration (or some other "adequate substitute") is necessary to effectively halt and redress such potential exploitation.

Accordingly, for a class waiver in a consumer contract of adhesion to withstand scrutiny (*i.e.,* not to be found substantively unconscionable), *Discover Bank* demands that the contract provide an "adequate substitute for the class action or arbitration mechanism." 36 Cal. 4th at 162, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. In determining whether ATTM's revised arbitration provision provides an "adequate substitute," this Court must consider the benefits of class action litigation and classwide arbitration as articulated by *Discover Bank.*

First, *Discover Bank* noted the class mechanism facilitates redress to individuals whose recovery "would be insufficient to justify bringing a separate action." 36 Cal. 4th at 156, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. Second, *Discover Bank* noted the class mechanism "produces several salutary by-products including a *therapeutic effect* upon those sellers who indulge in fraudulent practices . . . ." *Id.* (emphasis

added). Finally, *Discover Bank* noted generally that (a) the availability of attorney fees to the prevailing party in arbitration is an insufficient substitute for class litigation or arbitration, and (b) "small claims litigation, government prosecution, or informal resolution" of claims involving small amounts of damages are not adequate substitutes for class litigation or arbitration. *Id.* Notably, however, the court declined to hold that class waiver provisions are *void* as against public policy (or *per se* invalid), only that they are *voidable.* The court noted: "We do not hold that all class action waivers are necessarily unconscionable." *Id.*

The question presented, therefore, is whether the arbitration provision now before the Court sufficiently addresses the concerns of *Discover Bank* and provides an adequate substitute for class litigation or arbitration. For the reasons set forth below, the Court concludes it does not.[4]

a. Contract of Adhesion

As noted, "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Discover Bank,* 36 Cal. 4th at 160, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. In its November 30, 2005 Order, this Court found that ATTM's original arbitration agreement was a con-

[4] At least one other court has addressed the arbitration provision in question and held it to be unconscionable under California law. *Steiner v. Apple Computer, Inc.,* 556 F. Supp. 2d 1016 (N.D. Cal. 2008).

tract of adhesion but noted the contract was presented to the Plaintiffs at the time of purchase (rather than in a subsequent mailer after the consumer had already purchased and activated the phone). Under such circumstances, ATTM's contract was found to be "on the low end of the spectrum of procedural unconscionability." (Order, Nov. 30, 2005 at 9). Although the revised terms of the arbitration agreement were mailed to the Concepcions after they purchased the phone, the original (less favorable) arbitration provisions were presented at the time of purchase. The subsequent mailer merely altered the existing agreement in a way that made the arbitration provisions more favorable to the Concepcions. Accordingly, the Court finds that ATTM's arbitration agreement with the Concepcions is on the low end of the spectrum of procedural unconscionability.

b. Predictably Small Amounts of Damages

The presence of predictably small amounts of damages (or individual gain) invokes the concern of *Discover Bank* that without class litigation or arbitration, individuals have no "method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Discover Bank,* 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100. If an individual's expected damages are so small as to make arbitration or litigation impractical, a class waiver is unconscionable "to the extent [it] operate[s] to insulate a party [with superior bargaining power] from liability." *Id.* at 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

This Court found ATTM's original arbitration provision met the "predictably small amounts of damages" prong of the *Discover Bank* test because in

the context of Plaintiffs' deceptive advertising claim, a consumer who pursues arbitration generally could recover no more than $30: the sales tax on the original retail price of a cellular phone. (Order, Nov. 30, 2005 at 11). In addition, ATTM's agreement to pay (sometimes significant) arbitration costs regardless of who prevailed,[5] as well as attorney fees to the prevailing party, did not change the result, because even if a consumer incurred no monetary cost, the expenditure of time, effort and emotional resources to pursue arbitration outweighed the minuscule benefits of arbitration. As Judge Richard Posner famously observed, "only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656 (7th Cir. 2004). The net effect: the arbitration provision and class action waiver operated to preclude recovery for ATTM's customers with disputes involving small amounts of damages. Such customers would not bother to pursue individual litigation or arbitration, and if precluded from participation in classwide litigation or arbitration, would effectively have no redress.

While the new arbitration provision does not change the amount of actual damages at issue ($30), it does exponentially change the amount of potential recovery in arbitration.[6] If ATTM denies an informal claim (*i.e.,* the Notice of Dispute) or offers less than

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[5] The minimum cost for "in-person" arbitration is $1,700: $750 in administrative fees, a $200 case service fee, and $750 in arbitrator fees. (Motion to Compel at 15, n.13.)

[6] $7,500 is the amount of the Premium in California because it is the maximum allowable recovery in small claims court. The amount changes based upon the small claims limit in the relevant jurisdiction.

the consumer requests-which are the only scenarios that would prompt a consumer to pursue arbitration-the amount of the consumer's award upon prevailing at arbitration jumps to $7,500 (the "Premium") plus double attorney's fees, if the consumer is represented by counsel. With the potential to recover two hundred fifty times one's actual damages, ATTM argues individual claimants are much more likely to pursue arbitration if they are unsatisfied with ATTM's offer during the informal claims process. The Court agrees.

