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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

DARCY TING, individually and on behalf of all others similarly situated, and CONSUMER ACTION, a non-profit membership organization, both as private attorneys general, Plaintiffs, vs. AT&T, a New York corporation, Defendant.	Case No. C 012969 BZ ADR **CLASS ACTION** **PLAINTIFFS' POST-TRIAL BRIEF** Trial Date: November 13, 2001 The Honorable Bernard Zimmerman

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This post-trial brief will address legal issues that were raised at the trial or after the close of previous briefing by AT&T and the Court, and supplements as well as incorporates all of plaintiffs' previous briefing in the case. This brief will not seek to summarize or re-state any of the testimony at the trial, except as it relates to the selected legal issues discussed below.

II. AT&T HAS OFFERED UNCONSCIONABLE TERMS IN THE CSA AND THEREFORE THE CONTRACT IS UNLAWFUL AND VOID

The Complaint has presented the claim that a contract can be formed in California with an unconscionable provision. The Court requested additional briefing on this issue at the close of testimony. (Trial Transcript, November 15, 2001, 685:24-688:13) Plaintiffs contend that based upon the Consumer Legal Remedies Act ("CLRA"), Civil Code, §§ 1750, *et seq*., and the Unfair Competition Law ("UCL"), Business and Professions Code, §§ 17200, *et seq.*, the answer is no.

A. Based Upon the Plain Meaning of the CLRA and its Legislative History No Contract Has Been Formed Between AT&T and its Customers Because the Offer Included Unconscionable Terms.

The Consumer Legal Remedies Act at section 1770 provides, in pertinent part, as follows:

> (a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
> . . .
> (19) Inserting an unconscionable provision in the contract.

Civil Code § 1770(a)(19).

Pursuant to § 1780 of the Civil Code, any consumer who suffers any damage as a result of any of the acts or practices listed in § 1770(a) may bring an action to recover or obtain any of the following: actual damages, an injunction, restitution, punitive damages, and any other relief the court deems proper. Civil Code § 1780(a). Further, attorneys fees and court costs are mandatory to the prevailing plaintiff in litigation filed pursuant to the CLRA. *Id.* at § 1780(d).

The CLRA contains an express statement of the legislative intent as follows: "This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical

procedures to secure such protection." Civil Code § 1760; *See also Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066, 1087, 90 Cal.Rptr.2d 334 (1999); *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 14-15, 108 Cal.Rptr.2d 699 (2001). This statement of legislative intent underscores that the CLRA was intended to require courts to consider unconscionability as an issue of contract formation. The CLRA embeds in its statutory scheme an anti-waiver provision: "Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Civil Code § 1751; *America Online, Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at 11.

Accordingly, by its plain terms, the CLRA provides that it is "unlawful" to "insert an unconscionable provision in the contract" and provides for remedies against someone who has inserted such a provision. Under standard California law of contracts, an essential element to the existence of a contract is that there is a "lawful object." Civil Code § 1550. The object of a contract must be lawful at the time it was attempted to be formed. Civil Code § 1596. A contract is not lawful if it is contrary to an express provision of law or to the policy of express law, though not expressly prohibited. Civil Code § 1667. Any contract which directly or indirectly exempts any one from responsibility for his own fraud, willful injury or violation of law, whether willful or negligent, is against public policy. Civil Code § 1668. An unlawful or illegal contract is void. *Kolani v. Gluska*, 64 Cal.App.4th 402, 406-407, 75 Cal.Rptr.2d 257, 260 (1998). Generally, courts can only reform a contract where the parties have made a mistake, and not where the purpose would be to save an illegal contact. *Id.* The doctrine that illegal or unlawful contracts are not to be enforced is not a defense to the enforcement of a contract, but instead is a rule of law that illegal contracts are never validly formed in the first place. *Id.*

AT&T's argument as set forth in tits Supplemental Trial Brief amounts to the following: since the doctrine of unconscionability as it is codified in the Civil Code at § 1670.5 serves only as a defense to a contract, the doctrine cannot mean anything more as it is codified in the CLRA at § 1770(a)(19). This position is flatly at odds with the governing case law. In *California Grocers Ass'n, Inc. v. Bank of America*, 22 Cal.App.4th 205, 217, 27 Cal. Rptr.2d 396, 403-4 (1994), the court stated:

> The doctrine of unconscionability has historically provided only a defense to enforcement of a contract, and normally cannot be used offensively to obtain mandatory injunctive relief. As embodied in Civil Code section 1670.5, the doctrine is phrased in defensive terms. . . .
>
> An affirmative cause of action for unconscionability may be provided by statute. This has occurred in the Consumers Legal Remedies Act (Civ. Code § 1750 et seq.), which expressly permits a consumer to bring an action for damages and injunctive relief based on insertion of an unconscionable provision in a contract.

AT&T's position is also at odds with the legislature's clear intention in passing the statute. The legislative history establishes a desire to enact two different statutory provisions with two purposes – one to create a defense, and one (the one relied upon by plaintiffs here) to create an affirmative cause of action for injunctive relief. The Bill Digest for AB 510 states as follows:

> **This bill contains two separate unconscionability provisions**:
>
> A. The bill amends the Consumer Legal Remedies Act by making it unlawful to insert an unconscionable provision in a contract entered into by a consumer . . . . **The consumer can also seek an injunction prohibiting further acts of the same kind** and can bring a class action on behalf of others similarly situated if certain criteria are met.
>
> B. When California adopted the Uniform Commercial Code it deleted that code's prohibition against unconscionable contracts. This bill takes that provision and adds it to the Civil Code. . . . 1. If a court finds that a contract or any clause of the contract is unconscionable it may refuse to enforce it. . . .

Bill Digest for AB 510, page 4-5 (emphasis added), Hearing Date 4/18/1979, attached to Hindin Declaration ¶ 9, as Exhibit 9. Essentially, AT&T wants this Court to overlook the first of these two separate provisions (§ 1770(a)(19), the provision creating a cause of action for affirmative injunctive relief, described in the (A.) of the Bill Digest), and pretend that the second of those provisions (the one codified in § 1670.5 of the Civil Code) is the only part of the statute carrying the force of law in California law. AT&T's approach does violence to the statute's plan of creating "two separate unconscionability provisions."[1]

[1] The case of *Marin Storage & Trucking Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal.App.4th 1042, 107 Cal.Rptr.2d 645 (2001), cited by AT&T in its supplemental brief, is contrary to the conclusions made herein. The *Marin* court did not involve the CLRA and specifically relied upon Civil Code § 1670.5 in analyzing the commercial contract at issue in that case. Because the case was not brought pursuant to any California consumer protection law, it fails to provide any support for AT&T's position. Where the action is premised upon the CLRA and UCL, it is clear that such an affirmative action may be brought attacking the formation of the contract due to the insertion of the unconscionable provision.

