



August 9, 2011

**Via Electronic Filing**

The Honorable Julius Genachowski  
Chairman, Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, D.C. 20554

**Via U.S. Mail**

The Honorable Eric Holder, Jr.  
Attorney General of the United States  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Catherine J.K. Sandoval  
Commissioner, California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102

**Re: AT&T Inc. and Deutsche Telekom AG Application Seeking FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile Acquisition of T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc., WT Docket No. 11-65**

Dear Chairman Genachowski, Attorney General Holder and Commissioner Sandoval:

We write to urge you to reject AT&T Inc.'s proposed purchase of T-Mobile because it will without question lead to higher prices for consumers.

This is not conjecture; it is the lesson of history. Seven years ago, AT&T Inc.'s wholly owned subsidiary, AT&T Mobility LLC (then known as Cingular Wireless Corporation) requested permission to buy AT&T's wireless network (then known as AT&T Wireless Services, Inc.) for \$41 billion. At that time, AT&T and Cingular had the first and second largest share, respectively, of wireless communications providers in the U.S. In order to get the merger approved, AT&T and an army of executives, lobbyists and allies assured regulators and consumers that the deal was in the public interest by making promises — the very same promises that we're hearing from AT&T today:

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2004 AT&T–Cingular pre-merger promises

- “In addition to **improvements in network coverage and service quality, and greater availability of enhanced service offerings**, the transaction will result in **a number of synergies** which will **benefit consumers...**”<sup>1</sup>
- The merger will “accommodat[e] the **growth of existing voice and data services** for several years.”<sup>4</sup>
- “[T]he transaction **increases network capacity** and provides the spectrum and compatible network resources to fill in the coverage holes of **both companies...**”<sup>6</sup>
- “[C]onsumers will enjoy significant **near-term improvements in service quality.**”<sup>8</sup>
- “[T]he merger will **alleviate spectrum capacity constraints** that currently hinder the growth of Cingular and AWS...”<sup>10</sup>

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2011 AT&T–T-Mobile pre-merger promises

- “This transaction will **increase spectrum efficiency to increase capacity and output, which not only improves service, but is also the best way to ensure competitive prices and services...**”<sup>2</sup>
- “The **synergies** of this transaction will create immense new capacity that will provide **enormous benefits to consumers.**”<sup>3</sup>
- “This merger is about **adding capacity and improving existing voice and data services...**”<sup>5</sup>
- “[The merger] **[e]nhances network capacity, output and quality** in near term for **both companies’ customers**”<sup>7</sup>
- “AT&T’s acquisition of T-Mobile USA ... **provides an opportunity to improve network quality in the near term for both companies’ customers.**”<sup>9</sup>
- The merger “[p]rovides fast, **efficient and certain solution to impending spectrum exhaust challenges facing AT&T and T-Mobile USA...**”<sup>11</sup>

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<sup>1</sup> Application for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0001656065, Exhibit 1, at 22 (Mar. 18, 2004) (“Application”) available at <https://wireless2.fcc.gov/UlsEntry/attachments/attachmentView.jsp?attachmentKey=17917140&affn=0179171404013300694756609>.

<sup>2</sup> AT&T, *AT&T to Acquire T-Mobile USA from Deutsche Telekom*, (Mar. 20, 2011) (Press Release) available at <http://www.att.com/gen/press-room?pid=19358&cdvn=news&newsarticleid=31703&mapcode=corporate|financial>.

<sup>3</sup> *Id.*

<sup>4</sup> Application, *supra* note 1, Exhibit 1, at 22.

<sup>5</sup> *AT&T Files Public Statement with FCC Supporting T-Mobile Acquisition*, AT&T (Jun. 10, 2011) (Press Release), available at <http://www.att.com/gen/press-room?pid=20019&cdvn=news&newsarticleid=32009&mapcode=corporate|financial>.

<sup>6</sup> Application, *supra* note 1, Exhibit 1, at 9.

<sup>7</sup> AT&T, *supra* note 2.

<sup>8</sup> Application, *supra* note 1, Exhibit 1, at 9.

<sup>9</sup> AT&T, *supra* note 2.

<sup>10</sup> Application, *supra* note 1, Exhibit 1, at 9.

2004 AT&T–Cingular pre-merger promises

- “As a result [of the merger], **consumers will quickly experience improved service quality**, such as a **reduction in blocking and dropped calls...**”<sup>12</sup>
- “The **public interest benefits** of the transaction are straightforward and compelling. The **combined company will be able to deliver the ... benefits faster and more broadly than either company could on a stand alone basis...**”<sup>14</sup>
- “The **complementary** nature of the overlapping service areas ... is a **particular benefit in rural areas...**”<sup>16</sup>
- “Approval of Cingular’s acquisition of AWS ... will benefit **public safety.**”<sup>18</sup>

2011 AT&T–T-Mobile pre-merger promises

- The merger will “**improv[e] consumers’ overall service quality** through faster data speeds and **fewer dropped and blocked calls.**”<sup>13</sup>
- “This transaction delivers significant customer, shareowner and **public benefits that are available at this level only from the combination of these two companies with complementary network technologies, spectrum positions and operations.**”<sup>15</sup>
- “[R]ural consumers will particularly benefit from real-time access to a wide range of resources that would not otherwise be as readily available.”<sup>17</sup>
- “[T]he transaction will allow us to bring these benefits to ... improve education, health care and **public safety...**”<sup>19</sup>

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<sup>11</sup> AT&T, *supra* note 2.

<sup>12</sup> Application, *supra* note 1, Exhibit 1, at 13.

<sup>13</sup> AT&T, *supra* note 5.

<sup>14</sup> Application, *supra* note 1, Exhibit 1, at 9.

<sup>15</sup> AT&T, *supra* note 2.

<sup>16</sup> Application, *supra* note 1, Exhibit 1, at 58.