Plaintiffs argue the *potential* for recovery of the $7,500 Premium and double attorneys' fee is "so remote" as to be illusory because, in the informal claims process, ATTM will simply *pay* its customers' demand in full rather than incur costs of arbitration (approximately $1,700 for in-person arbitration), as well as Premium-based damages ($7,500) and double attorney's fees.[7] (Oppo. to Motion to Compel at 8-9). ATTM's self-interest, according to Plaintiffs, is "best served" by offering the consumer his or her full demand so ATTM "will never pay the full $7500 due under the 'premium.'" (Oppo. to Motion to Compel at 9.) Because the Premium "only becomes available if the customer prevails after rejecting [ATTM's] last

[7] As ATTM notes, a consumer's Notice of Demand may include a request for attorney's fees as the attorney fee provision in question "supplements" any right to such fees that the customer may have under applicable law. Thus, a customer who prevails on a statutory claim that allows for attorney's fees is entitled to a fee award, and the fee is doubled if the arbitrator awards the customer more than ATTM's last written settlement offer. Accordingly, ATTM has an incentive to include reasonable attorney's fees in its settlement offers, and has a policy of doing so. (Reply to Motion to Compel at 6.)

settlement offer and is awarded a greater amount than that last settlement offer," Plaintiffs predict, "[ATTM] will surely never allow this situation to arise." (*Id.* at 8, n.4).

Plaintiffs' argument actually supports ATTM's position for two reasons. First, Plaintiffs acknowledge that the new provision prompts ATTM to *accept liability,* rather than "escape liability," for small dollar claims made during the *informal claims process* (even for claims of questionable merit and for claims it does not owe). Plaintiffs complain that if ATTM is faced with even a "$5 claim" it "would be best served to offer $6, $10, or even $100 just to ensure [it] will never pay the full $7,500 due under the Premium." (Opp. to Motion to Compel at 9). By this argument, however, Plaintiffs acknowledge that as a result of the Premium, a consumer is virtually guaranteed a payment by ATTM of up to twenty times ("$100" for a "$5 claim") his or her actual damages simply by filling out a one-page form to initiate the informal claims process.

If ATTM resolves its customer's claims through prompt payment, and does so for fear of being subjected to its contract-based $7,500 Premium, the Premium has served a noble purpose, even if no customer ever actually receives it. The customer will have been made whole, or at least satisfied, and with minimal effort, as he or she need only fill out and mail a one page Notice of Demand which is readily accessible on ATTM's website. The process is quick, easy to use, and prompts full or, as described by Plaintiffs, even excess payment to the customer *without* the need to arbitrate or litigate. In this way, the revised arbitration provision sufficiently incenti-

vizes consumers in disputes involving small dollar amounts to pursue ATTM's informal claims process.

Second, if the informal claims process fails, the $7,500 Premium is available to induce the consumer to pursue individual arbitration. Notably, Plaintiffs do not argue that the $7,500 Premium will not apply, or is insufficient to induce a customer to pursue arbitration, if a claim is not resolved during the informal claims process. It is therefore evident that if ATTM does not resolve the claim informally and to the consumer's satisfaction, the $7,500 Premium remains available as a substantial inducement for the consumer to pursue the claim in arbitration.[8]

The next issue is whether the arbitration provision adequately addresses the "policy at the very core of the class action mechanism . . . to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Discover Bank,* 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citing *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Plaintiffs argue that a "class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (Oppo. to Motion to Compel at 20, quoting *Discover Bank,* 36 Cal. 4th at 157, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (citations omitted).

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[8] In *Steiner,* 556 F. Supp. 2d at 1030, the court concluded that the Premium is illusory and thus, an insufficient incentive for individuals to pursue *arbitration.* The court, however, did not address the effect of the Premium as an incentive for individuals to pursue the *informal claims process.*

As discussed, under the revised arbitration provision, nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full. In contrast, it appears that consumers who are members of a class do not fare as well. To recover, individual class members generally must file a claim form similar to that contemplated by ATTM's informal claims process. But the incentive for a class member to file a claim form is low. ATTM cites studies that show class members rarely receive more than pennies on the dollar for their claims, and that few class members (approximately 1-3 %) bother to file a claim when the amount they would receive is small. (Motion to Compel at 14, n.12.) Plaintiffs do not dispute these statistics. What class actions *actually* offer to individual consumers with small dollar claims is highly relevant to the determination of whether a proposed alternative procedure is an adequate substitute for class litigation or arbitration.

ATTM argues its arbitration procedure is an adequate substitute to the class mechanism: "[T]here is nothing unfair about the tradeoff that [ATTM's] customers make: In exchange for relinquishing the ability to bring or join a class action, customers receive a dispute resolution mechanism that affords them either a quick settlement offer that often will amount to a full recover), or cost-free arbitration that provides them with the potential for a significant 'individual gain' in the form of a $7,500 premium-an amount that substantially exceeds the size of claims they might make." (Reply Brief at 7.) The new arbitration provision "allows both customers and ATTM to win: Customers' claims are resolved quickly and fully, and ATTM achieves significant savings on transaction costs (which in part are passed on to cus-

tomers) while retaining good relations with its customers." (Reply Brief at 7.) The Court agrees.