B. The Unfair Competition Law Provides Further Support for the Position That the Unconscionable Terms of the Offer Render the Contract Unlawful and Therefore Unenforceable.

Under California's Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq*., a plaintiff is entitled to injunctive relief and restitution where an "unlawful, unfair or fraudulent" business act or practice has occurred. "Because section 17200's definition is disjunctive, a 'business act or practice' is prohibited if it is 'unfair' *or* 'unlawful' *or* 'fraudulent.' In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa. [citation omitted]. Virtually any law-federal, state or local-can serve as a predicate for a section 17200 action." *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093, 1102-1103, 53 Cal.Rptr.2d 229 (citation omitted) (emphasis in original). The scope and history of the UCL was addressed in detail by the California Supreme Court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548 (1999). The *Cel-Tech* court stated as follows:

> [T]he unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather . . . it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice [citation and footnote omitted]. Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law."'" [citations omitted]. It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." [citations omitted]. . . .
>
> The unfair competition law . . . has a broader scope for a reason. "[T]he Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its broad sweeping language, precisely to enable judicial tribunals to deal with the innumerable' "new schemes which the fertility of man's invention would contrive." [citations omitted].

Id. at 180-181. *See also Schnall v. The Hertz Corporation*, 78 Cal.App.4th 1144, 1153, 93 Cal.Rptr.2d 439 (2000), *rev. denied*, *quoting Rubin v. Green*, 4 Cal.4th 1187, 1200, 17 Cal.Rptr.2d 828 (1993).

As alleged in the complaint, the plaintiffs have also brought this action based upon the UCL. This is a separate affirmative claim attacking contract formation due to the insertion of the unconscionable provisions into the CSA. Again, AT&T's argument is that since unconscionability

serves merely as a defense in Civil Code § 1670.5, it must not mean something more – something affirmative – in § 17200 of the Business and Professional Code. AT&T's interpretation is flatly at odds with the purpose and structure of § 17200, as it has been elucidated in the case law.

First, § 17200 "'borrows' from other laws, treating violations of those laws as unlawful practices independently actionable." *Rothschild v. Tyco Internat'l (US), Inc.*, 83 Cal.App.4th 488, 493-94, 99 Cal. Rptr.2d 721 (2000). Second, "[v]irtually any federal, state or local law can serve as the predicate for an action under § 17200 based on unlawful business practices." *Gemisys Corp. v. Phoenix American, Inc.*, 186 F.R.D. 551, 564 (N.D. Cal. 1999). The fact that Civil Code § 1670.5 does not create a cause of action for injunctive relief does not indicate that § 17200 cannot create such a claim – there are many circumstances where § 17200 creates causes of action for violations of statutes that do not do so themselves. *See Diaz v. Allstate Ins. Group*, 185 F.R.D. 581 (C.D. Cal. 1998) ("laws that have been enforced under § 17200's 'unlawful' prong include state anti-discrimination laws, environmental protection laws, state labor laws, and state vehicle laws"); *Haskell v. Time, Inc.*, 965 F.Supp. 1398 (E.D. Cal. 1997) ("A private plaintiff may bring an action under §§ 17200 and 17204 to redress any unlawful practice that does not otherwise permit a private right of action, such as a criminal statute.") Moreover, the remedies under § 17200 are cumulative to other remedies, § 17205; so there is no reason why § 1670.5's remedy (to void an otherwise enforceable contract) should bar § 17200 from creating an additional remedy (a right to a prospective injunction barring the enforcement of the unconscionable term). *Schnall v. Hertz Corp.*, *supra*, 78 Cal.App.4th at 11-52-53, 93 Cal.Rptr.2d at 446. In sum, AT&T's position is at odds with the entire nature of § 17200.

As has been shown by the plain language of the CSA and the evidence presented at the trial, the provisions of the CSA violate each of the disjunctive prongs of the UCL.

1. The Provisions of the CSA Are Unlawful.

A violation of the CLRA is separately actionable under the UCL. As noted above, by prohibiting "any unlawful business act or practice," § 17200 "borrows" violations of other laws and treats them as unlawful practices, which the UCL makes independently actionable. *State Farm Fire & Casualty Co. v. Superior Court*, *supra*, 45 Cal.App.4th at 1103, *citing Farmers Ins. Exchange v.*

Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487 (1992). The purpose of the UCL is to permit the courts broad flexibility in addressing unlawful conduct against the public. *Cel-Tech Communications v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at 181.[2]

Plaintiffs have proven a cause of action under the unlawful prong, since the CLRA makes it unlawful to insert an unconscionable provision into a contract. The CSA violates the CLRA by inserting unconscionable provisions into the CSA, including § 4, § 7, and § 8(c). This is both a violation of the CLRA and the UCL.

2. The Provisions of the CSA Are Unfair.

"Th[e 'unfair'] standard is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . [Citations omitted]'" *State Farm Fire & Casualty Co. v. Superior Court, supra*, 45 Cal.App.4th at 1103-1104, *citing Motors, Inc. v. Times Mirror Co.*, 102 Cal.App.3d 735, 740, 162 Cal.Rptr. 543 (1980); *Schnall v. The Hertz Corporation*, *supra*, 78 Cal.App.4th at 1153, *rev. denied*.

As set forth by the *State Farm* court:

> The test of whether a business practice is unfair "involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim ...." [citations omitted]. In *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, the court, acknowledging that the parameters of the term "unfair business practice" had not been defined in a California case, applied guidelines adopted by the Federal Trade Commission and sanctioned by the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244. [footnote omitted]. The court concluded that an "unfair" business practice occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*People v. Casa Blanca Convalescent Homes, Inc.*, *supra*, 159 Cal.App.3d at p. 530.)

Id. at 1104.[3]

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[2] Indeed, as the California Supreme Court noted in 1998, each time the Legislature has amended the UCL, it has broadened its coverage. In 1992, it acted to overrule a prior Supreme Court decision by stating that the law prohibited any "act or practice." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*,17 Cal.4th 553, 572,71 Cal.Rptr.2d 731 (1998).

[3] The test of unfairness in the consumer context was specifically not addressed in *Cel-Tech*, 20 Cal.4th 163.

> Next, the *State Farm* court provided the following examples of "unfair" acts under the UCL:
>
> Examples of unfair business practices include: charging a higher than normal rate for copies of deposition transcripts (by a group of certified shorthand reporters), where the party receiving the original is being given an undisclosed discount as the result of an exclusive volume-discount contract with two insurance companies [citation omitted]; **placing unlawful or unenforceable terms in form contracts** [citation omitted]; asserting a contractual right one does not have [citation omitted]; systematically breaching a form contract affecting many consumers [citation omitted] or many producers [citation omitted]; and imposing contract terms that make the debtor pay the collection costs [citation omitted].

