No. 55028-4 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DOUG SCOTT, LOREN TABASINKE, SANDRA TABASINSKE, PATRICK OISHI, JANET OISHI, et al.,

Appellants,

v.

CINGULAR WIRELESS,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE CATHERINE SHAFFER

APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

In *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d 293, 103 P.2d 753 (2004), and *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.2d 773 (2004), the Washington Supreme Court set out and applied two principles: arbitration clauses are substantively unconscionable and thus unenforceable if they are either (a) one-sided in favor of the stronger party; or (b) effectively exculpatory clauses. While Cingular heaps praise on the window dressing it has draped around its arbitration clause, it remains clear that the central feature of that clause—the ban on class-wide relief—runs afoul of both of these principles.

The ban on class actions is one-sided in Cingular's favor. As a number of courts have recognized, consumers often sue large corporations such as Cingular on a class-action basis, but these corporations virtually never sue their own customers on such a basis. Moreover, as the record here establishes and as many courts have recognized, without the class-action mechanism, the vast majority of individuals with small dollar claims (such as Plaintiffs here) will not be able to vindicate those claims.

Cingular offers many meritless defenses of its arbitration clause, making much of the fact that its customers are permitted to go to small claims court. In the fantasy scenario Cingular offers this Court, even if Plaintiffs are correct that it has damaged many thousands of its customers

for modest sums of money, all of those customers would (a) learn that they had been cheated; (b) formulate the proper legal theory to justify recovering those sums; and (c) affirmatively pursue Cingular in small claims court on an individual basis. This is simply implausible, given that the record demonstrates that virtually all of the individuals would have to do these three things without the aid of a lawyer, as there is no bar of consumer lawyers in Washington (or anywhere else) who handle such small cases on an individual basis.

Cingular relies heavily on *Stein v. Geonerco, Inc*., 105 Wn. App. 41, 17 P.3d 1266 (2001) (which is *not* an unconscionability case), but that case is unpersuasive here. Among other things, *Stein* was decided without the aid of the principles set forth in *Zuver* and *Adler*, and prior to nearly all of the cases decided around the country that have struck down class-action bans. More recently, Division 3 of the Court of Appeals struck a consumer contract that bans class actions. *See Dix v. ICT Group, Inc*., __ Wn. App. __, 106 P.3d 841 (2005).

Cingular cites to a number of cases from other jurisdictions that have held that it is acceptable for arbitration clauses to ban class actions, but those cases are also unpersuasive. Most of Cingular's cases are from jurisdictions which, unlike Washington, accept arbitration clauses that are one-sided in favor of the stronger party.

Finally, Cingular argues that the Federal Arbitration Act preempts any state law that would invalidate the contract provision barring class-wide relief. Cingular's preemption argument is cast as an alternative defense, but in fact it depends upon Cingular winning its arguments under Washington state contract law. In *Zuver* and *Adler*, the Washington Supreme Court rejected arguments that the FAA shields provisions in arbitration clauses that are either one-sided or effectively exculpatory clauses from generally applicable principles of state contract law.

I. CINGULAR'S BAN ON CLASS-WIDE RELIEF IS SUBSTANTIVELY UNCONSCIONABLE.[1]

[1] If Cingular's contract is substantively unconscionable, it may not be enforced. *Adler*, 153 Wn. 2d at 346–47 ("[S]ubstantive unconscionability alone can support a finding of unconscionability"). This Court should find that the same is true of procedural unconscionability. *Kruger Clinic Orthopaedics v. Regence Blueshield*, 123 Wn. App. 355, 371, 98 P. 3d 66 (Div. 1 2004) ("Consumer transactions may be invalidated for procedural or substantive unconscionability.") (citing *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1666, 1174 (W.D. Wash. 2002). In this case, Cingular's arbitration clause was sent out on a take-it-or-leave-it basis in a bill stuffer, a notoriously ineffective means of communicating to consumers that they are waiving important legal rights. Appellants' Br. at 46–49. Cingular makes much of the fact that arbitration is referenced several times, but that was easy to do in a document that it knew few consumers would read because it was embedded in a bill stuffer. In addition, Cingular essentially acknowledges that the entire wireless industry requires similar arbitration clauses. Respondent's Br. at 47–48. While Cingular argues that this does not matter, numerous courts have recognized that an absence of meaningful choice is an important factor in procedural unconscionability. *See, e.g., Ting v. AT&T*, 182 F. Supp. 2d 902, 929 (N.D. Cal. 2002), *aff'd with respect to unconscionability*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) ("Finding a carrier who did not contain such a provision was not easy."); *American General Finance v. Branch*, 793 So.2d 738 (Ala. 2000). Cingular argues that because the revised arbitration clause was less draconian than its predecessor, it cannot be procedurally unconscionable. However, the Court must consider "all the circumstances surrounding the transaction," *Adler*, 153 Wn. 2d at 345. Even if this Court does not strike Cingular's clause solely because it is procedurally unconscionable, it should consider these facts in evaluating the clause's substantive unconscionability.