Given the unrebutted class action statistics above-pennies on the dollar with few consumers actually submitting claims in class litigation-as well as Plaintiffs' concession that the Premium prompts early payment of small dollar claims, the record before the Court demonstrates that a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars. Because the arbitration provision provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim, the subject provision is an adequate substitute for class arbitration as to this prong of *Discover Bank.*

c. A negations that ATTM Deliberately Cheated Large Numbers of Consumers out of Individually Small Sums of Money

While the second prong of *Discover Bank* addresses the class action function of providing *recovery* to individuals with disputes involving small amounts of damages, the third prong addresses the "role of the class action in *deterring* . . . wrongdoing." *Discover Bank,* 36 Cal. 4th at 156, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (emphasis added). Instead of focusing on the ability of a proposed alternative mechanism to provide relief to aggrieved consumers, this prong speaks to the concern that eliminating class actions "would permit the defendant to retain the benefits of

its wrongful conduct and to continue that conduct with impunity." *Id.* Accordingly, under this prong, the Court addresses whether-given the allegations in this case-the elimination of a class action remedy in exchange for ATTM's proposed dispute resolution mechanism would undermine this stated public policy and vitiate the "therapeutic effect" of class actions in "halting" fraudulent conduct. *Id.* at 156-61, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

In its November 30, 3005 Order, the Court held that this prong was met because Plaintiffs alleged that ATTM was engaged in a scheme to illegally charge a relatively small amount of money for a phone it advertised as "free." (Order, Nov. 30, 2005 at 12). The allegations in this respect have not changed, but as discussed in some detail above, the arbitration provision has dramatically changed. Nevertheless, Plaintiffs argue that "[e]ven if [individual] potential plaintiffs would be willing to fight to protect their rights [over small damage claims], many claims still will go unremedied in the absence of a class action because, especially *as to deceptive practices* directed toward unwary consumers, *'[m]any plaintiffs may not know their rights are being violated.'"* (Oppo. at 21) (citation omitted) (emphasis added). According to Plaintiffs, prohibiting class litigation and requiring individual actions would leave many consumers "like the class members Plaintiffs represent with no recovery at all for violations of their rights, even if there would be attorneys willing to take their cases. Only the class procedures heralded in California courts-and their provisions for notifying potential class members-can address these problems." (*Id.* at 21, 30 Cal. Rptr. 3d 76, 113 P.3d 1100) (emphasis added).

ATTM did not respond to this argument in its reply brief. However, in its moving papers, ATTM argued, but provided no evidence, that the Premium-based incentive is "likely to facilitate the development of a market for fair settlement" of consumer claims. (Motion to Compel at 15, citing Nagareda Decl. ¶ 11). It is unclear how this "market" would be created, whether such a market presently exists, and how such a market would apprise consumers of alleged wrongdoing. Presumably, if a market for fair settlement exists, it may provide an adequate substitute for class litigation as those who are harmed by, but unaware of, wrongdoing apparently would be provided notice and have an opportunity to redress such wrongdoing through ATTM's informal claims and arbitration process. In this way, such a market theoretically would have a deterrent effect on alleged corporate wrongdoing.

While ATTM notes that the revised arbitration provision has been in place for approximately 70 million customers for over 15 months, it does not point to any claims (Notices of Dispute or Demands for Arbitration) for deceptive advertising. In addition, ATTM's informal resolution of disputes during 2007 for $1.3 billion appears to involve "billing problems," and not claims for deceptive advertising or other alleged wrongdoing by ATTM. (*See* Berinhout Decl. ¶¶ 15-16.) Further, of the 570 people who have pursued arbitration against ATTM (either through the filing of a Notice of Dispute or Demand for Arbitration), ATTM has failed to identify the nature or amount of these claims. Without such evidence, the Court is unable to determine (a) whether a market for settlement exists; (b) if so, whether the market created by the arbitration provision is an adequate substitute for class arbitration *vis-a-vis* putative

members of a class who are (absent notice) unaware of the violations alleged in the present litigation; and (c) whether such a market would adequately deter ATTM's alleged wrongdoing.