Id. (emphasis added). As set forth by the *State Farm* court, AT&T's conduct in the instant action, i.e. placing unlawful or unenforceable terms in the form contract, is an "unfair" business practice under the UCL and as such, is actionable.

3. The Provisions of the CSA Are Deceptive and Therefore Fraudulent.

In addition to being both unlawful and unfair, AT&T's conduct was proven to be misleading, warranting relief based upon the "fraudulent" prong of the UCL. A business practice is "fraudulent within the meaning of section 17200 if 'members of the public are likely to be deceived.'" *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211, 197 Cal.Rptr. 783 (1983); *State Farm Fire & Casualty Co. v. Superior Court*, *supra*, 45 Cal.App.4th at 1105; and *People v. Dollar Rent-A-Car Systems* 211 Cal.App.3d 119, 131,259 Cal.Rptr. 191 (1989). Moreover, the deceptive nature of the practice is measured by the audience to which it is addressed. *Committee on Children's Television, supra*, 35 Cal.3d at 214.

AT&T created and disseminated the CSA in a manner that was misleading and likely to deceive the consumers to whom it was directed. AT&T admits it attempted to "reassure" its customers that nothing had changed and that they didn't have to do anything so they would not call into the IVR or write to the company and especially so they would not change long distance services. (*See* Plaintiffs' Amended Trial Brief, Section II(D)(2), pages 7 through 9) This strategy focused those customers who opened the CSA envelope on language which would cause them to throw the contents away without reading it because they didn't need to do anything and their service wasn't changing. *Id.*

AT&T argues that it attempted to focus its customers on the "dispute resolution" provision, or § 7, of the CSA by referencing the "new binding arbitration process" in the cover letter and the frequently asked questions and by stating at the beginning of § 7 that it is important to read this entire section.[4] However there is no mention in the cover letter or the FAQ of § 4 which contains the limits on AT&T's liability which combined with § 7 further insulate AT&T from any liability. This is clearly deceptive in that if someone followed AT&T's instructions and only read § 7, they would have missed § 4, which is more sweeping.

What AT&T does point out to its customers is that the "new binding arbitration process" uses an objective third party rather than a jury for resolving any disputes that may arise." (Joint Exhibit 1) Not only is there no mention in the cover letter or FAQs of § 4, there is also no mention of the ban on class actions, the secrecy provision, the excessive fees charged by the AAA, the "loser pays" rule, the shortening of the statute of limitations periods, or the fact that if you fail to pay your bill and AT&T initiates a collection action it is entitled to seek reimbursement of its costs and attorneys fees for the action (see CSA § 2e). By focusing its customers on the reassuring language and stating that "nothing has changed" when in fact there are many changes which affect substantive rights of the customers, AT&T has committed a deceptive practice which is fraudulent as defined by the UCL and subsequent case law.

III. AT&T'S SUGGESTION THAT NEW YORK LAW APPLIES CANNOT SAVE THE CSA

AT&T devotes a significant portion of its Trial Brief arguing that even if federal law does not erase all state law, that New York law, rather than California law, governs this dispute. AT&T is mistaken.

First, AT&T puts the cart before the horse. California law is very clear that a choice of law clause will not be enforced if it is unconscionable. AT&T contends that if this Court finds that a contract exists under California law, that New York law determines if that contract is conscionable,

[4] As plaintiffs demonstrated at trial through the testimony of Todd Hilsee, the reference to the "new dispute resolution provision" in the cover letter and the FAQs would have gone unnoticed by AT&T customers who opened the envelope because the focus was put on the bolded sentence of the cover letter and the statement that customers need do nothing because their service was not changing. (Trial Transcript, Nov. 13, 2001, at 129:8-13)

and thus valid and enforceable. In fact, California law is clear that choice of law contracts must pass muster under California's law of conscionability as well. As the California Supreme Court recently stated in *Washington Mutual Bank v. Superior Court*, 24 Cal.4th 906, 103 Cal.Rptr.2d 320 (2001), "Of course, choice-of-law agreements have no effect in a class action if the trial court determines that they are unenforceable. . . ." 24 Cal.4th at 918. The court went on to state:

> The weaker party to an adhesion contract may seek to avoid enforcement of a choice-of-law provision therein by establishing that "substantial injustice" would result from its enforcement . . . or that superior power was unfairly used in imposing the contract.

Id. The upshot of this is that AT&T cannot avoid California law governing the enforceability of the CSA by pointing to New York law. If plaintiffs prevail on their argument that the CSA is unenforceable under California law, then this Court should never reach New York law.

AT&T's argument is that it does not matter whether California law prohibits as unconscionable arbitration clauses that strip consumers of statutory rights and remedies and that bar class actions, because California law does not apply under its forum selection clause.[5] AT&T ignores the fact, however, that California law provides that if a forum selection clause contravenes a fundamental California policy, it will not be enforced. *See Washington Mutual*, *supra*, 24 Cal.4th at 917, 103. The same point was made most recently in *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal. Rptr.2d 699, 708 (2001), *rev. denied*, where it stated that "California courts will refuse to defer to the selected forum if it do so would substantially diminish the rights of California residents in a way that violates our state's public policy."

California law is also manifest that the provisions of the CSA violate a fundamental policy of California law. The California courts have made clear that if a forum selection clause limits the substantial legal rights of California consumers, the agreement will not be enforced. *See America Online*, *supra*, 108 Cal. Rptr.2d at 707 ("Our law favors forum selection agreements only so long as . . . California consumers will not find their substantial legal rights significantly impaired by their

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[5] While AT&T summarily asserts that the CSA is enforceable under New York law, it cites to no New York cases to support this claim. Plaintiffs have found little New York law relating to the central issues here – the unconscionability of limitations on statutory liability, the unconscionability of prohibitions on class actions, etc. It appears that New York law is far less mature and developed than California law, and that New York law provides no answer to the issues posed in this case. AT&T's premise is that it matters whether New York law or California law is applied, because New York law will permit it to limit statutory damages and ban class actions. If this premise is correct, then California law is clear that the choice-of-law clause may not be enforced.

enforcement."), and at 709 ("Forum selection clause will not be given effect if it would 'result in an evasion of a . . . statute of the forum protecting its citizens.'").