A. Cingular's Ban on Class-Wide Relief Violates Core Principles Laid Down in *Zuver* and *Adler*.

1. The Ban On Class-Wide Relief Is One-Sided.

Cingular never disputes that under Washington law, a contract provision that is one-sided in favor the stronger party to the contract is substantively unconscionable. Instead, Cingular argues that its contract is not one-sided because it permits both sides to operate under the same rules. This formalistic argument is not credible.

By barring class-wide relief, Cingular strips its customers of rights that are often very important to them. By contrast, the provision takes nothing from Cingular. Throughout the U.S., consumers regularly sue major corporations—including cell phone companies—on a class-action basis. The obvious reality is that the converse never happens. One could search the case law for hours without finding a single instance where a cell phone company has ever sued its customers on a class-action basis. Simply put, Cingular is taking away a device that is predictably only used by one party. This point was strongly made in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003), which was cited by the Washington Supreme Court in *Zuver*. 153 Wn. 2d at 312. Moreover, Cingular's argument about apparent neutrality could have been made about the confidentiality clause at issue in *Zuver*—ostensibly that provision also involved "the same rules for both parties." The Washington

Supreme Court was not fooled, however, and recognized that this provision actually affected the individual plaintiffs much more negatively than it affected the corporate defendant. The same is true here.

Cingular argues (Respondent's Br. at 33, 37) that Washington law does not recognize class actions as an important device for consumers. A similar claim was rejected in *Dix*. In *Dix*, the court held that a provision in a consumer contract that would operate as a class-action ban was not enforceable under Washington law. The plaintiffs in *Dix* were Washington customers of America Online ("AOL") who, like Plaintiffs here, filed a class action alleging Consumer Protection Act ("CPA") claims. AOL moved to dismiss based on the contract's forum-selection clause, which gave Virginia state courts exclusive jurisdiction over any disputes. The plaintiffs argued that this clause was unenforceable as applied to Washington consumers:

> [B]ecause class action suits are not available in Virginia and the amount of damages suffered by each individual is probably less than $250, Washington customers have little incentive to litigate in Virginia, thereby violating the CPA's public policy of protecting this state's policy of protecting this state's citizens from unfair and deceptive business practices.

106 P.3d at 844–45. If Cingular were right that class actions were not important, the court should have rejected this argument. It did not:

> [Plaintiffs] filed their purported class action alleging, among other claims, a violation of the CPA. The CPA provides that "[u]nfair

> methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Because its purpose is "to protect the public and foster fair and honest competition," RCW 19.86.920, *the CPA does not exist merely for the purpose of benefiting an individual plaintiff.* Rather, the [statute's] purpose is to offer broad protection to the citizens of Washington from unfair or deceptive acts or practices. Requiring Ms. Dix and Mr. Smith to litigate their CPA claim in Virginia *without the benefit of a class action procedure* as is allowed in Washington therefore undermines the very purpose of the CPA, which is to offer broad protection to the citizens of Washington. The forum selection clause is unenforceable.

Id. at 845 (emphasis added; internal citations omitted).