ATTM may complain that it has received few claims, or perhaps no claims, for deceptive advertising because no such wrongdoing occurred, and that the alleged wrongdoing is manufactured by Plaintiffs' lawyers to create a putative class action. That may be true; or Plaintiffs' claim may be true (that the alleged wrongdoing exists but few consumers are aware of it). Regardless, at this stage: of the proceedings, Plaintiffs have stated a claim (as discussed *infra* at § II, B) and the Court's inquiry necessarily is focused on whether the arbitration provision is an adequate substitute for the deterrent effect of the class action mechanism. Plaintiffs argue that if the arbitration provision is enforced, ATTM will simply pay the Concepcions what they are owed to avoid risking payment of the Premium, and thereby also avoid potential liability to thousands of other customers who have no knowledge of the alleged wrongdoing. ATTM, Plaintiffs say, will therefore have no incentive to stop its wrongdoing.[9]

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[9] While the revised arbitration provision permits punitive damages claims, which could be used by an individual claimant in arbitration to deter alleged corporate wrongdoing, the United States Supreme Court has effectively limited punitive damages awards to ten times compensatory damages, making the maximum possible damage award $75,000. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.") One, or even several, such damage awards would be an insufficient substitute for the

(footnote continued on next page)

Faithful adherence to California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages, compels the Court to invalidate ATTM's class waiver provision. A class waiver provision may "serve[ ] as a disincentive for [a party with superior bargaining power] to avoid the type of conduct that might lead to class action litigation in the first place." *Discover Bank,* 36 Cal. 4th at 159, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (quoting *Szetela,* 97 Cal. App. 4th at 1101, 118 Cal. Rptr. 2d 862). "By imposing [a class waiver] clause on its customers, [a party with superior bargaining power] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits . . . ." *Id.* This overarching policy concern of deterring corporate wrongdoing is not sufficiently addressed by ATTM's revised arbitration provision.

In balancing the relative procedural and substantive unconscionability of the revised arbitration provision, Plaintiffs have met their burden of establishing that the provision is unconscionable as ap-

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deterrent effect caused by the threat of large damage awards that frequently accompany class action lawsuits.

plied to them under California law.[10] ATTM's motion to compel arbitration is denied.[11]

B. Motion to Dismiss

1. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. Fed. R. Civ.P. 12(b)(6). *See Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds* by *Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in plaintiffs favor. *See Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United*

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[10] Although the Concepcions arguably would be better off to individually pursue their claim in arbitration (as their net recovery may be larger and more quickly paid through ATTM's informal claims and arbitration process), they have demonstrated by this litigation their desire to forego their individual rights under the arbitration provision in order to pursue relief on behalf of a larger group of consumers.

[11] For the reasons set forth in the Court's November 30, 2005 Order, the Court declines to conclude that the FAA preempts any holding that ATTM's arbitration provision is unenforceable under California law.

States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

Defendants seek dismissal of Plaintiffs' SAC on four grounds: (1) Plaintiffs lack standing to bring their claims under California's UCL and FAL because they fail to adequately plead actual reliance and injury in fact; (2) Plaintiffs cannot allege false or deceptive advertising as a matter of law because California law permits the sales tax disclosure complained about by Plaintiffs; (3) Plaintiffs' claim fails because the "chain of causation" was broken when the sales tax was disclosed on the sales receipt; and (4) Plaintiffs' claim for, restitution under the CLRA should be dismissed because, as this Court has previously ruled, their failure to provide statutory notice permits them to receive only injunctive relief. These arguments are addressed in turn.

2. Standing

Section 17200 of the California Business and Professions Code defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." Cal. Bus. & Prof. § 17200. By defining unfair competition to include any "unlawful . . . business act or practice," the UCL permits violations of other laws to be treated as unfair competition that are independently actionable. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999). As such, any violation of the FAL necessarily violates the UCL. *Committee on Children's Television, Inc. v. General Foods Corp.,* 35 Cal. 3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660 (Cal. 1983).

The FAL, which is codified at Section 17500, provides: "It is unlawful for any person . . . corporation or association, or any employee thereof . . . to disseminate or cause to be so made or disseminated [,] any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised." Cal. Bus. & Prof. § 17500. California courts have noted that the FAL prohibits "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar,* 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183 (Cal. 1985).

Proposition 64, which was approved by California voters on November 2, 2004, amended certain provisions of the UCL and FAL. Before Proposition 64 passed, an uninjured private party could bring a UCL (or FAL) action on behalf of the "general public," and could obtain remedies on behalf of nonparties. Proposition 64 amended Section 17204 of the UCL, as follows: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code § 17204. Section 17203, which was also amended by Proposition 64, now provides, with respect to representative private plaintiffs: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . . ." Cal. Bus. & Prof. Code § 17203. Accordingly, after Proposition 64, a person seeking to represent claims on behalf of others must show that

(1) he or she has suffered an injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising.

In the November 30, 2005 Order, the Court found that the first prong-injury in fact was-properly alleged. With respect to the second prong, the Court found Plaintiffs had not adequately alleged causation. Plaintiffs' SAC now includes detailed allegations regarding each Plaintiff's reliance on the advertisements to enter the store and purchase the cellular phones. These allegations are sufficient.

3. Safe Harbor

Defendants next argue California law permits the sales tax and level of disclosure that Plaintiffs contend is actionable. In particular, 18 C.C.R. § 1585(b)(3) *requires* "retailers of . . . wireless communication device[s]" to "report and pay tax measured by the unbundled [full retail] sales price of the device and may collect tax or tax reimbursement from its customer measured by the unbundled sales price." Moreover, California Civil Code § 1656.1(a) permits retailers to disclose the sales tax to be collected in the sales contract, sales receipt, or in its advertising. Since Plaintiffs admit the sales tax was disclosed in the sales receipt, Defendants argue Plaintiffs cannot state a claim for Defendants' failure to disclose the tax in their advertising. *See Cal- Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th 163, 183, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999) ("[a]cts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law.")