Finally, AT&T's forum selection clause only comes into effect if there was a voluntary agreement to it. *See America Online*, *supra*, 90 Cal.App.4th at 12, 108 Cal. Rptr.2d at 707 ("Our law favors forum selection agreements only so long as they are procured freely and voluntarily. . . ."). As shown in prior briefing on the Motion for Preliminary Injunction and Trial Brief, AT&T has not obtained the voluntary, knowing, assent to the CSA from the plaintiffs or the plaintiff class. (*See* Motion for Preliminary Injunction, Section III(B); Reply to Opposition to Motion for Preliminary Injunction, Section III; Trial Brief, Section VI)

IV. THIS COURT SHOULD DECLARE UNCONSCIONABLE AND ILLEGAL ALL OF SECTIONS 4, 7 AND 8(C) OF THE CSA

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745 (2000), the California Supreme Court addressed the question of whether the presence of various unconscionable provisions or provisions contrary to public policy in an arbitration agreement leads to the conclusion that the arbitration agreement as a whole cannot be enforced, or, insofar as there are unconscionable provisions, they should be severed and the rest of the agreement enforced. The Court held that contracts would not be enforced if they are "permeated" by unconscionability. *Id.* In *Armendariz*, the Court noted several factors that weighed against severance of the unlawful provisions in that case.

First, the Court noted that a factor weighing against the severance of the unlawful provisions was that the arbitration agreement contained more than one unlawful provision. 24 Cal.4th at 124. The arbitration agreement had both an unlawful damages provision and an unconscionably unilateral arbitration clause. The Court stated that "[s]uch multiple defects indicated a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id.* The Court held that, "given the multiple unlawful provisions, the trial court did not abuse its discretion in concluding that the arbitration agreement is permeated by an unlawful purpose." *Id.*

In this case, the CSA contains quite a few unlawful provisions: (a) the one-sided prohibition

on all punitive damages in § 4; (b) the prohibition on class actions; (c) the excessive fees required by AAA's Commercial Rules; (d) the confidentiality provision; (e) § 7(b)'s shortening of statutory limitations periods; (f) the one-way assignment provision in § 8(c); and (g) the one-way reimbursement of attorney's fees and costs of suit in AT&T's favor when it brings a collection action. This factor of *Armendariz* is thus plainly met here.

The Court in *Armendariz* also noted that Courts have tended to invalidate rather than restrict contractual provisions when it appears they were drafted in bad faith, *i.e.*, with a knowledge of their illegality. 24 Cal.4th at 124 n.13. Significantly, the Court reasoned that an employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter; in that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice. Because the Court resolved *Armendariz* on other grounds, it did not decide whether the state of the law with respect to damages limitations was sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that the damages clause was drafted in bad faith. *Id.*

In this case, however, for a contract term that went into effect in 2001, AT&T plainly had fair notice that it was illegal for it to attempt to prohibit all punitive damages in a contract of adhesion. As the Court in *Armendariz* stated: "The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed." 24 Cal.4th at 103.

As another factor, the court looked to whether there is a single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement. *Id.* at 124-25. The Court found that if it would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms, that this would strongly militate towards striking down the entire arbitration provision.

In this case, the Limitations on Liability provision in § 4 of the CSA would have to be re-

written to add language such as "except as provided by any statute," or by striking language referring to fraud or "any other" claims, and to write in language limiting the provision to claims for negligence (as AT&T now claims it is limited). Section 4 can not be reformed by the striking of a few words, but must be redrafted. This is not a proper role for this Court, and this Court should strike the entire section.

The same kind of issue repeatedly arises with respect to § 7 of the CSA. For the CSA to reflect AT&T's current statement of its intentions, for example, the plain language of the confidentiality provision would have to be rewritten to add some sort of limitation such as "except you may communication such information to your spouse, or your neighbor, or to people with whom you work." Section 7(c)'s loser pays rule would have to be augmented by language explaining that such loser pays fee relief is only available to "the prevailing consumer," for it to be consistent with the scheme set forth in most federal and state consumer and other remedial statutes.[6]

The upshot of this is simple – the flaws of the CSA cannot be addressed by "blue penciling" out a few words here or there. This Court would have to substantially augment the contract by drafting a variety of new provisions from the ground up. Accordingly, under the reasoning and logic of *Armendariz*, §§ 4, 7 and 8(c) must be stricken in their entirety. If AT&T wishes to amend the CSA to promulgate new dispute resolution provisions that are legal under California law, it is certainly free to do so at some future point.

V. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE FEDERAL COMMUNICATIONS ACT

A. FCC's Intent Behind Detarrifing was not to Preclude Such Actions As That Which Plaintiffs Have Brought.

AT&T's Supplemental Trial Brief argues that the FCC "agreed" in 1997 with the petition

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[6] In the related attorneys' fees context, most such statutes provided for the award of fees only for prevailing plaintiffs, not prevailing defendants. The rationale is that requiring individuals to pay a defendant's fees merely because they do not prevail would discourage plaintiffs from seeking the protection of the law. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). The *Christiansburg* logic has been applied to statutes such as the Maryland Consumer Protection Act. *See* National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 8.8.10.3 at 568 (1997) ("Courts have followed the *Christiansburg Garment* holding in [Unfair and Deceptive Acts and Practices] cases.") The *Christiansburg* rationale has also been applied to deny claims for fees to prevailing defendants for claims under the Truth in Lending Act. *See Postow v. OBA Federal S&L Ass'n*, 627 F.2d 1370, 1387-88 (D.C. Cir. 1980).

AT&T had filed with the agency. That petition argued that the FCC could not completely deregulate long distance phone services under § 201 of the Federal Communications Act ("FCA"), and also that state regulations of the terms and conditions of long distance service are preempted by the FCA. According to AT&T, even though the FCC never actually said that the FCA preempts state consumer protection laws such as those relied upon by plaintiffs here, that "statement" is implied by the fact that the FCC "granted" AT&T's petition. AT&T's argument is flatly wrong.

First, the FCC did not say that it was granting every aspect of AT&T's petition, and more importantly, the Order on Reconsideration, 12 FCC Rcd. 15,014, fails to state that state laws are preempted. While the FCC made clear that it agreed with AT&T that § 201 continues to require the FCC to play a role in regulating long distance service, it also said at ¶ 77 of that Order that "consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime." This case could not more plainly involve state consumer protection laws regarding the legal relationship between the carrier and the plaintiff class.

AT&T's reading of that Order also flatly contradicts the FCC's notice to consumers on its website that consumers "are protected by the **full range** of state laws, including those governing . . . consumer protection, and deceptive practices." (Plaintiffs' Exhibit 203, page 2 (emphasis added)) The FCC's web page directing consumers how to file a complaint with the FCC also tells consumers: "If you are not satisfied with the carrier's response to your complaint, the Commission's rules allow you the opportunity to either file a formal complaint or seek relief through civil court." (Defendant's Exhibit 302, page 5) AT&T's reading also is contrary to the statements made by FCC officials to the press, which AT&T's expert Mr. Pines testified are important "supplemental notices" about the detariffing process for consumers. (*See* Trial Transcript, Nov. 14, 2001, 484:1-16)

Second, even if AT&T's fantasy here were true, and even if the FCC were to come out with a pronouncement that state consumer protection laws are preempted by § 201 of the FCA, such a statement would simply be contrary to the statute itself. State laws may only be held to be preempted where Congress clearly expressed an intention to preempt state law. In this case, AT&T is attempting to imply preemption from the FCA's mere grant of power to the FCC. (Indeed,

AT&T's argument goes to a second level of implication, arguing that the FCC's "granting" of a multi-part petition by AT&T implies federal preemption of numerous state laws.)