<sup>17</sup> Randall Stephens, *The AT&T/T-Mobile Merger*, written testimony submitted to Subcommittee on Antitrust, Competition Policy and Consumer Rights, at p.2 (May 11, 2011), available at <http://www.mobilizeeverything.com/documents/Stephenson%20Testimony%20ATT%20T-Mobile.pdf>.

<sup>18</sup> Application, *supra* note 1, Exhibit 1, at 24.

<sup>19</sup> Randall Stephens, *supra* note 17, at p. 3.

2004 AT&T–Cingular pre-merger promises

- “The combination of AWS and Cingular will allow the availability of these services on a **seamless, nationwide basis** far more promptly than can otherwise be achieved, if they could be achieved at all, by the companies individually.”<sup>20</sup>
- AT&T is "working to make this **transition as seamless as possible** for customers of AT&T Wireless."<sup>22</sup>
- “[C]ustomers of both companies will continue to enjoy the benefits of their current phones, rate plans, and features, without any service interruptions.”<sup>23</sup>
- AT&T Wireless customers were assured that they would be able to "**continue using their existing phones and rate plans but now have access to the largest digital voice and data network in the country.**"<sup>25</sup>
- “By acquiring **both spectrum and infrastructure**, the company can provide **expanded coverage** to consumers in the near term.”<sup>28</sup>

2011 AT&T–T-Mobile pre-merger promises

- “We are confident in our ability to execute a **seamless integration**, and with additional spectrum and network capabilities we can better meet our customers' current demands...”<sup>21</sup>
- “Will T-Mobile customers have to get a new phone? No. Their **current T-Mobile phone will continue to work fine once the transaction is complete.**”<sup>24</sup>
- “Will T-Mobile customers have to move to a new plan? Will they lose their plans? No. **They will be able to keep their existing price plan.**”<sup>26</sup>
- “Once the transaction closes, **T-Mobile customers will gain access to the benefits of AT&T's network.**”<sup>27</sup>
- AT&T and T-Mobile USA customers will see **service improvements** - including **improved voice quality** - as a **result of additional spectrum, increased cell tower density and broader network infrastructure.**”<sup>29</sup>

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20 Application, *supra* note 1, Exhibit 1, at 15.

21 AT&T, *supra* note 2.

22 Second Amended Consolidated Complaint and Demand for Jury Trial at ¶32, *Coneff v. AT&T Corp.*, No. 06-944 (W.D.Wash 2006).

23 *Id.*

24 AT&T, *Message to Customers*, at Q3, <http://www.mobilizeeverything.com/consumers.php> (last visited Jun. 29, 2011).

25 Second Amended Consolidated Complaint and Demand for Jury Trial, *supra* note 22.

26 AT&T, *supra* note 24 at Q4.

27 *Id.* at Q6.

28 Application, *supra* note 1, Exhibit 1, at p. 22.

29 AT&T, *supra* note 2.

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2004 AT&T–Cingular pre-merger promises

- “[C]onsumer benefits cannot be realized quickly by acquiring spectrum in a **piecemeal fashion.**”<sup>30</sup>
- “Wireless telephony markets are and will remain **robustly** competitive [after the merger]”<sup>32</sup>

2011 AT&T–T-Mobile pre-merger promises

- Contrary to opponents’ arguments, neither [AT&T’s] massive investment [in wireline and wireless networks], **nor piecemeal technology “solutions” can solve the macro-level, system-wide constraints confronting AT&T...**<sup>31</sup>
- “The transaction will enhance margin potential and improve the company’s long-term revenue growth potential as it benefits from a **more robust mobile broadband platform** for new services.”<sup>33</sup>

What happened after the AT&T - Cingular merger? Once the Federal Communications Commission approved the deal (after negligible scrutiny), the newly merged company – which later renamed itself AT&T Mobility LLC – betrayed its promises. It abandoned the old AT&T network, deliberately degrading the network so that AT&T customers would be forced to migrate to Cingular’s own network, pay an upgrade fee of \$18, buy new phones and agree to new and more expensive rate plans. These anti-consumer moves were enforced by an anti-competitive “early termination fee” of anywhere between \$175 and \$400, which prevented customers of AT&T from moving to another carrier.

In short, AT&T policyholders were railroaded into spending hundreds of dollars more in order to maintain their cellular service - a colossal rip-off by the same corporate executives who are now asking for permission to do it all over again.

Nothing in the terms of the proposed merger bars AT&T from engaging in a repeat performance against helpless T-Mobile customers if this deal is approved. Indeed, even as the companies mount a massive public relations campaign to win your approval, T-Mobile executives are already implicitly acknowledging that once the merger is approved, AT&T will make changes in the T-Mobile network:

T-Mobile has no plans to alter our 3G / 4G network in any way that would make your device obsolete. The deal is expected to close in approximately 12 months. After that, **decisions about the network will be AT&T’s to make.** That said, the president and CEO of AT&T Mobility was quoted in the *Associated Press* saying “there’s nothing for [customers] to worry about... [network changes affecting devices] will be done over time... ”<sup>34</sup>

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<sup>30</sup> Application, *supra* note 1, Exhibit 1, at p. 5.

<sup>31</sup> AT&T, *supra* note 5.

<sup>32</sup> Application, *supra* note 1, Exhibit 1, at 25.

<sup>33</sup> AT&T, *supra* note 2.

<sup>34</sup> T-Mobile, *Q&A: More Information about AT&T Acquisition of T-Mobile USA* (Mar. 20, 2011) (Press Release), available at <http://newsroom.t-mobile.com/articles/more-information-att-acquires-tmobile>.