2. The Ban On Class-Wide Relief Does Serve As An Exculpatory Clause

Under Washington law, if a provision in a contract of adhesion effectively serves as an exculpatory clause, then it is substantively unconscionable. Appellants' Br. at 19–20. Again, Cingular does not acknowledge this rule of law, but simply argues that its customers may readily pursue individual cases in small claims court. Cingular's position is implausible at best: it suggests that if it has cheated many thousands of customers out of small sums of money, that there is no need for the class-action mechanism because all of those persons will realize that they had been cheated; be able to pursue their legal claims in small claims court on an individual basis without the assistance of an attorney; and choose to devote the time and energy to this difficult task despite the small sum at issue. This same argument was made—and rejected—in the *Ting* case, as

AT&T's arbitration clause, like Cingular's, permitted its customers to pursue their claims individually in small claims court. *Ting v. AT & T*, 182 F. Supp. 2d at 915, 935–36.

Tellingly, Cingular has never offered any evidence to dispute the detailed factual testimony presented by Plaintiffs' experts, who explained that the inevitable practical effect of making the class-action device unavailable to Cingular's customers with individually small claims would be to deprive the vast majority of them of *any viable remedy*. Appellants' Br. at 4–6. Instead of producing any factual testimony to support its claim that tens of thousands of customers would be likely to pursue individual cases without attorneys in small claims court, Cingular instead now urges this Court to dismiss the unrebutted record as "irrelevant" to the "legal" question of whether its customers are left without recourse. Respondent's Br. at 27. Cingular is attempting to turn a factual issue into a hypothetical one. While the question of whether a class-action ban that strips one party of its only meaningful remedy *is unconscionable* is surely a question of law, the question of whether Cingular's class-action ban indeed strips its customers of their only remedy is a question of fact, and one that has already been answered in the affirmative. Appellants' Br. at 4–6 and 21–22. The cases cited by Cingular are not to the contrary: without the benefit of an empirical record like that established here, the

hypothetical availability of attorneys' fees in cases such as *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), was apparently sufficient for that court to speculate that alternatives to class actions would provide sufficient redress as a matter of law. In this case, however, the factual record is clear, leaving this Court free to skip the speculation and go straight to addressing the critical legal question at stake.

Cingular's attempt to discredit Plaintiffs' experts' testimony as "self-interested" (Respondents' Br. at 27) is likewise unavailing. Sally Gustafson Garratt's testimony is based not on any personal interest in seeing this case proceed on a class-action basis, but on her eight years as Division Chief for Consumer Protection in the Washington State Attorney General's office, during which her staff of over 100 employees handled more than 250,000 inquiries from consumers each year. CP at 1568–69 ¶¶ 6–7. And Cingular's baseless comments do nothing to rebut the testimony of Peter Maier, whose statement that the claims of Cingular's customers are "much too small . . . to consider litigating such a claim on behalf of an individual consumer," CP at 1582 ¶ 11, is based on his 24 years of experience as a Washington consumer lawyer, CP at 1579–80 ¶ 3.

3. An Arbitration Clause With An Unseverable Unconscionable Term Is Not Rendered Enforceable By Other "Consumer-Friendly" Terms.

Having stripped its customers of the one mechanism that would

permit most of them to effectively vindicate their rights, Cingular congratulates itself for not stripping all of the other rights from the tiny minority of customers who might proceed on an individual (albeit unrepresented) basis against it. But there is no authority for Cingular's proposition (Respondent's Br. at 33) that its class-action ban is not unconscionable because *other* terms in its arbitration clause are not unconscionable. While it is true that many courts striking down class-action bans in arbitration clauses also strike down other terms (Respondents' Br. at 33 n.14), the presence of those other illegal terms does not determine whether the *class-action ban itself* is unconscionable, but rather goes to the question of whether the *clause as a whole* is so permeated by unconscionable provisions as to be unenforceable. *See, e.g.*, *Al Safin v. Circuit City Stores*, 394 F.3d 1254, 1262 (9th Cir. 2005); *Ting*, 319 F.3d at 1149.[2] Cingular's argument here is tantamount to saying that if a company was found liable on three theories (breach of contract, fraud, and violation of the U.C.C.), the precedent relating to the U.C.C. would not apply in future cases that did not involve the other two theories.