Whatever the merits of this argument prior to 1996, in that year Congress could not have more explicitly declared that such an argument is not permitted by the statute after the amendments. Congress added an explicit statement to the statute, which has been codified as Note C to § 152 of the FCA, stating "**This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments."** (Emphasis added). Since the FCA does not expressly preempt state consumer protection laws, this ends the inquiry. AT&T is arguing implied preemption from a statute that expressly disclaims any implied preemption. As we established in our Trial Brief, Congress further nailed down the point in direct statements in the Conference Report accompanying the 1996 Act. (*See* Trial Brief at 24-25)

AT&T has argued in briefing relating to its Motions in Limine that the provisions of the FCA cited by plaintiffs do not apply to interstate long distance service, but only to intrastate long distance service. This argument defies the plain language of the statute. Section 152(a) begins by stating that "The provisions of this Act [47 U.S.C. §§ 151, *et seq*.] **shall apply to all interstate and foreign communication by wire . . . .**" (Emphasis added.) Thus, contrary to AT&T's suggestion, the first sentence of the section to which the "No Implied Preemption" rule was appended refers to all interstate communications. In any case, AT&T points to no (and there is no) limitation in the language of Note C to § 152 suggesting that the provision is limited to intrastate service.

As we pointed out in our Trial Brief, the FCA also contains an express Savings Clause for state consumer protection regulations. 47 U.S.C. § 253(b). (*See* Trial Brief at 23-24) AT&T erroneously suggests that this provision is limited to intrastate service. AT&T's argument ignores the fact that § 253(a) applies by its own terms to "interstate or intrastate telecommunications service." In addition, § 253 repeatedly cites to § 254 of the FCA, which also contains several references to interstate long distance service.

In sum, because Congress has expressly and explicitly rejected AT&T's preemption arguments, AT&T must ignore the terms of the FCA and attempt to squeeze an ocean out of the

sponge of the FCC's 1997 comments in the Order on Reconsideration. The FCC never said what AT&T would have wished it said, however, and in any case may not override Congress's plain command. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (holding that "no deference is due to an agency interpretation at odds with the plain language of the statute; even contemporaneous and long-standing agency interpretations must fall to the extent that they conflict with the statutory language."); *see also Hotels of the Marianas, Inc., d/b/a Hilton International Guam v. Government of Guam*, 71 F.3d 1459, 1455 (9th Cir. 1995).

B. The FCC Is Not Equipped to Handle Consumer Complaints and Does Not Handle Them "All the Time" as Professor Priest Testified.

AT&T presented the testimony of Professor George L. Priest on the issue of the adequacy of the Federal Communications Commission to respond to consumer complaints. In the words of Professor Priest, the FCC handles such complaints "all the time" and this is the "most basic activity of the FCC."[7] (Trial Transcript, Nov. 15, 2001, 565:22-566:8) Plaintiffs contend that such testimony was improper, speculative, and without foundation and so objected at the time of the testimony. In response to the testimony of Professor Priest, plaintiffs reviewed three years of the Index of the FCC Record, which is a "comprehensive compilation of decisions, reports, public notices and other documents of the" FCC and which Professor Priest insisted he reviews on a regular basis in his work. Plaintiffs have discovered a very different record than that which was testified to by Professor Priest.

Plaintiffs have attached copies of the cumulative index of the FCC Record for the years 1996, 1999, and 2000. (Hindin Decl. ¶¶ 5-7, Exhs. 3, 4, 5) The index identifies each record listed as a "case."[8] Plaintiffs have reviewed all "cases" reported as being filed by individuals, as opposed to those filed by entities which were identified with business names, for these representative three

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[7] Professor Priest testified that these conclusions are based upon his study of the "Federal Register entries and of the FCC reports, which consist predominantly of the resolution of individual complaints with regard to carrier practices, and it's given much more attention than rule making and other broader policy decisions. They're a relatively small part of anything that the FCC publishes." (Trial Transcript, Nov. 15, 2001, 569:1-6)

[8] Each "case" listed in the index can be accessed through Westlaw or Lexis/Nexis by typing in the citation as follows: (Volume of FCC Record) FCC Rcd (Case Number). For example, the citation of the case of Jeffrey Krauss in volume 14 of the FCC Record is 14 FCC Rcd 2770.

years. (*Id*.) For the majority of the "cases" wherein an individual was listed as the complainant these were not cases which could be identified as consumer complaints. *Id*. Most of the individuals were seeking licenses to broadcast a radio or cable signal or seeking to have their cable show carried by a particular public access cable station. *Id*.

Plaintiffs provide the following summary of such complaints and whether or not they were complaints by consumers[9]:

Year	**Total Number of "Cases" in FCC Record**	**Total Number of "Cases" Where Individual is Named Complainant**	**Total No. of "Cases" Which Could Be Construed as Consumer Complaints**
1996	2,859	76 (17 of which are duplicative, leaving 59)	3
1999	2,759	107 (13 of which are duplicative, leaving 94)	7
2000	3,608	91 (23 of which are duplicative, leaving 68)	6

In total over the three year period studied, only 16 consumer complaints were listed in the FCC Record, out of a total of 9,226 cases. *Id*. Based upon this ratio, the FCC's handling of consumer complaints cannot reasonably be described as happening all the time.

Plaintiffs have also reviewed the Federal Register which was allegedly reviewed by Professor Priest. The Federal Register is a compilation of all federal agency decisions regarding rule making and notices. There is a section in the Federal Register which lists the rule making and notices of the FCC for a particular time period. Plaintiffs have attached three examples of the section of index of the Federal Register which relates to the FCC for the years 1996, 1999 and 2000. (Hindin Decl. ¶ 8, Exhs. 6, 7, 8) As is clear from a review of these samples, there are no individual consumer complaints listed in this index. Based upon this public record, plaintiffs renew their objection to Professor Priest's testimony and move to strike it from the evidentiary record.

Notwithstanding Professor Priest's assertions, and in addition to the survey of the FCC Reports and Federal Register just discussed, the evidentiary record at the trial contains a wealth of

[9] In the declaration of Karen L. Hindin, plaintiffs have presented summaries of the consumer complaints. (Hindin Decl. ¶ 7)

evidence to indicate that the FCC does little to vigorously protect the interests of many long distance customers in recovering monetary compensation for damages they may have suffered.

Mr. McEldowney testified that he has experience with the FCC's response to customer complaints about long distance. (Trial Transcript, Nov. 13, 208:22-211:1) Based on this experience, he testified as follows:

> [I]n essence, the FCC is really not set up to work on individual complaints. **The general practice is pretty much just to refer them back, by the boxes, to the individual long distance companies** for them to do something with them.