Moreover, AT&T has publicly admitted that if the merger goes through, T-Mobile subscribers with 3G phones will have to replace their phones to keep their wireless broadband service.<sup>35</sup> AT&T plans to “rearrange how T-Mobile’s cell towers work”<sup>36</sup> so that T-Mobile’s airwaves can be used for 4G service rather than 3G. Even though AT&T will be altering T-Mobile’s 3G cell towers to operate 4G services, Ralph de la Vega, president and CEO of AT&T Mobility and Consumer Markets, said that after the merger, T-Mobile 3G phones will need to be replaced with AT&T 3G phones, which “will happen as part of the normal phone upgrade process.”<sup>37</sup> Once AT&T forces the T-Mobile subscribers with 3G phones to buy AT&T 3G phones, it is only a matter of time before AT&T pushes all of its subscribers over to the 4G network.

T-Mobile customers who are forced to migrate to AT&T’s network will have to buy new phones, agree to more expensive rate plans, or cancel their contracts and pay a termination fee. Once known for its low prices, T-Mobile has already begun increasing its rates and decreasing options in anticipation of the merger. On July 20, 2011, T-Mobile discontinued its unlimited data plans, replacing them with plans that cap the amount of data a customer can use; once the customer hits the data cap, T-Mobile will substantially slow down their network speed.<sup>38</sup> Nine days later, AT&T, which stopped offering new unlimited data plans last year, announced it would similarly start throttling data speeds even for customers on “grandfathered” unlimited data plans.<sup>39</sup> AT&T is attributing its slow-down to the “serious wireless spectrum crunch.”<sup>40</sup> In another implicit promise sure to be broken, AT&T has told its customers and regulators that “[n]othing short of completing the T-Mobile merger will provide additional spectrum capacity to address these near term challenges.”<sup>41</sup>

Finally, T-Mobile was recently named one of the world’s most ethical companies for 2011.<sup>42</sup> It was the only U.S. wireless telecommunication service provider that made the list.<sup>43</sup> By

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<sup>35</sup> Peter Svensson, *AT&T: T-Mobile 3G phones will need to be replaced*, Associated Press (Mar. 21, 2011), available at <http://finance.yahoo.com/news/ATT-TMobile-3G-phones-will-apf-862423457.html>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Cecilia Kang and Hayley Tsukayama, *AT&T to Throttle Data Speeds for Heaviest Wireless Users*, The Washington Post (Aug. 1, 2011), [http://www.washingtonpost.com/business/technology/atandt-to-throttle-data-speeds-for-heaviest-wireless-users/2011/08/01/gIQAh0HBoI\\_story.html](http://www.washingtonpost.com/business/technology/atandt-to-throttle-data-speeds-for-heaviest-wireless-users/2011/08/01/gIQAh0HBoI_story.html).

<sup>39</sup> Nathan Olivarez-Giles, *AT&T to Slow Speed for Top 5% of Unlimited Data Plan Users*, Los Angeles Times (Jul. 29, 2011) <http://latimesblogs.latimes.com/technology/2011/07/att-unlimited-data.html>.

<sup>40</sup> *Id.*

<sup>41</sup> AT&T, *An Update for Our Smartphone Customers With Unlimited Data Plans* (Jul. 29, 2011) (Press Release) available at <http://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=32318&mapcode=corporate>.

<sup>42</sup> T-Mobile, *T-Mobile Honored as One of the “Worlds Most Ethical Companies” and Only U.S. Wireless Telecommunications Service Provider to Receive Distinction*, (Mar. 16, 2011) (Press Release) available at <http://newsroom.t-mobile.com/articles/worlds-most-ethical-company>.

<sup>43</sup> *Id.*

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contrast, complaints about AT&T's service and prices are legion.<sup>44</sup> Indeed, the views of millions of AT&T customers have been summarized by an online campaign known as "#attfail."<sup>45</sup> This merger will eliminate a U.S. wireless company that at least seemed to care about its customers.

To this day, the AT&T customers who were misled and overcharged by AT&T's actions after the 2004 merger are still fighting in the courts for refunds and other remediation arising from the merger. In 2006, lawyers for Consumer Watchdog, joined by a group of private law firms, filed a national class action lawsuit against AT&T on behalf of the millions of customers who were victimized by the merger: *Coneff v. AT&T Corp., et al.*, No. C06-0944 (W.D. Wash). In response, AT&T's lawyers claimed that when AT&T customers were forcibly moved to the new network, they simultaneously agreed to waive their right to seek refunds from AT&T in court because of a provision buried in the fine-print of AT&T's contract that required arbitration of all disputes and barred customers from joining together in an arbitration. Throughout the litigation, AT&T changed its arbitration clause several times, each time modifying various terms while retaining the arbitration clause that prohibited customers from bringing or participating in a class action, regardless of whether it is brought in arbitration or in court. In 2009, the U.S. District Court in Seattle, Washington, held that AT&T's arbitration clause was unconscionable because most AT&T customers would never obtain redress without the ability to bring a class action. Attached as Exhibit A is a copy of our complaint from *Coneff v. AT&T Corp.*, and attached as Exhibit B is the 2009 ruling of the federal district court.

The case is presently before the 9<sup>th</sup> Circuit. In its briefing, AT&T now contends that the U.S. Supreme Court's recent decision in *AT&T Mobility v. Concepcion* 563 U.S. \_\_ (2011) should be interpreted by the courts to apply to the egregiously unfair and one-sided mandatory arbitration clauses like the one struck down in *Coneff* in 2009, which, in our case and unlike in *Concepcion*, has been shown to preclude customers' basic due process rights.

Albert Einstein defined insanity as doing the same thing over and over again and expecting different results. Considering AT&T's track record, it is irrational to expect that the AT&T and T-Mobile merger will yield different results. If the merger is approved, millions of T-Mobile customers will be subjected to the same costly and unfair practices that AT&T customers experienced after the 2004 Cingular merger. Moreover, permitting AT&T to swallow a competitor will leave the American cellular marketplace controlled by a duopoly that, through the artifice of termination fees and arbitration agreements, will effectively eliminate competition between them.