Similarly, Cingular argues that the presence of other "consumer-

[2] Cingular's attempt (Respondent's Br. at 33) to distinguish *Ting* on grounds that the arbitration clause struck down there required the customer to split the arbitrator's fees is misleading. The provision in AT&T's clause required customers to pay the costs of arbitration only if their claims were for more than $10,000—so any difference evaporates in the context of small claims like those at issue here. 182 F. Supp. at 915, 933–34.

friendly features" (Respondent's Br. at 15) permits this Court to enforce an arbitration clause containing an unconscionable term as long as the other terms in the clause are not unconscionable. Cingular even suggests (Respondent's Br. at 11) that *Adler* and *Zuver* support this contention because the court "refused to enforce only those aspects of the challenged arbitration provisions that . . . directly interfered with the plaintiffs' ability to obtain redress." In *Adler* and *Zuver*, however, the court could enforce the remainder of the terms because the unconscionable provisions in those cases could be severed. *Adler*, 153 Wn. 2d at 358; *Zuver*, 153 Wn. 2d. at 319–21. Cingular, on the other hand, specifically drafted its contract to make certain that its arbitration clause "*in its entirety*" is "*null and void*" if the class-action ban is found invalid, CP at 355–56, indicating in no uncertain terms that its interest lies not in arbitration, but in banning class actions.[3] In sum, the presence of enforceable terms in an arbitration clause neither absolves a class-action ban of unconscionability nor permits a court to enforce the clause despite the unconscionable term.

B. The Cases Cited By Cingular In Which Courts Have Enforced Class-Action Bans Are Not Persuasive.

1. The *Stein* Case Does Not Support Cingular's Position.

Cingular's reliance on this Court's holding in *Stein v. Geonerco*,

[3] It is also noteworthy that the class-action ban is the *only term* so essential to Cingular that it cannot be severed from the arbitration clause without invalidating the entire clause.

Inc., 105 Wn. App. 41, 17 P.3d 1266 (2001), is misplaced. First, *Stein* was decided without the benefit of nearly all of the law that now governs this question. For example, when *Stein* was decided, it was not yet clear whether Washington would be one of the jurisdictions that refuse to enforce one-way, non-mutual arbitration clauses, or if Washington would join the jurisdictions that do enforce such clauses. The Washington Supreme Court's subsequent guidance in *Zuver* and *Adler* has changed the landscape fundamentally, however, as has the U.S. Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

Stein was also decided at a time when few if any courts had refused to enforce an arbitration clause that barred class actions. At the time this Court decided *Stein*, the Ninth Circuit had not yet decided *Ting v. AT&T*, 319 F.3d 1126, for example, the West Virginia Supreme Court of Appeals had not yet decided *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002), the Alabama Supreme Court had not yet decided *Leonard v. Terminix Int'l Co.*, 854 So.2d 529 (Ala. 2002), and the Western District of Washington had not yet decided *Luna v. Household Fin. Corp. III*, 236 F. Supp.2d 1166 (W.D. Wash. 2002), among many other cases.

Furthermore, the state-law principles of unconscionability that govern this case were not before the Court in *Stein*. In *Stein*, the plaintiff

argued that there was an "inherent conflict between arbitration and statutory provisions that encourage class participation," and thus that the contract at issue—which was *silent* on class actions—prevented him from filing a class action merely *by requiring arbitration.* 105 Wn. App. at 48. In light of the plaintiff's "fail[ure] to cite relevant statutory provisions that conflict with the arbitration of his claims," *id.* at 48–49, the Court found the arbitration clause enforceable.[4]

Finally, *Stein* is distinguishable in that it did not involve a small-dollar consumer claim in a case with a factual record demonstrating that no attorneys would handle such claims on an individual basis. *Stein* concerned a dispute about a warranty that affected the purchase of a home—the kind of claim that can typically be pursued on an individual basis. There was no indication in the record in *Stein* that the factors that make Cingular's class-action ban function as an exculpatory clause in the context of small consumer claims like Plaintiffs' here were present there. *See Kruger Clinic Orthopaedics v. Regence Blueshield*, 123 Wn. App. 355, 371, 98 P. 3d 66 (Div. 1 2004) ("policy considerations underlying an analysis of a consumer transaction are not at issue"), *Luna*, 236 F. Supp. at

[4] The other question facing the Court in *Stein*—whether a conflict between arbitration and class actions prevents courts from compelling class arbitration where the clause is silent—has since been answered differently by the U.S. Supreme Court in *Bazzle*, 539 U.S. 444 (which held that depending on state contract law, arbitrators may proceed on a class-action basis when an arbitration clause is silent).