(*Id*. at 209:1-6 (emphasis added)) Mr. McEldowney also testified that it took 17 years of prodding for the FCC to finally come up with "fairly decent rules" addressing slamming, for example. (Trial Transcript, Nov. 12, 196:7-11)

Furthermore, as AT&T itself has recognized, the FCC does not permit consumers to seek compensatory damages on a class-wide basis. *See In Matter of Halprin v. MCI*, 13 FCC Rcd 22,568 at ¶ 17 (1998), where the FCC stated that "class action lawsuits are not contemplated by, nor consistent with, the private remedies created under §§ 206 through 209 of the Act. Therefore, although other consumers situated similarly to complainants might be entitled to damages pursuant to § 208(a) of the Act, the remedy available to these customers is to file their own § 208 complaints. . . ." As plaintiffs have repeatedly made plain in previous briefing, the law of conscionability in California as explicated by the California Supreme Court is that it is not an adequate remedy to say that every victim of a systematic wrongdoing has the right "to file their own complaints." For whatever reasons (resources, statutory or administrative constraints, or a preference that such matters be handled in the courts as consumers exercise their rights as described on the FCC's website), the FCC has established a system that California law recognizes will not constitute an adequate remedy for the vast majority of consumers.

In addition, the trial testimony included Mr. Pines' recognition that AT&T's customers would have received a "supplemental notice"about detariffing in an opinion piece by Jane Bryant Quinn that stated "You're not losing any federal consumer protection because you never had any. The FCC didn't review the rates and terms, it simply filed whatever the phone companies sent in." (Trial testimony, Nov. 14, 517:8-11) While Ms. Quinn's statement cannot be used for the truth of

the matter asserted, it is clear that many customers will not share Professor Priest's rosy perceptions of the FCC's effectiveness, and that perception alone is likely to lead many of them not to pursue remedies with the FCC.

VI. CALIFORNIA LAW DOES NOT REQUIRE A SHOWING OF SURPRISE OR LACK OF MEANINGFUL CHOICE TO ESTABLISH THAT A CONTRACT IS UNCONSCIONABLE

As our preceding briefing makes clear, plaintiffs must establish both procedural and substantive unconscionability. A stronger showing on one prong may make up for a weaker showing on the other. *Carboni v. Arrospide*, 2 Cal.App.4th 76, 83, 2 Cal.Rptr.2d 845 (1991); *see also Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745 (2000). While many contracts are procedurally unconscionable, most challenges to contracts fail to establish that the agreements are substantively unconscionable.

Plaintiffs have argued that AT&T's contract is procedurally unconscionable and that it fails under all four factors considered by California courts: it is a contract of adhesion, it was imposed upon the weaker party by the stronger party, there is a lack of meaningful choice for consumers, and the contract's terms will be a "surprise" to most of AT&T's customers. Plaintiffs have never suggested that it is necessary for them to make a strong showing of all four factors to prevail in their challenge to the contract, however, and it is clear under California law that no such showing is necessary.[10]

In the California Supreme Court's most recent and comprehensive discussion of unconscionable contract terms (and particularly such terms in the context of agreements to arbitrate), it required no showing of surprise or meaningful choice. In *Armendariz v. Foundation Health Psychcare Serv.s, Inc.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745 (2000), there was no showing of surprise: the plaintiff had affirmatively *signed* two separate documents containing conspicuous arbitration clauses. There was also no showing of lack of meaningful choice – it is clear that the plaintiff could

[10] It should also be noted that "The burden should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein." *Ilkhchooyi v. Best*, 37 Cal.App.4th 395, 45 Cal.Rptr.2d 766 (Cal. Ct. App. 1995).

have obtained employment with any number of other employers.[11] Nonetheless, the Court readily found the contract at issue to be procedurally unconscionable,[12] and cited repeatedly throughout its analysis of unconscionability to the case of *Stirlen v. Supercuts, Inc.*, 51 Cal. App.4th 1519, 60 Cal.Rptr. 28 138 (1997). The *Stirlen* court stated in the clearest possible terms what is required to establish procedural unconscionability:

> **In the present case, the threshold question is whether the subject arbitration clause is part of a contract of adhesion, thereby establishing the necessary element of procedural unconscionability.**

51 Cal. App.4th at 1533 (emphasis added). The court went on to define a contract of adhesion as "a standard contract, 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." *Id.*

Stirlen's command in this respect was followed by another California Court of Appeals just a few weeks ago, in *Flores v. Transamerica Homefirst, Inc.*, 113 Cal.Rptr.2d 376 (2001):

> Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion -- i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. . . . **A finding of a contract of adhesion is essentially a finding of procedural unconscionability.**
> . . .
> In sum, the undisputed facts indicate that the arbitration agreement was imposed upon plaintiffs on a "take it or leave it" basis. **The arbitration agreement was a contract of adhesion and thereby procedurally unconscionable.**

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[11] A brief tour of California cases striking down contracts as unconscionable demonstrates that in a great many cases, there was no showing or indication that a party could not have obtained the good, service or employment elsewhere. *E.g., Bolter v. Superior Court*, 87 Cal.App.4th 900, 104 Cal.Rptr.2d 888 (2001) (arbitration clause requiring plaintiff to go to Utah to dispute a claim was unconscionable, no discussion of whether plaintiff could not obtain a franchise to clean rugs from other franchisers not imposing such a requirement); *Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App.4th 1659, 18 Cal.Rptr.2d 563 (1993) (arbitration clause unconscionable where it required prohibitive fees and an inconvenient forum, no indication whether consumer could obtain a loan from some other lender without being required to agree to such provisions); *Spence v. Omnibus Indus.*, 44 Cal.App.3d 970, 119 Cal.Rptr. 171 (1975) (arbitration clause imposing prohibitive fees through American Arbitration Association was unconscionable, no discussion of whether plaintiff could not have had home remodeled with other contractors who did not include such fees in their contracts). In short, this is a factor that courts sometimes consider, but it is not a requirement that must be present in all cases.

[12] The Court held that the contract was adhesive as it "was imposed on employees as a condition of employment and there was no opportunity to negotiate." *Armendariz v. Foundation Health Psychcare Servs., Inc., supra*, 24 Cal.4th at 115. After discussing the risks involved when one side can exert pressure on the other, and the risks of one-sided substantively unconscionable terms, the court then turned to the employee's specific substantive unconscionability claims. *Id.* Under AT&T's proposed approach, the California Supreme Court should have held the contract to be procedurally conscionable because there was no surprise and the person could have gotten another job, and should have never reached the issue of substantive unconscionability.

