No. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CINGULAR WIRELESS,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already received extensive briefing on the merits of this appeal, and particularly how the issues posed here may be informed by cases from this Court's jurisprudence. This Supplemental Brief will avoid repeating the discussion set forth before the Court of Appeals. Nonetheless, because the issues raised in this appeal are of such exceptional significance, because two important decisions have come down from other courts, and because Respondent Cingular Wireless ("Cingular") has interposed a great number of arguments in support of its arbitration clause, Petitioners are grateful for the opportunity to expand upon some of their points in this Supplemental Brief.

First, since the close of the earlier briefing, two courts have decided cases that strongly support Petitioners' position in this matter. Of particular interest is *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), where the California Supreme Court held that a contract provision barring class actions that is very similar to the provision at issue here was unconscionable under California law with respect to consumers with small claims. While there was a dissent relating to a choice-of-law issue not relevant here, every member of the court agreed that the Federal Arbitration Act did not preempt California state law barring class action

bans. In addition, the Missouri Court of Appeals recently held that a class action ban in a wireless telephone contract is unconscionable. *Whitney v. Alltel Communications*, 173 S.W.3d 300 (Mo. App. 2005).

Second, Cingular has argued that the U.S. Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that corporations may insert class action bans in arbitration clauses. While Petitioners refuted this claim on several grounds in their earlier briefing, this Brief will offer additional reasons why Cingular's argument on this point is incorrect.

Third, Cingular has suggested that contractual provisions banning class actions are not exculpatory because individual consumers will be able to find lawyers willing to handle very small cases in the hopes of recovering attorneys' fees under Cingular's contract terms, and some of the cases cited by Cingular suggest that consumers will find lawyers willing to handle such cases in the hopes of recovering statutory attorneys' fees. But Cingular's arguments are based upon unrealistic assumptions about consumer protection that are sharply at odds with the actual state of the law and the practice in the field. This Brief will more thoroughly explain why attorneys' fees provisions are not an adequate replacement for the class action device in cases that involve small individual sums, and demonstrate that in this setting a provision banning class actions still

operates as an exculpatory clause.

Fourth, Cingular has argued that the Court should disregard the portions of decisions that hold that bans on class actions are unconscionable if those cases concerned arbitration clauses with multiple unconscionable provisions. This Brief will establish that the holdings of cases such as *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), striking down class action bans cannot be ignored merely because the contracts at issue suffered from other defects as well.

Fifth, this Brief will set forth additional authorities establishing that the presumption against the preemption of state law applies with particular force in this case.

Finally, this Brief will refute some of Cingular's "sky-is-falling" policy arguments, and will demonstrate that Cingular has no valid reliance interest in insulating itself from liability by banning class actions.

ARGUMENT

I. ADDITIONAL AUTHORITY SUPPORTS PETITIONERS' POSITION THAT CINGULAR'S CLAUSE IS SUBSTANTIVELY UNCONSCIONABLE.

Petitioners have consistently argued that Cingular's class action ban is unconscionable because it effectively serves as an exculpatory clause. In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court recently struck down a similar contractual

waiver of class actions, where disputes typically involved small damages. *Id*. at 1110. While recognizing that class action waivers are not "in the abstract" exculpatory, the court found that they are exculpatory in effect for many consumers:

> [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. at 1108–09 (internal quotations and citation omitted). Based on this finding, the court held that class action waivers in adhesive consumer contracts were unconscionable applied to small-value claims. *Id*. at 1110.

Petitioners have further explained that Cingular's ban on class-wide claims also is completely one-sided because it strips its customers of their claims, but leaves its own claims protected. In *Discover Bank*, the California Supreme Court described this one-sided arrangement as follows:

> Moreover, such class action or arbitration waivers are indisputably one-sided. 'Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover Bank, because credit card companies typically do not sue their customers in class-action lawsuits.'

Id. at 1109 (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002)).

Cingular has repeatedly suggested that the only important case law favoring Petitioner's position is from California, despite the many published favorable cases from non-California courts such as Florida, Ohio, West Virginia and Alabama cited in Petitioners' briefs to the Court of Appeals. Now, Petitioners respectfully urge the Court to closely consider yet another non-California opinion that is particularly thoughtful and persuasive: *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 311 (Mo. App. 2005). In *Whitney*, the Missouri Court of Appeals refused to enforce a class action ban in a wireless telephone arbitration agreement, finding it to be "so prohibitive as to effectively deprive a party of his or her statutory rights." 173 S.W.3d at 311. While the court in *Whitney* considered additional limitations in that company's contract that are not present here, the essential exculpatory nature of the class action limitation alone is clear from the trial court's factual findings in that case:

> Here, plaintiff filed a putative class action challenging a charge of 88 cents per month. By itself, such a claim would not be economically feasible to prosecute. However, when all of the customers are added together, large sums of money are at stake. Prohibiting class treatment of these claims would leave consumers with relatively small claims without a practical remedy.