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<sup>44</sup> See Will Park, *AT&T has Most Dropped Calls, Verizon has Least Says Study*, Intomobile (May 5, 2010), <http://www.intomobile.com/2010/05/05/att-customers-log-the-most-dropped-call-complaints-verizon-claims-least/>; John Paczkowski, *AT&T Ranked Last in Consumer Reports' Best Cellphone Service Survey*, AllThingsD (Dec. 1, 2009), <http://allthingsd.com/20091201/att-ranked-last-in-consumer-reports-best-cell-phone-service-survey/>; Dan Richman, *Cingular, AT&T Wireless Ring Up Most Complaints*, Seattle PI (Mar. 28 2005), <http://www.seattlepi.com/business/article/Cingular-AT-T-Wireless-ring-up-most-complaints-1169604.php>; Consumers Union, *Records Reveal AT&T Wireless has Four Times as Many Customer Complaints as Verizon*, Consumers Union (May 11, 2004) (Press Release) available at <http://www.consumersunion.org/pub/campaigncellhell/001079.html>.

<sup>45</sup> Fred Vogelstein, *Bad Connection: Inside the iPhone Network Meltdown*, Wired Magazine (Jul. 19, 2010), [http://www.wired.com/magazine/2010/07/ff\\_att\\_fail/all/1](http://www.wired.com/magazine/2010/07/ff_att_fail/all/1).

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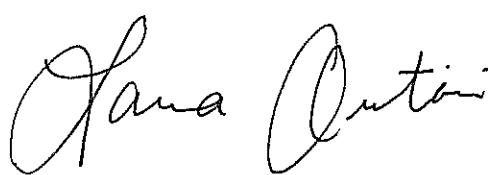
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This is a bread and butter test of the federal government's commitment to American consumers versus the Wall Street and corporate interests that too often seem to be the winners every time the federal government takes action. The Administration should ignore the lofty pronouncements of the corporate-funded academics and allies who provide cover for the glib promises of two cellular giants, along with the Wall Street firms that will reap millions in fees for providing the merger paperwork, in favor of the average American family, who, after all they have been forced to sacrifice these last few years, should not be required to pay more of their dollars for the ability to use a cell phone.

Sincerely,



Harvey Rosenfield



Laura Antonini

cc (via U.S. Mail or email):

President Barack Obama

The Honorable Michael J. Copps, Commissioner, Federal Communications Commission

The Honorable Robert McDowell, Commissioner, Federal Communications Commission

The Honorable Mignon Clyburn, Commissioner, Federal Communications Commission

The Honorable Eric T. Schneiderman, New York Attorney General

Sharis A. Posen, Chief of Staff for the Antitrust Division, United States Department of Justice

Laury E. Bobbish, Chief, Telecommunications and Media Enforcement section, United States Department of Justice

Richard A. Feinstein, Director, Bureau of Competition, Federal Trade Commission

# **EXHIBIT A**

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

MARYGRACE CONEFF, et al.

Master File No. C06-0944 RSM

**Plaintiffs,**

## **SECOND CONSOLIDATED AMENDED COMPLAINT**

v<sub>1</sub>

**DEMAND FOR JURY TRIAL**

AT&T CORP., et al.,

## Defendants

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1 Plaintiffs Marygrace Coneff, Christine Aschero, Joanne Aschero, Alex Aschero,  
 2 Jennie Bragg, Gina Franks, Amy Frerker, Addie Christine Lowry, Jeff Haymes, Harold  
 3 Melendez, Michelle Johns, Kelly Petersen, Steven Knott, Liesa Krausse, Steven Shulman,  
 4 S. Leonard Shulman, and Devin Gilker, on their own behalf and as representatives of a  
 5 putative class of similarly situated parties, complain and allege on information and belief  
 6 as follows:

7 **I. INTRODUCTION**

8 1. Plaintiffs bring this action to challenge conduct related to Defendant  
 9 Cingular Wireless LLC's ("Cingular") acquisition of Defendant AT&T Wireless  
 10 Services, Inc. ("AT&T Wireless") in 2004. Although Cingular publicly represented that  
 11 the acquisition would be seamless for AT&T Wireless customers, those statements did  
 12 not disclose materially adverse facts. In reality, after the acquisition, Cingular failed to  
 13 maintain and dismantled the AT&T Wireless network so as to degrade the service  
 14 provided to AT&T Wireless customers. Cingular did so to induce AT&T Wireless  
 15 customers to transfer their AT&T plans to Cingular plans, which are generally more  
 16 expensive and less favorable to consumers, and to charge AT&T Wireless customers with  
 17 various fees and costs in connection with those new plans.

18 2. Also, in July 2006, Cingular began charging a \$4.99 monthly fee to AT&T  
 19 Wireless subscribers who were on a TDMA/Analog network, merely to continue use of  
 20 that network. The imposition of this mandatory fee illustrates Cingular's strategy to  
 21 induce AT&T Wireless subscribers to either upgrade to a more expensive Cingular plan,  
 22 or to pay an early termination fee to get out of their AT&T service plan.

23 3. AT&T Wireless subscribers have suffered actual injury as a result of not  
 24 receiving the quality of service promised by Defendants, and by being put in the position  
 25 of having to choose between (I) accepting degraded service, (ii) transferring to Cingular  
 26 and thereby having to pay the herein alleged fees, or (iii) changing their wireless carrier,  
 27 and thereby incurring a termination fee.

28 ///

1       4. Plaintiffs hereby assert claims for unjust enrichment/common law  
 2 restitution, violations of consumer protection laws, breach of contract, breach of implied  
 3 covenant of good faith and fair dealing, and violation of the Federal Communications Act  
 4 ("FCA"). This complaint does not challenge Defendants' rates, right to enter the market,  
 5 or specific decisions about Defendants' physical infrastructure. Rather, this is a case  
 6 about concealing materially adverse facts from consumers about how their cell phone  
 7 service and costs associated therewith would be negatively impacted by the merger, and  
 8 the unreasonable and discriminative charges imposed as a result thereof.