Id. at 381-382 (citations omitted, emphasis added). *See also California Grocers Ass'n, Inc. v. Bank of America*, 22 Cal.App.4th 205, 214, 27 Cal. Rptr.2d 396, 401 (1994) ("The notion of 'procedural' unconscionability merely addresses the question whether a contract is adhesive.").

Plaintiffs believe that they have established far more than the minimum that is necessary to demonstrate that the CSA is procedurally unconscionable. AT&T should not be permitted to rewrite California law to require a greater showing on this point than that demanded in the *Stirlen* case. Having conceded that the CSA is a contract of adhesion, California precedent dictates that AT&T has effectively conceded procedural unconscionability. (Undisputed Fact 22).

There is nothing radical about this law, moreover. While a great many contracts fall within the minimum standards for procedural unconscionability, very few of them strip the weaker parties of rights and remedies guaranteed to them by California's consumer protection laws. It is only in this sort of unusual situation that a contract of adhesion takes on practical significance. As the California Supreme Court has stated;

> To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' . . . Thus, a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules legislative or judicial operate to render it otherwise.

Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 819-20, 171 Cal.Rptr. 604 (1990) (*Graham* involved no surprise, as the wealthy and sophisticated plaintiff had signed no less than four contracts containing an arbitration clause).[13]

VII. THE LAKE, SNELL, PERRY SURVEY AND THE TESTIMONY OF CELINDA LAKE IS ETHICAL AND SHOULD BE RELIED UPON BY THIS

[13] This fact also addresses the argument made by counsel for AT&T in closing at the Trial that plaintiffs were unrealistic, because plaintiffs would supposedly require AT&T to go to the great expense and inconvenience of establishing individual accounts with each member of a household. In fact, plaintiffs have no problem with AT&T having a single account with a household, where only one person reads the mailings from AT&T. When AT&T chooses to strip statutory and constitutional rights from its customers in a way that California law recognizes to be substantively unconscionable and beyond their reasonable expectations, however, *then* (but only then) does it take on legal significance that AT&T's mailings are not in fact read or understood by most of its customers. *See Patterson*, 14 Cal.App.4th at 1666 ("there was evidence in the declarations of several plaintiffs that they had not read the arbitration provision nor had any ITT employee pointed it out to them at the time they signed the loan agreement. **While failure to read the provision does not excuse compliance with it, it does establish actual surprise** the unfairness of which is reinforced by ITT's failure to call the arbitration clause to the attention of its borrowers." (Emphasis added, citations deleted)

COURT

At the trial Professor Steckle raised questions about the ethics of Celinda Lake regarding the alleged breach of confidentiality of the names of the survey participants. AT&T's attempt to make an issue of "confidentiality" is a red herring. In fact, it was AT&T who requested that plaintiffs produce the survey interview forms which recorded the participants responses in the first place. (Hindin Decl. ¶ 3, Exh. 1) AT&T first requested such information prior to the deposition and then again at the deposition of Ms. Lake and confirmed this request in writing. (Hindin Decl. ¶ 4, Exh. 2) It was not until plaintiffs suggested that AT&T could clear up any confusion about whether or not the survey participants were in fact all AT&T long distance customers as opposed to wireless, internet, cable, etc. customers, that AT&T devised this new vehicle to attack Ms. Lake's credibility, claiming that she somehow breached confidentiality by providing to AT&T exactly what it asked for in the first place.[14]

Professor Steckle's testimony regarding the 2 million AT&T customers who were not long distance customers and how that would affect the survey results lacks foundation. AT&T has had every opportunity to check its own records to confirm which survey participants it claims were not AT&T long distance customers when they responded to the survey. It has not done so. AT&T's attack on Ms. Lake and the survey is predicated on the fact that its own internal surveys match up closely with the results of the Lake, Snell, Perry survey. (*See* Trial Brief at II(D)(3)) This Court should confirm its prior ruling on the motion *in limine* made on November 6, 2001 that the presumption is that such information would not have been in AT&T's favor.

In keeping with this Court's guidance at preliminary discovery hearings, plaintiffs treated AT&T's written demand for this documentation (subsequently repeated by counsel for AT&T on the record during Ms. Lake's deposition) as if it were a formal discovery request backed by the legal force of a subpoena. In addition, plaintiffs and Ms. Lake were following the understanding of the parties that documents produced that contained identifying information as to individual consumers would be kept confidential. This understanding was based in part upon AT&T's assertions in this

[14] As this Court will recall, plaintiffs agreed to enter into a protective order which would govern this litigation and as such any documents produced by Ms. Lake.

Court in the context of the CSA's secrecy provision that the Federal Communications Act prohibits the public disclosure of this information. While Ms. Lake generally zealously protects the confidentiality of identifying information, in this case her understanding was that she was obligated to produce this information by a directive bearing the effect of a court order and that the confidentiality and security of the information was protected by both the force of a federal statute and by a good faith agreement between the parties. Under these circumstances, it is terribly unfair to Ms. Lake for AT&T to allege that she has acted unethically in responding to its OWN discovery demands.

VIII. AT&T RAISED A NUMBER OF MERITLESS FACTUAL DEFENSES DURING THE TRIAL

A. AT&T'S Factual Defense That Surprise as to Limitations on Liability and Constitutional Rights Do Not Matter, Because Consumers Supposedly Do Not Value Those Rights, Is Entirely Without Merit.

During the trial, one of AT&T's principal defenses to the issue of surprise was that consumers did not need to know about the limitations on their rights and remedies in the CSA because they are more interested in such issues as the price and continuation of their service. As we have established in prior briefing, California law is clear that where a contract strips consumers of their constitutional rights and remedies, there is an elevated standard applicable to the question of whether the consumers have consented to the contract, and the contract is more likely to be held unconscionable if the consumers would be "surprised" to learn of its terms. This law is well established, and is not based on focus groups. Whether AT&T's consumers are more interested in prices is not a relevant issue or an issue of contract formation. Their supposed preference does not mean that the legal system will devalue or disregard their legal and constitutional rights.

Plaintiffs' position is that if including the limitations on liability and arbitration provisions along with the other provisions of the CSA led AT&T's customers not to notice these limitations upon their rights, only contributes to the showing of surprise. AT&T argues that it would have been logistically inconvenient to send out these provisions of the CSA separately (even though the case law makes clear that credit card issuers regularly add arbitration clauses to standard form agreements through the device of an amendment, a device specifically provided for in the CSA). If AT&T

proposes to strip millions of California consumers of their legal and constitutional rights, however, it is not an adequate justification to say that it would be "inconvenient" to take steps to ensure that those consumers are likely to learn of this fact.