177 S.W.3d at 309. While the Missouri appellate court went beyond that finding and looked at even further evidence of unfairness, under Washington state law dealing with exculpatory and one-sided contracts,

this Court should be informed by the *Whitney* court's citation to the factual finding that the ban on class actions alone rendered the small claims at issue infeasible to prosecute. In sum, after this Court's decisions in *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d 293, 103 P.3d 753 (2004), and *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.2d 773 (2004), it was clear that Cingular's ban on class actions was of dubious legality in Washington. With the powerful new decisions in *Discover* and *Whitney*, however, the landscape has become considerably bleaker for Cingular.

Another recent case that provides analogous support to Petitioners' position is *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). In that case, the court rejected an attempt by defendants to moot out a class action by offering the class representative the maximum recoverable statutory damages. The court recognized that if defendants could so easily avoid class actions, "meritorious FDCPA claims might go unredressed because the awards in an individual case might be too small to prosecute an individual action[,] . . . frustrating the goals and enforcement mechanism of the FDCPA." 85 F.3d at 345. While *Weiss* did not involve an unconscionability challenge to a class action waiver provision, it does underscore a fundamental flaw in Cingular's approach to this action. The upshot of Cingular's arguments is that the named plaintiffs in this case could abandon their obligation to the putative class members they

undertook to represent, and seek recovery for their individual claims in an individual arbitration. Even if such an individual action made any economic sense (which it does not), Cingular's position amounts to a suggestion that it would be fair to require Petitioners to take their individual money and run. The *Weiss* case reveals the serious wrong suggested in this approach.

Finally, Cingular filed a supplemental authorities brief in the Court of Appeals that made much of *Parrish v. Cingular Wireless*, 28 Cal. Rptr. 3d 802 (2005). However, the California Court of Appeals has since reversed itself and held that Cingular's arbitration clause is unenforceable. 2005 WL 2420719 (Oct. 3, 2005).

II. CINGULAR'S CITATION TO *GILMER* IS UNPERSUASIVE.

Cingular has suggested that the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), supports its position that its class action ban is enforceable. Br. of Respondent at 17. While Petitioners' earlier briefing established that Cingular's argument is misguided, *Gilmer* is further distinguishable on several additional grounds. First, unlike the arbitration clause at issue here, the clause in *Gilmer* allowed for class arbitrations. *Id.* at 32 (noting that collective relief could be obtained in arbitration). Therefore, unlike the plaintiffs here, the

Gilmer plaintiff would not be deprived of a class remedy if arbitration were compelled. Second, *Gilmer* was not a class action, but an individual civil rights action seeking damages substantially greater than the damages sought here. Thus, the availability of a class action was not necessary for the *Gilmer* plaintiff to obtain relief. Finally, *Gilmer* is inapposite because the Court there was interpreting the text and structure of the Age Discrimination in Employment Act, not whether the arbitration clause was unenforceable as a matter of generally applicable state contract law.[1] For these reasons, *Gilmer* provides no ammunition to parties seeking to defend exculpatory arbitration clauses banning class actions against unconscionability challenges. *See Discover Bank*, 113 P.3d at 1113; *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279 (W. Va.), *cert. denied*, 537 U.S. 1087 (2002).

III. CINGULAR'S CLASS ACTION BAN IS EFFECTIVELY EXCULPATORY REGARDLESS OF THE AVAILABILITY OF ATTORNEYS' FEES OR THE POSSIBILITY OF GOVERNMENT ENFORCEMENT ACTIONS.

A. Prevailing Parties In Individual Cases Are Unlikely To Receive Full Fees.

Cingular defends its class action ban by asserting that its

[1] Cingular's reliance on *Johnson v. W. Suburban Bank*, 255 F.3d 366 (3d Cir. 2000), Br. of Respondent at 18, 26, is inapposite for the same reason. In that case, the court addressed whether class action bans are fundamentally inconsistent with federal law. However, whether a contractual term violates an entire statutory scheme is an entirely different question from whether the term is unconscionable under state contract law. *See, e.g. Discover Bank*, 113 P.3d at 1114 n.6.

arbitration clause provides for the reimbursement of attorney fees in some cases. Br. of Respondent at 4. According to Cingular, this is sufficient to ensure that attorneys will represent its customers in arbitration on an individual basis despite their small claims, in the hope that they will receive a fee disproportionate to the underlying amount in controversy. However, this speculation is belied by the evidence in this case: Cingular's own arbitration provider testified that not one Cingular customer in Washington had filed a claim against Cingular in arbitration, even *after* the attorney fee provision was added to the contract. CP at 1435 ¶ 8.