## 9           II. JURISDICTION AND VENUE

10      5. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d). This is a  
 11 putative class action involving more than 100 class members, at least one member of the  
 12 putative class is a citizen of a state different from Defendants, and the aggregate amount  
 13 in controversy exceeds \$5,000,000, exclusive of interest and costs.

14      6. Each Defendant has conducted business in this District. During the relevant  
 15 time period, Defendant AT&T Wireless had its principal place of business within this  
 16 District, and many of the acts alleged herein occurred in this District. Accordingly, venue  
 17 in this District is proper under 28 U.S.C. § 1331(c).

## 18           III. PARTIES

### 19      A. Plaintiffs

20      7. Plaintiff MARYGRACE CONEFF is a resident of California. She was an  
 21 AT&T Wireless subscriber who experienced degraded service as a result of Cingular's  
 22 dismantling of the AT&T Wireless network. In order to obtain better phone service, Ms.  
 23 Coneff transferred to Cingular, was charged an \$18 "transfer" or "upgrade" fee,  
 24 purchased a Cingular phone, and was required to agree to a new service contract with  
 25 Cingular on terms that were less favorable than her prior contract with AT&T Wireless.

26      8. Plaintiff CHRISTINE ASCHERO is a resident of California. She was an  
 27 AT&T Wireless subscriber who experienced degraded service as a result of Cingular's  
 28 dismantling of the AT&T Wireless network. Because of the poor service following

1 Cingular's acquisition of AT&T Wireless, Ms. Aschero was induced to pay an early  
 2 termination fee to cancel service before the expiration of her contract term.

3       9. Plaintiffs JOANNE ASCHERO and ALEX ASCHERO are residents of  
 4 California. They are AT&T Wireless subscribers who experienced degraded service as a  
 5 result of Cingular's dismantling of the AT&T Wireless network. Notwithstanding their  
 6 degraded service, they have remained AT&T Wireless subscribers under their preexisting  
 7 AT&T contract terms in order to avoid payment of an early termination fee.

8       10. Plaintiff JENNIE BRAGG is a resident of California. She was an AT&T  
 9 Wireless subscriber who experienced degraded service as a result of Cingular's  
 10 dismantling of the AT&T Wireless network. In order to obtain better phone service, Ms.  
 11 Bragg purchased a Cingular phone and agreed to a new service contract with Cingular on  
 12 less favorable terms, which included charges for additional services she did not request.

13       11. Plaintiff KELLY PETERSEN is a resident of California. She was an  
 14 AT&T Wireless subscriber who experienced degraded service as a result of Cingular's  
 15 dismantling of the AT&T Wireless network. In an effort to get better service, she was  
 16 forced to purchase a new phone, pay \$18 for a new SIM card, and upgrade to a Cingular  
 17 plan on terms that were less favorable than her prior contract with AT&T Wireless.

18       12. Plaintiff GINA FRANKS is a resident of Washington. She was an AT&T  
 19 Wireless subscriber who experienced degraded service as a result of Cingular's  
 20 dismantling of the AT&T Wireless network. In an effort to obtain better phone service,  
 21 Ms. Franks entered into a new service contract with Cingular on terms less favorable than  
 22 her previous contract with AT&T Wireless.

23       13. Plaintiff AMY FRERKER is a resident of Washington. She was an AT&T  
 24 Wireless subscriber who experienced degraded service as a result of Cingular's  
 25 dismantling of the AT&T Wireless network.

26       14. Plaintiffs STEVEN SHULMAN and S. LEONARD SHULMAN are  
 27 residents of Washington who are doing business as Leschim Market. They were AT&T  
 28 Wireless subscribers who experienced degraded service as a result of Cingular's

1 dismantling of the AT&T Wireless network. In an effort to obtain better service, they  
 2 upgraded to a more expensive Cingular service plan, purchased a new phone, and paid  
 3 \$18 for a new SIM card. The subject phones are used, in part, for business purposes.

4       15. Plaintiff STEVEN KNOTT is a resident of Alabama. He was an AT&T  
 5 Wireless subscriber who experienced degraded service as a result of Cingular's  
 6 dismantling of the AT&T Wireless network. When Mr. Knott complained to Defendants  
 7 about the degraded service, he was advised that he should "upgrade" and purchase new  
 8 phones, or pay an early termination fee of \$175. Mr. Knott upgraded to a Cingular plan  
 9 that cost almost twice as much as his AT&T plan, was forced to purchase two Cingular  
 10 phones, and was charged an \$18 upgrade fee.

11       16. Plaintiff JEFF HAYMES is a resident of Arizona. He was an AT&T  
 12 Wireless customer for many years and experienced degraded service as a result of  
 13 Cingular's dismantling of the AT&T Wireless network. In an effort to obtain better  
 14 service, Mr. Haymes paid an \$18 fee to upgrade to a Cingular phone plan on terms less  
 15 favorable than his previous AT&T Wireless plan.

16       17. Plaintiff HAROLD MELENDEZ is a resident of Arizona. He was an  
 17 AT&T Wireless customer who experienced degraded service as a result of Cingular's  
 18 dismantling of the AT&T Wireless network. After complaining to Defendants about the  
 19 poor service, Mr. Melendez upgraded to a less favorable Cingular service plan and  
 20 purchased a new phone and SIM card.