Although wireless communication retailers are required to pay sales tax on the full retail value, may

pass that tax onto consumers, and do not have to advertise the tax, no California law sets forth the disclosure required when the sales tax passed onto the consumer is calculated based upon a price *other than the advertised price.* At this stage of the proceedings, the Court declines to dismiss the action.

4. Causal Chain

Defendants note the SAC alleges that by the time Plaintiffs had completed the transaction, the sales receipt made them aware of the tax and they easily could have stopped the transaction and avoided injury. According to Defendants, the "causal chain is broken by Plaintiffs' acknowledgment that [the] sales tax was listed on the sales receipts." (Def. Supp. at 6). A completed sale, however, is not the only injury Plaintiffs allege.[12] Plaintiffs allege they were induced to "shop for and consider signing a service contract." (SAC ¶ 21). Damages allegedly arising out of events occurring before the sale took place also can be linked to the advertising. Accordingly, the Court declines to find that all damages have been foreclosed because the tax appeared on the sales receipt.

5. Restitution

Defendants also seek dismissal of Plaintiffs' claim for restitution under the CLRA because they

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[12] The Court declines to address whether a "chain of causation" is broken as to damages allegedly occurring during or after the sale, since the SAC adequately alleges damages arising out of events that took place before the sale. In addition, it is unclear whether Plaintiffs received a sales receipt before or after signing a service contract, and whether there was an opportunity to avoid paying the sales tax after it was disclosed.

failed to give proper notice to Defendants of their CLRA claim, as required by California Civil Code § 1782. Section 1782(a) provides:

> Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:
>
> (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.
>
> (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.
>
> The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

Cal. Civ. Code § 1782(a). While litigating the motion to dismiss the FAC, Plaintiffs conceded they failed to comply with the thirty day notice requirement set forth in § 1782. (*See* Order, Nov. 30, 2005 at 17). On those grounds, the Court dismissed the damages claims with prejudice pursuant to *Outboard Marine Corp. v. Superior Court,* 52 Cal. App. 3d 30, 40-41, 124 Cal. Rptr. 852 (1975) ("The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements . . . . This clear purpose may only be accomplished by a literal application of the notice provisions."). Howev-

er, the claim for injunctive relief was not dismissed because Section 1782(d) authorizes the filing of an action for injunctive relief without first providing notice to the vendor. (Order at 18).

Plaintiffs now claim that restitution, like injunctive relief, is not subject to the notice: requirement. California Civil Code § 1782(d) provides that an "action for injunctive relief . . . may be commenced without compliance with subdivision (a)." Section 1782(a) specifies that the notice: requirement applies to an "action for damages." Plaintiff argues the notice requirement should be: interpreted to encompass only claims for "actual damages," while Defendant argues it should encompass claims for all types of monetary damages, including restitution.

Section 1780, which list the available remedies for violations of the section, includes "actual damages," injunctive relief, and restitution of property. To interpret Section 1782's notice requirement for "damages" to be limited to "actual damages" would render the word "actual" in Section 1780 redundant. In addition, if the Legislature intended Section 1782's reference to "damages" to include *only* "actual damages," it is unclear why it would specifically exempt *only* injunctive relief from the notice requirement in Section 1782(d). Accordingly, the Court finds that the notice requirement applies to monetary damages, regardless of whether such damages are calculated based upon the unjust enrichment of Defendant or the Plaintiffs' loss. Plaintiffs' restitution claim under CLRA is therefore dismissed with prejudice.

VII. CONCLUSION AND ORDER

For these reasons, ATTM's motion to compel the Concepcion Plaintiffs to arbitration is denied; Defendants' motion to dismiss Plaintiffs' claims under the UCL and FAL is denied; and Defendants' motion to dismiss Plaintiffs' claims for restitution under the CLRA is granted with prejudice.

IT IS SO ORDERED.

APPENDIX C

What if I am unsatisfied with the resolution AT&T offers me for a problem I am experiencing?

QUESTION:

What if I am unsatisfied with the resolution AT&T offers me for a problem I am experiencing?

ANSWER:

AT&T Mobility ("AT&T") (formerly Cingular Wireless) is committed to resolving all disputes in a fair, effective, and cost-efficient manner. Accordingly, every customer's Service Agreement provides for disputes to be resolved in binding arbitration or Small Claims Court. AT&T's arbitration provision, which is set forth verbatim below, has been designed to make arbitration as convenient and inexpensive for our customers as possible. Among other things, it specifies that AT&T will bear all of the costs of arbitration (unless an arbitrator determines that a customer's claims are frivolous), and that, under certain circumstances (explained in the arbitration provision), AT&T will pay a premium to you and your attorney if you receive an arbitration award greater than the value of AT&T's settlement offer. This right to attorney's fees supplements any right that you may have under applicable law (as explained in the provision).