This is unsurprising, given that Cingular's clause provides that an arbitrator need not award attorneys' fees unless the arbitrator awards the consumer at least 100% of the value of her claim. Thus, for example, a customer who prevails on her breach-of-contract claim will still recover no fees if the arbitrator determines she is entitled to even one dollar less than the amount in damages demanded.

In addition, Cingular need only reimburse attorney fees that the arbitrator decides are "reasonable." CP at 356. In determining what attorneys' fees are reasonable, courts and arbitrators may well be reluctant to award fees that are out of proportion to the plaintiff's damages, no matter how much time has been invested in the case. *See, e.g., Nuttall v. Dowell*, 31 Wn. App. 98, 113–14, 639 P.2d 832 (1982) (limiting attorney

fee award to $1,400, the amount recoverable by the plaintiff for a CPA violation); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) ("Ultimately, the fee award must be reasonable in relation to the results obtained.") (internal quotations omitted); *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1335–36 (4th Cir. 1996) ("considerations of proportionality should guide the decision whether to award fees").[2]

Thus, for small-dollar cases like those at issue here—each involving a few hundred dollars or less—a fee award tied to the amount at stake will make the case a money-loser for the attorney. Many attorneys simply cannot afford to take the risk that a court or arbitrator will sharply curtail a fee award, and thus will be deterred from representing aggrieved individuals with valid claims. As Plaintiffs' expert Peter Maier, a veteran Washington consumer attorney with 24 years of experience, explained:

[2] Similarly, courts have found it unreasonable to award fees that exceed the amount at stake in the underlying litigation. *See, e.g.*, *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 932-33 (8th Cir. 2003) (instructing the district court "that any attorney's fee awarded for the proceedings on remand may not exceed one-third of the remaining amounts in controversy"); *James v. Thermal Master, Inc.*, 563 N.E.2d 917, 919 (Ohio App. 1988) (affirming trial court's decision to reduce attorney's fee in light of small jury award); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1264 (2d Cir. 1987) ("New York courts have stated that, as a general rule, they will rarely find reasonable an award to a plaintiff that exceeds the amount involved in litigation." (citation omitted)); *Strama v. Peterson*, 689 F.2d 661, 665 (7th Cir. 1982) ("usually attorneys' fees should not be granted greatly in excess of a client's recovery" (citation omitted); *In re Taylor*, 2003 WL 22282173 at *5 (Bankr. D. Vt. Oct. 1, 2003) (holding that under federal bankruptcy law, "attorney's fees in excess of the amount in controversy is prima facie unreasonable").

> Even if there is a prospect of recovering attorney fees from the Defendant, the potential of recovering attorney fees does not provide a sufficient incentive for me to take the case if the amount of damages to be recovered is only a few hundred or even a few thousand dollars. The award of attorney fees is discretionary with the court or the arbitrator, and thus is inherently uncertain in its outcome, and, in my experience, a court or arbitrator is often unwilling to award full attorneys fees even if the consumer prevails if the amount of those fees far exceeds the amount of damages.

CP at 1583 ¶ 12.

In light of this, Cingular's rosy prediction concerning the eagerness of the private bar to handle small individual consumer claims rings hollow. Even where fee-shifting statutes or contract terms apply, small claims often translate into small fees, fees that likely represent just a fraction of the attorney's costs, time and labor. And even where a few private attorneys are willing to face the risk of receiving a substantially reduced fee, that same risk will deter many others from handling such cases, and while some consumers may be able to obtain relief for their injuries, many others will not.[3] Therefore, many aggrieved consumers

[3] The cases cited by Cingular —*Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), and *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005)—do not dictate otherwise. In those cases, the courts summarily concluded, with no evidence whatsoever and on the basis of nothing but their own conjecture, that the availability of attorneys' fees guaranteed that attorneys would handle small consumer claims on an individual basis. Additionally, in those cases there was no record evidence equivalent to the evidence here showing that not a single Washington consumer has filed an individual arbitration against Cingular, despite the availability of attorneys' fees. The California Supreme Court expressly criticized *Snowden* on this ground, holding that *Snowden*'s conclusion was based on "unsupported assertions" and concluding the fee-shifting statutes do not constitute an adequate substitute for class actions. *See Discover Bank*, 113 P.3d at 1110.

will be left without recourse if class actions are disallowed. Cingular's contractual term offering to reimburse some winning plaintiffs for "reasonable" attorney fees does nothing to alter this reality.