21       18. Plaintiff ADDIE CHRISTINE LOWRY is a resident of Florida. She was an  
 22 AT&T Wireless subscriber with multiple phones who experienced degraded service as a  
 23 result of Cingular's dismantling of the AT&T Wireless network. The service she  
 24 received was so poor that one of her four phone lines became completely unusable.  
 25 When Ms. Lowry complained to Defendants about the poor service, she was informed  
 26 that she could either upgrade to a more expensive plan, or pay a termination fee to cancel  
 27 service. Ms. Lowry chose to wait out the contract for three lines and pay the termination  
 28 fee to cancel the fourth line that was rendered unusable. Since September 2006, Cingular

1 has been charging Ms. Lowry an extra \$4.99 a month merely to remain on the  
 2 TDMA/Analog network.

3       19. Plaintiff DEVIN GILKER is a resident of Illinois. He was an AT&T  
 4 Wireless subscriber who experienced degraded service as a result of Cingular's  
 5 dismantling of the AT&T Wireless network. In an effort to obtain better service, he paid  
 6 "upgrade," "transfer" or "SIM" fees to Cingular following its merger with and acquisition  
 7 of AT&T Wireless.

8       20. Plaintiff LIESA KRAUSSE is a resident of New Jersey. She was an AT&T  
 9 Wireless subscriber who experienced degraded service as a result of Cingular's  
 10 dismantling of the AT&T Wireless network. After numerous dropped phone calls,  
 11 including one during a phone call from her mother reporting a medical emergency, Ms.  
 12 Krausse complained to Defendants. She was informed that her options were to drive 20  
 13 miles to be closer to a network tower, to upgrade to a new phone, or to cancel her AT&T  
 14 plan and incur an early termination fee. Because Ms. Krausse believed the service  
 15 provided under her AT&T service plan was inadequate, she cancelled the contract and  
 16 asked that the termination fee be waived. Cingular assessed a \$175 early termination fee  
 17 anyway.

18       21. Plaintiff MICHELLE JOHNS is a resident of Virginia. She had been an  
 19 AT&T Wireless subscriber for several years before Cingular dismantled the AT&T  
 20 network. Thereafter, Ms. Johns' service became so degraded and unreliable that she had  
 21 no choice but to purchase a Cingular phone and transfer to a Cingular service plan that is  
 22 less favorable than the plan she had with AT&T Wireless.

23 **B. Defendants**

24       22. Defendant CINGULAR WIRELESS LLC is a Delaware limited liability  
 25 company with its principal place of business in Atlanta, Georgia. Cingular Wireless LLC  
 26 was formed in April 2000 as a joint venture between SBC Communications Inc. and Bell  
 27 South Corporation, and provides wireless phone services.

28       ///

1       23. Defendant CINGULAR WIRELESS CORPORATION is a Delaware  
 2 corporation with its principal place of business in Atlanta, Georgia. Cingular Wireless  
 3 Corporation is a holding company for Defendant Cingular Wireless LLC and has no  
 4 material assets other than Cingular Wireless LLC. Like Cingular Wireless LLC, Cingular  
 5 Wireless Corporation is jointly controlled by SBC Communications, Inc. and Bell South  
 6 Corporation. As used herein, "Cingular" refers to Cingular Wireless Corporation and its  
 7 alter ego, Cingular Wireless LLC.

8       24. Defendant AT&T WIRELESS SERVICES, INC. ("AT&T Wireless") was  
 9 formed in July 2001 as a Delaware corporation. At all relevant times, AT&T Wireless  
 10 had its principal place of business in Redmond, Washington. In October 2004, AT&T  
 11 Wireless was acquired by Cingular and renamed New Cingular Wireless Services, Inc.

12       25. Defendant NEW CINGULAR WIRELESS SERVICES, INC. ("New  
 13 Cingular") is a New York corporation with its principal place of business in Atlanta,  
 14 Georgia. New Cingular was formed in October 2004 as the successor-in-interest to  
 15 Defendant AT&T Wireless. New Cingular is a wholly-owned subsidiary of Defendant  
 16 Cingular Wireless LLC.

17 **C. Agency / Joint Venture**

18       26. At all times herein mentioned, Defendants, and each of them, were agents  
 19 or joint venturers of each of the other Defendants, and in doing the acts alleged herein  
 20 were acting within the course and scope of such agency. Each Defendant had actual  
 21 and/or constructive knowledge of the acts of each of the other Defendants, and ratified,  
 22 approved, joined in, acquiesced in, and/or authorized the wrongful acts of each co-  
 23 defendant, and/or retained the benefits of said wrongful acts.

24 **IV. FACTUAL ALLEGATIONS**

25 **A. Cingular's Acquisition of AT&T Wireless**

26       27. At the end of 2003, Cingular was the second largest provider of wireless  
 27 communication services in the United States in terms of subscribership. Cingular had 24  
 28 million customers as of December 31, 2003, and reported \$15.5 billion in revenues for

1 2003. Cingular provided its customers wireless voice and data service over a nationwide  
 2 wireless network which it maintained. The Cingular network provided extensive  
 3 coverage throughout the United States. In addition, Cingular entered into network access  
 4 agreements with other network operators in the United States to provide additional  
 5 network coverage for Cingular subscribers.

6       28. At the end of 2003, AT&T Wireless was the third largest provider of  
 7 wireless communications services in the United States based on subscribership. AT&T  
 8 Wireless had 22 million customers as of December 31, 2003, and reported \$16.7 billion in  
 9 revenues for 2003. AT&T Wireless provided wireless voice and data service over a  
 10 nationwide wireless network. The network operated and maintained by AT&T Wireless  
 11 provided extensive coverage throughout the United States. In addition, AT&T Wireless  
 12 entered into network access agreements with other network operators in the United States  
 13 to provide additional network coverage for AT&T Wireless subscribers.

14       29. On February 17, 2004, Cingular and AT&T Wireless entered into an  
 15 agreement whereby Cingular would acquire AT&T Wireless for \$41 billion. Upon  
 16 completion of the acquisition, AT&T Wireless would be renamed New Cingular Wireless  
 17 Services, Inc. and would operate as a solely-owned subsidiary of Cingular.