As part of AT&T's commitment to the fair, effective, and cost-efficient resolution of all disputes, AT&T has made its current arbitration provision available to all current and former customers – including customers who were customers of Cingular

Wireless, the former AT&T Wireless, BellSouth Mobility, Ameritech Mobile, Pacific Bell Wireless, SBMS, SNET Mobility, and SBC Wireless. AT&T will abide by the terms of its current arbitration provision in all instances. In particular, in those rare occasions when AT&T may have a claim against a current or former customer, AT&T will arbitrate that claim or bring it in small claims court, even if a predecessor company's arbitration provision entitles AT&T to pursue such claims in any court that has jurisdiction. Customers whose contracts include arbitration provisions that differ from this current arbitration provision may, of course, arbitrate pursuant to the terms of those contracts if they prefer to do so. Similarly, it you are a former customer whose contract did not include an arbitration provision, you may arbitrate any dispute you may have under the current arbitration provision.

DISPUTE RESOLUTION BY BINDING ARBITRATION

Please read this carefully. It affects your rights.

Summary:

Most customer concerns can be resolved quickly and to the customer's satisfaction by calling our customer service department at 800-331-0500. **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction (or if AT&T has not been able to resolve a dispute it has with you after attempting to do so informally), we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdic-**

tion. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** AT&T will pay all costs of arbitration, no matter who wins, so long as your claim is not frivolous. Moreover, in arbitration you are entitled to recover attorneys' fees from AT&T to at least the same extent as you would be in court. In addition, under certain circumstances (as explained below), AT&T will pay you and your attorney a special premium if the arbitrator awards you an amount that is greater than what AT&T has offered you to settle the dispute.

Arbitration Agreement:

(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising); claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and claims that may arise after the termination of this Agreement. References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, succes-

sors and assigns, as well as all authorized or unauthorized users or beneficiaries of services or equipment under this or prior Agreements between us.

Notwithstanding the foregoing, either party may bring an individual action in small claims court. **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement.

(2) A party who intends to seek arbitration must first send to the other, by certified mail, a written Notice of Dispute ("Notice"). The Notice to AT&T should be addressed to: General Counsel, AT&T Mobility LLC, 5565 Glenridge Connector, 20th Floor, Atlanta, GA 30342 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If AT&T and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or AT&T may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by AT&T or you shall not be disclosed to the arbitrator until after the arbitrator determines the amount, if any, to which you or AT&T is entitled.

You may download or copy a form Notice and a form to initiate arbitration from here:

http://www.wireless.att.com/arbitration-forms.

(3) After AT&T receives notice at the Notice Address that you have commenced arbitration, it will

promptly reimburse you for your payment of the filing fee. (The filing fee currently is $125 for claims under $10,000, but is subject to change by the arbitration provider. If you are unable to pay this fee, AT&T will pay it directly upon receiving a written request at the Notice Address.) The arbitration will be governed by the Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. (You may obtain information that is designed for non-lawyers, about the arbitration process at http://www.wireless.att.com/arbitration-information). All issues are for the arbitrator to decide, including the scope of this arbitration provision, but the arbitrator is bound by the terms of this Agreement. Unless AT&T and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your billing address. If your claim is for $10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds $10,000, the right to a hearing will be determined by the AAA Rules. Except as otherwise provided for herein, AT&T will pay all AAA filing, administration and arbitrator fees for any arbitration initiated in accordance with the notice requirements above. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose

(as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. In such case, you agree to reimburse AT&T for all monies previously disbursed by it that are otherwise your obligation to pay under the AAA Rules.

(4) If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is:

- equal to or less than the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address; and greater than the value of AT&T's last written settlement offer made before an arbitrator was selected:

then AT&T will:

- pay you the greater of (a) $5,000 or (b) the maximum claim that may be brought in small claims court in the county of your billing address ("the premium") instead of the arbitrator's award; and
- pay your attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that your attorney reasonably accrues for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium").

If AT&T did not make a written offer to settle the dispute before an arbitrator was selected, you and your attorney will be entitled to receive the premium and the attorney premium, respectively, if the arbitrator awards you any relief on the merits. The arbitrator may make rulings and resolve disputes as to the payment and reimbursement of fees, expenses,

and the premium and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the arbitrator's ruling on the merits.

(5) The right to attorneys' fees and expenses discussed in paragraph (4) supplements any right to attorneys' fees and expenses you may have under applicable law. Thus, if you would be entitled to a larger amount under the applicable law, this provision does not preclude the arbitrator from awarding you that amount. However, you may not recover duplicative awards of attorneys' fees or costs. Although under some laws AT&T may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, AT&T agrees that it will not seek such an award.

(6) The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. YOU **AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.** Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific proviso is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

(7) Notwithstanding any provision in this Agreement to the contrary, we agree that if AT&T makes any change to this arbitration provision (other

than a change to the Notice Address) during your Service Commitment, you may reject any such change and require AT&T to adhere to the language in this provision if a dispute between us arises.