B. Individuals With Small Claims Have Little Incentive To Seek Out An Attorney Or Pursue Their Claims.

The value of a class action is not only that it provides an incentive for an attorney to pursue claims that are otherwise economically infeasible, but also that it enables individual claimants to obtain relief that they otherwise would not be aware of or willing to pursue.

Small dollar claims will not be brought unless incentives exist for both attorneys *and* their potential clients. Even if fee-shifting provisions did provide an adequate incentive for attorneys to handle individual cases (which they do not), they fail to provide an adequate incentive for consumers to seek an attorney, because individual consumers suffering small injuries are unlikely to find it worthwhile to pursue small claims. Litigation or arbitration is a stressful and time-consuming endeavor for any plaintiff, and therefore the stakes of any case must be substantial enough so that a claimant will be willing to put up with the attendant burdens of fighting for her rights. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a

lunatic or a fanatic sues for $30.").

Moreover, even if potential plaintiffs would be willing to fight to protect their rights, 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." *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 547 (N.D. Cal. 2005) (quoting *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998)). A primary benefit of class actions is that they provide relief to all victims of a defendant's misconduct, regardless of whether the defendant's illegal activities fly under the radar screens of many injured consumers. That broad relief cannot be replicated on an individual basis unless each potential class member knows that her rights were violated. Thus, prohibiting class actions and requiring individual actions inevitably would leave many consumers like the class members Petitioners represent with no recovery at all for violations of their rights, even if there would be attorneys willing to take their cases. Fee-shifting provisions, therefore, do not adequately substitute for class actions.

C. Government Action Is Not An Adequate Alternative to Class Actions.

Cingular and its *amici* are likely to argue that it is acceptable to strip consumers of the right to seek redress for their injuries because

government agencies like the Attorney General's office and the Federal Trade Commission (FTC) can protect consumers through public enforcement actions. But an argument that it is permissible to effectively eliminate the Washington CPA's private right of action simply because there is a public right of action defies the Washington legislature's conclusion that public *and private* causes of action are necessary to effectuate the CPA's purpose of protecting consumers. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784, 719 P.2d 531 (1986) ("In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1971 amended the CPA to provide for a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.").

It is well known that despite the good intentions of state and federal agencies, they simply do not have the capability to police all consumer protection violations without private help. The U.S. Supreme Court has recognized that class actions "evolved in response to injuries unremedied by the government," not the other way around. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). Similarly, courts have held that "[t]he alternatives to the class action—private suits or government actions—have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously

contend that they are truly effective." *Eshagi v. Hanley Dawson Cadillac Co.*, 574 N.E.2d 760, 766 (Ill. App. 1991); *accord Discover Bank*, 113 P.3d at 1110 (rejecting the argument that government prosecution provides an adequate substitute to class actions).

Finally, federal and state agencies recognize that private rights of action are indispensable to effective consumer protection. *See* Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 126 (1987) (FTC encouraged adoption of state consumer protection statutes because of "the unavailability of private enforcement of the Federal Trade Commission Act"). Sally Gustafson Garratt, former Division Chief for Consumer Protection, testified in this case that the Washington State Attorney General's office often "did not have the resources to pursue [consumer cases] and relied on the private class action to correct the deceptive or unfair industry practice and to reimburse consumers for their losses." CP at 1571 ¶ 12. In sum, class actions are necessary in order to fill the void in consumer protection created by the inherent limitations of government action.

IV. PETITIONERS' AUTHORITIES MAY NOT BE DISREGARDED MERELY BECAUSE SOME OF THOSE CASES INVOLVED CONTRACTS WITH MULTIPLE UNFAIR PROVISIONS.

Cingular repeatedly argues that decisions supporting Petitioners'

argument should be accorded little weight because many of them involved contracts that not only banned consumers from bringing or participating in class actions, but that also explicitly stripped consumers of statutory remedies, imposed excessive arbitration costs on consumers, or the like. Cingular's argument is unpersuasive on several levels.

First, in a number of cases cited by Petitioners— *Discover Bank*, for example—the ban on class actions was the only flaw in the lender's contract that the plaintiffs challenged.