1183 (distinguishing consumer claims from other types of claims in substantive unconscionability inquiry).

Finally, Plaintiffs do not argue, Cingular's gesticulations notwithstanding (Respondent's Br. at 15), that *all* class-action bans in *all* contracts are inherently unconscionable, but that a class-action ban in a consumer contract in a case involving small dollar claims that effectively insulates one party from liability cannot be enforced under Washington state law. *Stein* is not to the contrary, and Cingular's argument that it somehow has implications for this case should be dismissed.[5]

2. The Cases from Other Jurisdictions Where Courts Permitted Arbitration Clauses That Banned Class Actions Are Inapplicable and Unhelpful.

Cingular cites (Respondent's Br. at 18) a list of cases where courts in other jurisdictions have enforced arbitration clauses that prohibit class-wide relief, insinuating that this Court should enforce its class-action ban because there are supposedly more courts for it than against it. If one looks closely at the cases cited by Cingular, however, it is clear that most of them are inapposite. First, many of these cases do not involve state

[5] *Heaphy v. State Farm Mutual Automobile Ins. Co*., 117 Wn. App. 438, 72 P.3d 220 (Div. 2 2003), a U.I.M. case, is equally inapposite. The issue in *Heaphy* was whether the plaintiff's claim—that the value of her automobile had diminished following an accident and repair—was a viable question of law or fact common to a class. The court concluded that, as a matter of law, the plaintiff's claim was not amenable to a class action. Thus, the court held that "[a]bsent any showing that the class action is appropriate for this case, the possibility of class certification cannot overcome the agreement to arbitrate the issue." 117 Wn. App. at 448. Here, in contrast, there is no question that Plaintiffs' claims are precisely the kind of claims for which a class action is appropriate.

unconscionability law. Cingular cites to *Randolph v. Green Tree*, 244 F.3d 814 (11th Cir. 2001) and *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), for example. The cases turn upon the language and legislative history of the federal Truth in Lending Act. They do not look at the contract law of Washington (or any other state), and say nothing about this state's law with respect to one-sided contracts.

Second, many of the cases cited by Cingular are decisions of state law that turn upon the contract law of states that—unlike this one—accept and enforce one-sided and non-mutual arbitration clauses. State laws relating to unconscionable contracts differ enormously from jurisdiction to jurisdiction. In this state, for example, it is unconscionable for an arbitration clause to be one-sided and non-mutual.

Washington State law in this respect is consistent with the law of many other jurisdictions. *See, e.g., Armendariz v. Foundation Health Psychare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000) (unconscionable for business to require employees to submit to binding arbitration as a condition of employment while reserving right to sue employees in court, absent some special justification for disparity); Ohio, *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 862 (Ohio 1998) (noting with concern that the arbitration clause preserved for the finance company the judicial remedy of foreclosure on the debtor's mortgage but restricted the debtor's

remedies solely to arbitration); and West Virginia, *Arnold v. United Companies Lending Corp.*, 511 S.E. 2d 854, 861 (W. Va. 1998) ("allowing such a one-sided agreement to stand would unfairly defeat the Arnolds' legitimate expectations").

It should not be surprising to learn that California, Ohio, and West Virginia are all states where appellate courts have struck down as unconscionable arbitration clauses that bar class actions (which, as set forth above, are a species of one-sided, non-mutual arbitration clause). *See, e.g.*, *Ting*, 319 F.3d 1126 (California law); *Eagle v. Fred Martin Motor Co.*, 809 N.E. 2d 1161 (Ohio Ct. App. 2004) (Ohio law); *Dunlap*, 567 S.E. 2d 265 (West Virginia law).