B. Notwithstanding the Testimony of AT&T's Witnesses, the CSA Does Contain a Mandatory Arbitration Clause.

Oddly, AT&T representatives and employees repeatedly describe the CSA as "giving" AT&T's customers four options for pursuing relief. Three of these "options" predate the CSA, however, and do not constitute any new remedy or relief offered to consumers. Contrary to AT&T's claims, for example, the CSA doesn't "give" people the right to go the FCC. Congress did that (for the relatively little good it does consumers), and AT&T has no control over that. Similarly, consumers had the right to go to small claims court or call a customer service representative before the CSA came into effect.

The only change is that without the CSA, AT&T's customers could have exercised their constitutional right to go to court, they could have taken part in a class action, and they could have gotten all of the remedies available under California law. The only "new" provisions of the CSA, the only changes from the status quo, are in the nature of stripping customers of rights and remedies, and not "giving" them anything. Consumers with claims of more than $5,000, or who wish to actually appear before a decision maker, have no option to go to court. That option – that constitutional right – is replaced with arbitration. Notwithstanding the impressions and good intentions of Mr. Delery or Ms. Janiec-Domino, that is "mandatory arbitration."

IX. IF THE CSA IS PERMITTED TO GO INTO EFFECT, THERE ARE LIKELY TO BE A SIGNIFICANT NUMBER OF AT&T CONSUMERS BRINGING CASES THAT WILL ARISE UNDER THE AAA'S COMMERCIAL RULES, AND THUS THAT WILL INVOLVE EXCESSIVE ARBITRAL FEES

This Court has raised the question of whether any claims will be raised against AT&T that involve sums of money sufficient to invoke the machinery of AAA's commercial rules. The answer is yes.

First, it is important to note that any consumer who wishes to have an in-person arbitration hearing – to actually appear before the person who will decide their case – may not do so under the

AAA's Consumer Rules, and is necessarily forced into the Commercial Rules. Plaintiffs submit that the opportunity to appear before a decisionmaker is an essential component of due process, and a great many consumers wish this opportunity as part of a dispute resolution process.

Second, AT&T's own submissions to this Court demonstrate that there will be a number of claims that exceed the ceiling for small claims court. In Mr. Delery's Declaration in Support of the Motion for Preliminary Injunction, at ¶ 36, he testified that in the year 2000, AT&T was sued in 59 consumer long distance cases in courts other than small claims courts, and that in 2001 it was sued in 38 long distance consumer cases in courts other than small claims courts. It should be noted that these cases (just under 100 in two years) were brought in the period preceding detariffing, when the filed rate doctrine defeated a great many consumer claims and deterred experienced consumer counsel from undertaking many cases.

Third, the reported case law includes a number of illustrations of serious claims that have been brought against AT&T in courts of general jurisdiction. In *Singer v. AT&T Corp.*, 185 F.R.D. 681 (S.D. Fla. 1998), a class action was certified against AT&T in a case involving the following issues:

> Plaintiff Lenore Deutch Singer ("Singer") had two lines installed in her home utilizing a single key equipment unit. Singer received two separate bills for the two lines installed in her home. Both bills reflected monthly charges for the leasing of key equipment. In essence, Singer was allegedly billed twice for the same equipment.
>
> Singer instituted this class action on her behalf and on behalf of all persons and entities overcharged for key equipment by AT&T after January 1, 1984. [Footnote: In the Spring of 1993, Singer complained to AT&T about the double billing. In response, AT&T issued two checks; one for $2,957.19 and another for $20.30. Singer is maintaining this action even though she received the checks from AT&T because there is no indication that the refund she received is complete payment for all of the overcharges, and the refunds do not include interest or profits earned by AT&T on the money that was improperly charged and held.] Singer alleges that AT&T is liable for violations of the RICO Act, breach of contract, unjust enrichment and breach of the duty of good faith and fair dealing.

185 F.R.D. at 684. Thus a single consumer had a claim (in single damages, rather than RICO trebled damages, and not including attorneys' fees) that AT&T valued at almost $3,000, and other consumers of the 30,000 identified in that case as having been double billed, *see id.*, may well also have had claims exceeding the $10,000 limit for AAA's Consumer Rules and the $5,000 limit for California small claims courts. It is true that the Singer case was a class action, but if AT&T is to be

taken at its word and this Court were to assume that all of the 30,000 class members in that case had a meaningful opportunity for relief under the CSA,[15] it is overwhelmingly likely that many of the class members raising RICO and other claims exceeding $10,000.

In *Peters v. AT&T Corp.*, 43 F.Supp.2d 926 (N.D. Ill. 1999), similarly, a debtor alleged that AT&T had conducted a misleading debt collection scheme that violated the Fair Debt Collection Practices Act. The district court denied AT&T's motion for summary judgment. The Court noted that the debt collector at issue "sends approximately 30,000 AT&T letters per month," suggesting that if the plaintiffs' allegations there of an improper scheme are correct, a significant number of other consumers might have claims under the FDCPA. It is clear that these federal statutory claims may not be cabined off to state small claims court, and that the claims (including attorneys' fees) are likely to often exceed $10,000.

During the trial, plaintiffs argued that fraud claims are also frequently likely to be brought against AT&T over time. A good illustration of such claims may be found in *Bauchelle v. AT&T Corp.*, 989 F. Supp. 636 (D.N.J. 1997), where the plaintiff alleged that AT&T "regularly and systematically falsely" made representations to customers about a particular calling plan. 989 F. Supp. at 640. The plaintiff alleged "violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*, fraud, and negligent misrepresentation." While *Bauchelle* was a class action (which the court found AT&T had improperly removed to federal court in light of the Federal Communications Act's savings clause), it illustrates the sort of fraud claims that may be raised. *See also Zekman v. Direct American Marketers, Inc., AT&T Co., et al.*, 675 N.E.2d 994 (Ill. Ct. App. 1997) (putative class action claiming violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and common law fraud against AT&T, involving alleged knowing acceptance of the benefits of a fraud).

Under state law, there is also a significant likelihood that some AT&T customers will assert claims under state statutes providing for significant injunctive relief that could not be obtained

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[15] In powerful persuasive authority in support of plaintiffs' argument that the CSA's ban on class actions is unconscionable, the *Singer* court noted that "a class action is the superior method of adjudicating this controversy. There are potentially 30,000 class members a majority of which will not, in all likelihood, pursue individual lawsuits. The amount in controversy for each individual potential class member is minimal. Additionally, this Court notes that it would be extremely costly for individuals to proceed against a large corporation such as AT&T." 185 F.R.D. at 692.

through AAA's Consumer Rules or in small claims court. *See, e.g., Day v. AT&T*, 63 Cal.App.4th 325, 74 Cal.Rptr.2d 55 (Cal. Ct. App. 1998) (holders of AT&T phone cards sued as private attorneys general to challenge unfair and deceptive business acts and advertising; AT&T's assertion of the filed-rate doctrine did not bar claims for injunctive relief).

DATED: November 28, 2001

Respectfully submitted,

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By: _____
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