Second, while it is true that courts in some of Petitioners' cases considered more than one factor in determining unconscionability, in other cases the discussion of class action bans stands alone. In *Ting*, for example, it is true that the court struck down four separate elements of the arbitration clause as substantively unconscionable: the ban on class actions, the excessive costs of arbitration, the provisions stripping consumers of various substantive statutory rights, and the secrecy provision. 319 F.3d at 1126. However, there is no indication that any of these provisions would have been considered legal if only it had stood alone without the other three. Indeed, in *Zuver*, this Court relied on the *Ting* court's holding striking down the confidentiality provision without considering that term's relation to the other provisions in AT&T's contract. 153 Wn. 2d at 312–13. Like the Ninth Circuit in *Ting*, this

Court examined each component of Airtouch's arbitration clause independently in evaluating unconscionability. It was only when discussing whether the unconscionable terms could be severed from the arbitration clause that the Court considered whether, when taken together, they rendered the clause unconscionable as a whole. *Id.* at 319–20.

V. THE CONSTITUTIONAL PRESUMPTION AGAINST PREEMPTION IS PARTICULARLY POTENT HERE.

In our briefing before the Court of Appeals, Petitioners argued that because preemption constitutes a radical intrusion on a state's power, the U.S. Supreme Court has recognized a strong presumption against preemption of state laws. In its most recent preemption decision, the Court greatly amplified and clarified the scope of this presumption:

> Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law causes of action. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest.

Bates v. Dow Agrosciences, LLC, 125 S. Ct. 1788, 1801 (2005) (citations omitted). The Court further clarified that when there are two equally plausible readings of a federal statute, courts should adopt the reading that would find no preemption of state law. *Id.*

The presumption against preemption is particularly applicable here, because contract law is an area traditionally governed by the states,

and the common law of unconscionability is an area of almost exclusive state regulation. While there is a body of federal common law governing contracts in certain narrow areas (such as in collective bargaining disputes governed by federal labor laws or in certain maritime settings), few areas of law have been more deeply entrusted to the states than contract law.[4]

Furthermore, if the Court finds that it is unconscionable for corporations to bar consumers with modest claims from bringing class actions, this holding could hardly be said to conflict with federal law, because just last year Congress made clear that federal law recognizes a necessary role for class actions in some circumstances. The findings that accompanied the Class Action Fairness Act ("CAFA"), for example, state:

> Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

28 U.S.C. § 1711 note, U.S. Pub. L. l09-2, § 2(a)(1), 119 Stat. 4 (Feb. 18,

[4] *See, e.g.*, *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) ("the cases before us, which center upon appellant Northern's claim for damages for breach of contract . . . , involve a right created by *state* law . . . ."), *id.* at 90 (Rehnquist, J. and O'Connor, J., concurring) ("the lawsuit . . . seeks damages for breach of contract . . . which are the stuff of traditional actions at common law. . . . There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law."); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable"); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) ("Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.").

2005). Similarly, the Senate Report that accompanied CAFA stated:

> Class actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries. As such, class actions are a valuable tool in our jurisprudential system.

S. Rep. 109-14 at 4, *reprinted at* 2005 U.S. Cong. Code and Admin. News 3, 5 (Feb. 28, 2005).

VI. THERE IS NOTHING RADICAL ABOUT BARRING CORPORATIONS FROM PROHIBITING THEIR CUSTOMERS FROM BRINGING OR PARTICIPATING IN CLASS ACTIONS.

Cingular and its *amici* are likely to suggest that it will upset the settled expectations of the wireless industry if corporations can be held accountable for wrongdoing on a class action basis. In fact, the industry has no reasonable expectation that it should be permitted to insulate itself from class actions.

First, arbitration clauses that ban class actions are of very recent vintage. Prior to the detariffing of phone service on August 1, 2001, phone carriers' relations with their customers were governed by tariffs on file with the Federal Communication Commission. Few, if any, carriers attempted to ban class actions in these filings. Only in the wake of deregulation did companies in the industry decide to attempt to immunize themselves from effective enforcement of state consumer protection laws

by banning class actions. *Cf. In re Currency Conversion*, 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005) (prior to 1999, only two major credit card issuers had adopted arbitration clauses banning class actions).

Second, the securities industry demonstrates that mandatory arbitration can be effectively integrated with class actions in court. Under the system adopted by the National Association of Security Dealers ("NASD"), investors with individual claims against brokers are required to bring those claims in private arbitration, but brokers may not bar investors from pursuing class action claims in court. *See* NASD Code of Arbitration Procedure, § 10301(d)(3) (prohibiting arbitration of class claims in favor of litigation of all such claims). There is certainly nothing "anti-arbitration" or "anti-business" about the way that the NASD conducts its arbitration system, and it would hardly be a radical step if the effect of this Court's decision is to replicate this core element of the NASD's system for cases involving small individual claims.

CONCLUSION

The 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 9th January, 2006.

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