The correlation here is strong, and it is hardly accidental. Jurisdictions (such as this one) that refuse to enforce arbitration clauses that are effectively one-sided consistently have also refused to enforce arbitration clauses that ban class actions. This fact helps explain the two-part holding of the federal district court in *Luna*, 236 F. Supp. 2d 1166. First, the court predicted (correctly, as it turns out) that the Washington Supreme Court would hold that it was unconscionable for a corporation to impose a one-sided arbitration clause upon a weaker party. Second, as a logical corollary, the *Luna* court held that the defendant's contractual ban on class-wide relief was one-sided and thus substantively unconscionable.

A number of other states have held that it is *not* substantively unconscionable for an arbitration clause to be either expressly or effectively one-sided. These courts would reject the holdings of *Zuver* and *Adler*. It should come as no surprise that most of the cases cited by Cingular come from courts applying the law of these jurisdictions. Cingular cites, for example (Respondent's Br. at 18, 26), *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). As one might predict, the Third Circuit is one of the jurisdictions that holds—unlike the Washington Supreme Court—that it is not substantively unconscionable for an arbitration clause to be one-sided and non-mutual *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183 (3d Cir. 1999).

Similarly, Cingular (Respondent's Br. at 18, 24–25, 29–30, 33) cites *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, (11th Cir. 2005). The *Jenkins* court was applying Georgia Law. *Id.* at 875. Georgia is another state in which the law—unlike the law here—permits one-sided arbitration clauses. *See Crawford v. Results Oriented, Inc.*, 548 S.E. 2d 342, 343 (Ga. 2001). Accordingly, if this Court is to follow *Zuver* and *Adler*, *Jenkins* is an untrustworthy guide.

Cingular also cites cases applying the law of jurisdictions that do not object to contractual terms that bar class actions outside of the arbitration setting. Cingular cites to *Snowden v. CheckPoint Check*

Cashing, 290 F.3d 631 (4th Cir. 2002), for example, to argue that a prohibition on class actions is not unconscionable. This is consistent with Maryland law, which differs from the law set out in *Dix*. *See Gilman v. Wheat, First Securities*, 692 A.2d 454 (Md. 1997) (enforcing forum selection clause that required consumers to bring cases in Virginia (which does not permit class actions)).

Cingular also argues that the U.S. Supreme Court approved the use of arbitration clauses to ban class actions in *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991). Respondent's Br. at 17. In *Gilmer*, however, the Court was interpreting the text and structure of the federal Age Discrimination in Employment Act, not a state law challenge to an arbitration clause such as those permitted under § 2 of the Federal Arbitration Act. The case contains no discussion of state law (much less state law limiting exculpatory clauses). *Gilmer* is also very different from this case because in *Gilmer* there was no reason to imagine that a ban on class actions would bar plaintiffs from effectively vindicating their substantive rights. Indeed, Congress was evidently aware that ADEA claims (typically claims that a person at the peak of her earning power was wrongfully terminated) are unlike small consumer claims, and that class actions are generally not necessary to provide a remedy to such plaintiffs. This is demonstrated by the fact that class actions under the ADEA

proceed on an "opt-in" basis rather than a normal opt-out process. *See, e.g., Allen v. Marshall Field & Co.,* 93 F.R.D. 438 (N.D. Ill 1982).

Finally, Cingular suggests (Respondent's Br. at 17–18) that class-action bans are never unconscionable because the class action is merely a "procedural" device, and arbitration clauses may enact any procedures imaginable without being unconscionable.[6] If Cingular's theory were the law, and corporations could impose upon consumers, in fine print adhesion contracts, any contract provision that can be characterized as "procedural," the Consumer Protection Act would be eviscerated. Drafters of adhesive contracts could evade limits on exculpatory clauses by, for example, requiring persons with small claims to travel to a completely inaccessible forum to arbitrate claims.