18       30. Cingular's acquisition of AT&T Wireless was completed on October 26,  
 19 2004.

20 **B. Cingular's Concealments and Material Omissions**

21       31. Cingular publicly represented that its acquisition of AT&T Wireless would  
 22 result in "increased network and spectrum capacity in areas where Cingular and AT&T  
 23 Wireless are already providing service," and would "greatly improve service quality and  
 24 coverage." *See Memorandum Opinion & Order, FCC 04-255, ¶29 (Oct. 26, 2004),*  
 25 attached hereto as Exhibit A.

26       32. On October 26, 2004, Cingular issued a press release stating that Cingular  
 27 would "allow customers of both companies to use the new, combined network without  
 28 roaming charges," and that "customers of both companies will continue to enjoy the

1 benefits of their current phones, rate plans and features, without any service interruption.”  
 2 Stan Sigman, Cingular’s President and Chief Executive Officer, stated that the company  
 3 was “working to make this transition as seamless as possible for customers of AT&T  
 4 Wireless.” Sigman assured AT&T Wireless customers that they would be able to  
 5 “continue using their existing phones and rate plans but now have access to the largest  
 6 digital voice and data network in the country.”

7       33. On October 29, 2004, Cingular issued a press release to unveil its new  
 8 “Raising the Bar” advertising campaign. The press release stated:

9           “Raising the Bar” is more than a tagline, it’s about providing the type  
 10 of service that customers expect from their wireless company . . .  
 11 The most tangible example of how Cingular is “Raising the Bar” is  
 12 the newly combined network, the largest digital voice and data  
 13 network in the United States. Cingular is calling it the “ALLOVER”  
 14 network. People will quickly begin to see more bars in more places .  
 . . Our “Raising the Bar” tagline and “ALLOVER” network branding  
 campaign allows us to clearly communicate a real improvement in  
 network and service quality.

#### 15       C. Cingular’s Dismantling of the AT&T Wireless Network

16       34. Contrary to Cingular’s assurances that AT&T Wireless customers would  
 17 have access to a “combined network,” Cingular instead made financial decisions with  
 18 regard to the old AT&T Wireless network and Cingular’s network which effectively  
 19 made the AT&T network inferior. The AT&T network was not maintained, and the  
 20 effect was to induce AT&T customers to transfer to the Cingular network.

21       35. Cingular substantially diminished its maintenance of the AT&T Wireless  
 22 network facilities. According to published reports, Cingular “has been spending next to  
 23 nothing to maintain the [AT&T Wireless] network, leaving customers who don’t upgrade  
 24 [to the Cingular network] in the lurch.” *Why You Still Can’t Hear Me Now*, The Wall  
 25 Street Journal, May 25, 2005, at D1. It has also been reported that “industry analysts  
 26 believe that Cingular is investing close to nothing” to maintain the AT&T Wireless  
 27 network. *How Cellular Services Rank On Complaints: Cingular Tops FCC List With*  
 28 //

1     *Most Grips Per Customer, Dropped Calls, Billing Errors*, The Wall Street Journal,  
 2 March 29, 2005, at D1, D5.

3         36. As part of its scheme, Cingular encouraged AT&T Wireless customers  
 4 suffering from degraded service to “upgrade” to Cingular. These upgrades, however,  
 5 required consumers to do one or more of the following: (I) pay an \$18 “transfer” fee to  
 6 Cingular; (ii) purchase one or more new phones from Cingular; (iii) pay \$18 for the SIM  
 7 chip which enables the phone to operate; and (iv) enter into a new service contract with  
 8 Cingular that is usually less favorable to the customer than the customer’s existing  
 9 contract with AT&T Wireless. AT&T Wireless customers who do not agree to such an  
 10 “upgrade” are left with the choice of fulfilling their contract term with AT&T Wireless  
 11 despite degraded or non-existent service, or paying an early termination fee of \$175 to  
 12 cancel service before the expiration of the 12 or 24-month contract term. This conduct  
 13 was undertaken on a uniform basis, and this case does not seek to remediate any  
 14 individual claims of poor service other than as a predicate to the class-wide omissions,  
 15 concealments and false advertising herein alleged.

16         D. **Cingular’s Implementation of a Mandatory \$4.99 Monthly Fee**

17         37. In October of 2004, the Federal Communication Commission approved  
 18 Cingular’s acquisition of AT&T Wireless on the condition that Cingular keep AT&T  
 19 Wireless’ TDMA/Analog system in place until at least February 2008.

20         38. Approximately 4.7 million current AT&T Wireless customers rely on the  
 21 TDMA/Analog network.

22         39. In July 2006, Defendants included the following statement in billing  
 23 statements to Cingular and AT&T Wireless customers:

24             The rates for your service on Cingular’s TDMA/Analog network are  
 25 increasing. As early as September, a TDMA/Analog network charge  
 26 of \$4.99 per line will appear on your bill each month. Alternatively,  
 27 you have the option to upgrade to a handset and rate plan on our new  
 28 and improved GSM network, the largest voice and data network in  
 America, with the fewest dropped calls of any national wireless  
 carrier.

See Exhibit B.

1       40. Cingular also issued a press release stating that it would start charging  
 2 customers with TDMA and Analog cellphones an extra \$4.99 monthly fee as early as  
 3 September 2006 unless, as the language above indicates, current AT&T customers  
 4 purchase a new phone and commit to a 2-year "upgraded" Cingular service contract on  
 5 Cingular's GSM network.