If you are viewing information on devices or services, please note: content reflects instructions for devices and services purchased from AT&T.

Some differences may exist for devices not purchased from AT&T.

APPENDIX D

Courts have ruled that agreements to arbitrate on an individual basis are enforceable under the laws of the following states when (1) the consumer's share of arbitration costs is capped at or below the equivalent court filing fee; and (2) individual remedies, including statutory awards of attorneys' fees, are available.

State	Case
Alabama	*Milligan* v. *Comcast Corp.*, 2007 WL 4885492, at *2 (N.D. Ala. Jan. 22, 2007); *Battels* v. *Sears Nat'l Bank,* 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Lawrence* v. *Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups* v. *Bankfirst*, 294 F. Supp. 2d 1265, 1274-1277 (M.D. Ala. 2003); *Gipson* v. *Cross Country Bank*, 294 F. Supp. 2d 1251, 1260-1264 (M.D. Ala. 2003); *Pitchford* v. *AmSouth Bank*, 285 F. Supp. 2d 1286, 1295-1296 (M.D. Ala. 2003); *Stephens* v. *Wachovia Corp.*, 2008 WL 686214, at *6-*7 (W.D.N.C. Mar. 7, 2008)
Arkansas	*Easter* v. *Compucredit Corp.*, 2009 WL 499384, at *5-*6 (W.D. Ark. Feb. 27, 2009); *Davidson* v. *Cingular Wireless LLC*, 2007 WL 896349, at *5-*8 (E.D. Ark. Mar. 23, 2007)
Colorado	*Rains* v. *Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Bonanno* v. *Quizno's Franchise Co.*, 2009 WL 1068744, at *17-*23 (D. Colo. Apr. 20, 2009); *Ornelas* v. *Sonic-Denver T, Inc.*, 2007 WL 274738, at *5-*6 (D. Colo. Jan. 29, 2007)

State	Case
Connecticut	*Pomposi* v. *Gamestop, Inc.*, 2010 WL 147196, at *8-*11 (D. Conn. Jan. 11, 2010)
Delaware	*Edelist* v. *MBNA Am. Bank*, 790 A.2d 1249, 1260-1261 (Del. Super. Ct. 2001); *Lloyd* v. *MBNA Am. Bank, N.A.*, 27 F. App'x 82, 84 (3d Cir. 2002); *Venezie* v. *MBNA Am. Bank*, 2006 U.S. Dist. LEXIS 54014, at *3-*4 (W.D. Pa. July 16, 2006); *Forness* v. *Cross Country Bank, Inc.*, 2006 WL 726233, at *2 (S.D. Ill. Mar. 20, 2006); *Pick* v. *Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at *15 (D. Del. Sept. 28, 2001)
District of Columbia	*Szymkowicz* v. *DirecTV, Inc.*, 2007 WL 1424652, at *2 (D.D.C. May 9, 2007)
Georgia	*Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-878 (11th Cir. 2005); *Coffey* v. *Kellogg Brown & Root*, 2009 WL 2515649, at *10-*13 (N.D. Ga. Aug. 13, 2009); *Honig* v. *Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1285-1290 (N.D. Ga. 2008); *Lomax* v. *Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *McGinnis* v. *T-Mobile USA, Inc.*, 2008 WL 2858492, at *6 (W.D. Wash. July 22, 2008)
Hawaii	*Brown* v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 & n.23 (Haw. 1996)

State	Case
Illinois	*Rosen* v. *SCIL, LLC*, 799 N.E.2d 488, 494-495 (Ill. App. Ct. 2003); *Franczyk* v. *Cingular Wireless LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005); *Crandall* v. *AT&T Mobility, LLC,* 2008 WL 2796752, at *5 (S.D. Ill. July 18, 2008); *Harris* v. *DirecTV Group, Inc.*, 2008 WL 342973, at *5 (N.D. Ill. Feb. 5, 2008); *Pivoris* v. *TCF Fin. Corp.*, 2007 WL 4355040, at *6 (N.D. Ill. Dec. 7, 2007); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4-*6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)
Kansas	*Wilson* v. *Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. May 27, 2005)
Louisiana	*Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004); *O'Quin* v. *Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003)
Maryland	*Walther* v. *Sovereign Bank*, 872 A.2d 735, 750-751 (Md. 2005); *Doyle* v. *Fin. Am., LLC*, 918 A.2d 1266, 1271 n.6 (Md. Ct. Spec. App. 2007); *Snowden* v. *Check-Point Check Cashing*, 290 F.3d 631, 638-639 (4th Cir. 2002); *Jones* v. *Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4-*6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)