Fortunately for Cingular's customers and Washington consumers, the Washington Supreme Court has already flatly rejected Cingular's theory.[7] For example, a rule providing that the outcomes of all arbitration

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[6] In making this argument, Cingular relies once again on decisions by jurisdictions with well-documented disagreements with the Washington Supreme Court on issues of unconscionability. *See* discussion of *Johnson* and *Jenkins, supra*. Cingular could find equally inapt support for its argument in *Strand v. U.S. Nat'l Bank Ass'n ND*, 693 N.W.2d 918 (N.D. 2005), in which the North Dakota Supreme Court found that a class-action ban was not unconscionable because "a class action is purely a procedural right . . . not a substantive remedy." *Id.* at 926 (citations omitted). As made clear below, Washington courts have emphatically rejected any such artificial distinction between substantive and procedural rights when it comes to a one-sided arbitration clause.

[7] In so doing, the Washington Supreme Court joined a number of courts that have refused to enforce illegal terms in arbitration clauses despite their supposed procedural character. *E.g., Patterson v. ITT Consumer Fin. Corp.*, 14 Cal. App. 4th 1659 (1993) (refusing to

proceedings be kept confidential is clearly procedural, rather than substantive, in nature. But in *Zuver*, the court struck down this term as unconscionable, recognizing that such a term "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations [and would] potentially discourage[] that employee from pursuing a valid discrimination claim." 153 Wn. App. at 315. Thus, if a procedural device (such as a class-action ban) would effectively bar individuals from vindicating their substantive rights, and would have the same impact as a more direct exculpatory clause, the procedural quality of this provision does not save it from violating state laws relating to unconscionable contracts. Cingular's argument that its class-action ban must be enforced because it is "procedural" thus essentially amounts to an argument that the court wrongly decided *Adler* and *Zuver*, and should be disregarded.

C. Cingular's Argument That This Court Should Rewrite Its Contract Law Because Its Customers Would Be Better Off Without Class Actions Is Not Persuasive.

Many of Cingular's arguments as to why its contract is not unconscionable are really policy arguments against the entire notion of enforcing consumer protection laws through the class-action device. According to Cingular, consumer protection class actions are bad because

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enforce arbitration clause that imposed excessive costs upon California consumers and required them to arbitrate their claims in Minnesota).

corporations are forced to raise their prices whenever they are held accountable for violating consumer protection laws. Respondent's Br. at 16. These sweeping notions—that the majority of consumer protection lawsuits should be wiped away and large corporations should be trusted to do what's right—would be better addressed to the legislature, but they certainly do not represent the law of Washington. As set forth in *Dix*, the policy of Washington State is to make the class-action device available to its citizens, to ensure that Washington consumers have a meaningful forum in which to bring their claims.

In any case, Cingular's self-serving explanations as to why there should be no effective legal checks upon its power are unpersuasive as a matter of policy. Cingular offers no proof that being held accountable under consumer protection laws will increase the costs of goods or services. In fact, a recent study has demonstrated that consumer class actions often reduce costs.

> [W]hen it comes to class action lawsuits to remedy fraudulent practices, there is no question that litigation reduces the prices that consumers pay.
>
> Most class actions are aimed at undisclosed fees, markups, kickbacks, and other over charges that chisel consumers in small quantities. Often obscured by complicated billing statements, these hidden costs enable businesses to advertise one price, but secretly charge a higher amount. This undermines consumers' ability to comparison shop, and benefits unscrupulous businesses at the expense of more honest competitors.

Public Citizen, *Six Common Transactions That Cost Less Because of Class Actions* (Aug. 20, 2003), at www.citizen.org/congress/civjus/ class_action /articles.cfm?ID=10278. The study gives concrete illustrations of how consumer class actions have reduced the prices that consumers must pay for a range of goods and services. For example, FleetBoston Financial Corp. was charging $35 for a "No Annual Fee" credit card before a class action was brought against it, and $0 for such a card afterwards. Similarly, MCI was charging $2.87 a minute for phone calls on Sundays (despite an advertisement promising that calls could be made for five cents a minute) before a class action was filed against it, and then charged the promised five cents per minute after the class action.

In addition, the argument that enforcing consumer protection laws will drive up prices rests upon the faulty assumption that corporations pass on to their consumers all profits realized from breaking consumer protection laws. In fact, anyone familiar with today's economy will recognize that corporations do a great many things with such income other than pass it on to consumers. *See, e.g.*, Claudia L. Deutsch, *Executive Pay: My Big Fat C.E.O. Paycheck*, N. Y. TIMES, April 3, 2005, at 31 (C.E.O.'s at large companies paid average of $9.84 million in 2004, up 12 percent from 2003). There is no evidence—and no reason to suspect—

that corporations who keep their ill-gotten gains when they break consumer protection laws will pass on those gains to their consumers.

II. THE FEDERAL ARBITRATION ACT DOES NOT PREVENT THIS COURT FROM APPLYING GENERALLY APPLICABLE PRINCIPLES OF WASHINGTON STATE CONTRACT LAW TO CINGULAR'S BAN ON CLASS-WIDE RELIEF.

Cingular argues that even if its contractual ban on class-wide relief is unconscionable under Washington state contract law, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, nonetheless preempts that law. First, Cingular asserts that "there is no general principle of Washington law precluding class-action waivers." Respondent's Br. at 12. Cingular's argument is wrong on several levels. There decidedly is a generally applicable principle of Washington state contract law that contracts of adhesion with one-sided provisions that favor the more powerful party are unconscionable and unenforceable. Appellants' Br. at 11–16. If this Court finds that a contract term barring consumers from pursuing class-wide relief is a one-sided provision that favors Cingular, this will be an application of a generally applicable rule of Washington state contract law and by Cingular's own logical admissions will not be preempted by the FAA.

Similarly, there is a generally applicable rule of Washington State contract law that contracts of adhesion that serve as exculpatory clauses

are unconscionable and unenforceable. Appellants' Br. at 19–20. If this Court credits the testimony from Mr. Maier and Ms. Garratt, and if this Court agrees with the numerous authorities discussed in Appellants' Brief at 20–29 and concludes that Cingular's contractual ban on class-wide relief does serve as an exculpatory clause, then a ruling for Plaintiffs will again be an application of a generally applicable rule of Washington State contract law. By acknowledging that the FAA does not preempt "general principle[s] of Washington law" (Respondent's Br. at 12), Cingular has hinged its FAA preemption argument on its weak factual arguments that banning class action has no effect on its customers. In addition, as discussed above, Cingular's assertion that no general principle of Washington law precludes class-action waivers is disproved by *Dix*.

Cingular's second preemption argument is that "even if there were such a general rule prohibiting class-action waivers, that rule would frustrate the purposes of the FAA," because class actions are supposedly neither speedy nor inexpensive. Respondent's Br. at 12, 38–45. This argument is entirely without authority. As Plaintiffs pointed out in our opening brief (at 33–34), this Court and the Washington Supreme Court have made abundantly clear that arbitration clauses are not to be enforced where they run afoul of generally applicable principles of state contract law. *Kruger*, 123 Wn. App. at 368; *Adler*, 153 Wn. 2d at 342. Cingular

cites no case holding that a generally applicable principle of state law is overridden by some federal principle favoring "speedy and inexpensive" resolutions of cases. In *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985), moreover, the Court held that the FAA permits the enforcement of arbitration clauses even where doing so would cause multiple proceedings, because saving time was not the overriding policy concern under the FAA.

Finally, Cingular's premise that a class-action ban leads to speedier and less expensive resolutions of cases is only imaginable if one presumes that the point of the class-action ban is to bar consumers from bringing cases at all. If one were to accept the premise in Cingular's brief that tens or hundreds of thousands of individual consumers would all bring individual actions in small claims court and/or arbitration, then it is clear that these duplicative adjudications of identical cases would hardly be speedier or less expensive than a class-wide proceeding. In short, with respect to FAA preemption, Cingular implicitly acknowledges that the point of its class-action ban is to save money by barring its consumers from bringing cases at all. This idea of "speedier and inexpensive resolutions"—not allowing cases to be pursued at all—is decidedly not consistent with the FAA's purpose. As Appellants' Opening Brief recounts (at 20, 37–38), numerous courts have recognized that arbitration is only favored under the FAA where it allows individuals to effectively

vindicate their individual rights.

CONCLUSION

This Court should find that Cingular's unseverable class-action ban is unconscionable, hold the arbitration clause unenforceable, and reverse the superior court's decision.

Respectfully submitted this 22nd April, 2005

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