State	Case
Michigan	*Francis* v. *AT&T Mobility LLC*, 2009 WL 416063, at *7-*9 (E.D. Mich. Feb. 18, 2009); *Adler* v. *Dell, Inc.*, 2008 WL 5351042, at *6, *10-*12 (E.D. Mich. Dec. 18, 2008); *Copeland* v. *Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005)
Mississippi	*Anglin* v. *Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523, 528-530 (S.D. Miss. 2009); *Steed* v. *Sanderson Farms, Inc.*, 2006 WL 2844546, at *10 (S.D. Miss. Sept. 29, 2006); *In re Jamster Mtkg. Litig.*, 2008 WL 4858506, at *4-*6 (Nov. 10, 2008), *amended on other grounds by* 2009 WL 250089 (S.D. Cal. Feb. 2, 2009)
Missouri	*Blitz* v. *AT&T Wireless Servs., Inc.*, 2005 WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005); *Cicle* v. *Chase Bank USA*, 583 F.3d 549, 555-556 (8th Cir. 2009); *Pleasants* v. *Am. Express Co.*, 541 F.3d 853, 857-859 (8th Cir. 2008); *Kates* v. *Chad Franklin Nat'l Auto Sales N., LLC*, 2008 WL 5145942, at *5 (W.D. Mo. Dec. 1, 2008); *Gutierrez* v. *State Line Nissan, Inc.*, 2008 WL 3155896, at *3-*4 (W.D. Mo. Aug. 4, 2008); *Bass* v. *Carmax Auto Superstores, Inc.*, 2008 WL 2705506, at *3 (W.D. Mo. July 9, 2008)

State	Case
New York	*Hayes* v. *County Bank*, 811 N.Y.S.2d 741, 743 (N.Y. App. Div. 2006); *Ragan* v. *AT&T Corp.*, 824 N.E.2d 1183, 1193-1194 (Ill. Ct. App. 2005); *Tsadilas* v. *Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004); *Ranieri* v. *Bell Atl. Mobile*, 759 N.Y.S.2d 448, 448-449 (N.Y. App. Div. 2003); *Douglas* v. *United States Dist. Ct.*, 495 F.3d 1062, 1068 (9th Cir. 2007); *Nayal* v. *Hip Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 573 (S.D.N.Y. 2009); *Bar-Ayal* v. *Time Warner Cable Inc.*, 2006 WL 2990032, at *16 (S.D.N.Y. Oct. 16, 2006)
North Dakota	*Strand* v. *U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-927 (N.D. 2005)
Ohio	*Alexander* v. *Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770, at *3 (Ohio Ct. App. Sept. 17, 2009); *Stachurski* v. *DirecTV, Inc.*, 642 F. Supp. 2d 758, 772 (N.D. Ohio 2009); *Credit Acceptance Corp.* v. *Davisson*, 644 F. Supp. 2d 948, 958-959 (N.D. Ohio 2009); *Price* v. *Taylor*, 575 F. Supp. 2d 845, 854-855 (N.D. Ohio 2008); *Howard* v. *Wells Fargo Minn., NA*, 2007 WL 2778664, at *4-*5 (N.D. Ohio Sept. 21, 2007); *McGinnis* v. *T-Mobile USA, Inc.*, 2009 WL 4824002, at *7-*8 (W.D. Wash. Dec. 9, 2009)
Oklahoma	*Edwards* v. *Blockbuster Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005); *McGinnis* v. *T-Mobile USA, Inc.*, 2009 WL 4824002, at *7-*8 (W.D. Wash. Dec. 9, 2009)

State	Case
South Carolina	*Morgan* v. *Advance Am.*, 2008 WL 4191754, at *16 (D.S.C. Sept. 5, 2008)
South Dakota	*Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 875 n.7 (11th Cir. 2005); *Eaves-Leanos* v. *Assurant, Inc.*, 2008 WL 80173, at *7 (W.D. Ky. Jan. 8, 2008)
Tennessee	*Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 364-365 (Tenn. Ct. App. 2001)
Texas	*AutoNation USA Corp.* v. *Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003); *Adler* v. *Dell, Inc.*, 2008 WL 5351042, at *6, *10-*12 (E.D. Mich. Dec. 18, 2008); *Davis* v. *Dell, Inc.*, 2007 WL 4623030, at *6-*8 (D.N.J. Dec. 28, 2007); *Sherr* v. *Dell, Inc.*, 2006 WL 2109436, at *6-*7 (S.D.N.Y. July 27, 2006); *Provencher* v. *Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-1206 (C.D. Cal. 2006); *Hubbert* v. *Dell Corp.*, 835 N.E.2d 113, 125-126 (Ill. Ct. App. 2005); *Stenzel* v. *Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005)
Utah	*Homa* v. *Am. Express Co.*, 558 F.3d 225, 227 (3d Cir. 2009); *Spann* v. *Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 714-715 (Tenn. Ct. App. 2006).
Virginia	*Gay* v. *CreditInform*, 511 F.3d 369, 391-392 (3d Cir. 2007); *Halprin* v. *Verizon Wireless Servs., LLC*, 2008 U.S. Dist. LEXIS 28840, at *15-*21 (D.N.J. Apr. 8, 2008)

State	Case
West Virginia	*Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 501-503 (4th Cir. 2002); *Strawn* v. *AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 898-900 (S.D. W. Va. 2009); *Miller* v. *Equifirst Corp.*, 2006 WL 2571634, at *16 (S.D. W.Va. Sept. 5, 2006); *Schultz* v. *AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 692 (N.D. W. Va. 2005)