6       41. Because most current AT&T Wireless subscribers use phones that operate  
 7 on the TDMA/Analog network, Cingular is effectively targeting current AT&T Wireless  
 8 subscribers and using the \$4.99 monthly charge to make it economically disadvantageous  
 9 to keep their current service. What Cingular has omitted from the \$4.99 fee statement is  
 10 the fact that it will charge an early termination fee to AT&T subscribers who do not wish  
 11 to incur the \$4.99 charge or who do not wish to pay for a new phone and get locked into a  
 12 2-year Cingular plan. Cingular's implementation of the mandatory \$4.99 monthly fee is a  
 13 pretextual tactic to compel current AT&T subscribers to forfeit their existing AT&T  
 14 calling plans and to purchase new telephones and accessories for a more expensive  
 15 Cingular plan. Cingular's program leaves AT&T Wireless subscribers with no  
 16 meaningful alternative. Similar to its dismantling of the AT&T Wireless network,  
 17 Cingular's imposition of the \$4.99 monthly charge is designed to wrongfully induce  
 18 migration to Cingular.

19       42. Plaintiffs do not challenge any rate, but rather allege that the imposition of  
 20 this \$4.99 charge was not disclosed to consumers and was yet another economic  
 21 inducement to AT&T Wireless customers to transfer to Cingular.

22 **E. No Enforceable Agreement to Arbitrate**

23       43. Defendants have inserted clauses into customer contracts that purport to  
 24 impose mandatory arbitration and a waiver of the right to participate in class actions.  
 25 However, these contracts are contracts of adhesion drafted entirely by the Defendants on  
 26 a take-it-or-leave-it basis in a setting in which disputes between the contracting parties  
 27 predictably involve small amounts of damages. Plaintiffs had neither the bargaining  
 28 power, nor the ability, to change the contractual terms. Defendants rely on the mandatory

1 arbitration and class action waiver provisions to shield themselves against consumers' use  
 2 of the civil justice system to redress Defendants' misconduct. In practice, the waiver  
 3 virtually immunizes the Defendants from responsibility for their own wrongful conduct.  
 4 Such waivers are unconscionable under State and Federal law and should not be enforced.

5       44.     The mandatory arbitration provision and, particularly, the class action  
 6 waiver provision in these types of contracts have repeatedly been held unenforceable.  
 7 *See, e.g., Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811  
 8 (2003); *Discover Bank v. Superior Court (Boehr)*, 36 Cal.4th 148 (2005); *Ball v. Cingular*  
 9 *Wireless, LLC*, Case No. 04CC06353, Order Denying Motion of Defendant Cingular  
 10 Wireless, LLC to Compel Arbitration And Stay Action (Cal. Superior Court Feb. 7, 2005)  
 11 (Cingular's arbitration clause found unconscionable); *In re Cellphone Termination Fee*  
 12 *Cases*, J.C.C.P. 4332, Order Denying Motions of AT&T and Cingular to Compel  
 13 Arbitration (Cal. Superior Court Jan. 20, 2004) (AT&T's arbitration clause and three  
 14 different forms of Cingular's arbitration clauses found unconscionable); *Tamayo v.*  
 15 *Brainstorm, USA*, 154 Fed.Appx. 564 (9th Cir. 2005) (class action waiver in an  
 16 arbitration clause contained in adhesive contract found unconscionable and not valid  
 17 under California law); *Kinkel v. Cingular Wireless, LLC*, 357 Ill.App.3d 556 (Ill.App.  
 18 2005) (motion for leave to appeal denied); *aff'd* 2006 WL 2828664 (Ill. Oct. 5, 2006);  
 19 *Muhammad v. County Bank of Rehoboth Beach, Delaware*, \_\_\_ A.2d \_\_\_, 2006 WL  
 20 2273448 (N.J., Aug. 9, 2006) (provision in consumer loan agreement that forbade class-  
 21 wide arbitration was unconscionable and, therefore, unenforceable).

22       45.     Both AT&T Wireless and Cingular have recently and extensively litigated  
 23 the enforceability of their purported arbitration clauses, including appeals, petitions for  
 24 review, and petitions for certiorari to the California Court of Appeals, the California  
 25 Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United  
 26 States Supreme Court.

27       46.     Despite suffering defeats in each of these courts, Defendants remain  
 28 obstinate. As part of a deliberate scheme to delay meritorious litigation, Defendants

1 continue to bring frivolous motions to compel arbitration so that Cingular can continue to  
 2 benefit and derive millions of dollars in revenue from its wrongful conduct. Such a delay  
 3 imposes unnecessary and burdensome costs on customers who assert meritorious claims  
 4 and ultimately discourages customers from pursuing their legal rights. *See, e.g., Ting v.*  
 5 *AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2002).

6       47. Plaintiffs believe that the purported arbitration agreements of AT&T  
 7 Wireless and Cingular are pretextual. Based on information and belief, AT&T Wireless  
 8 and Cingular have rarely, if ever, used arbitration to resolve their own claims against a  
 9 customer. Instead, both have resolved millions of claims against customers by assigning  
 10 them to collection agencies who then pursue a variety of means to resolve them, including  
 11 filing lawsuits, but not arbitration. Based on information and belief, few, if any,  
 12 customers have ever been awarded any material relief by an arbitrator pursuant to any  
 13 AT&T Wireless or Cingular arbitration agreement. Moreover, despite the fact that AT&T  
 14 Wireless included an arbitration clause in its terms and conditions beginning in July 1999,  
 15 relatively few cases have ever been arbitrated. Given the millions of AT&T Wireless and  
 16 Cingular customers, such numbers tend to show the arbitration procedure contained in the  
 17 contract is illusory.

18       48. The subject arbitration clauses are procedurally and substantively  
 19 unconscionable. The contracts are themselves contracts of adhesion, which are presented  
 20 to consumers on a “take it or leave it” basis. The purported rights to bring claims in small  
 21 claims court or to pursue actions to collect debts are illusory, and the purported  
 22 reciprocity of those clauses does not provide the consumer with any meaningful channel  
 23 to adjudicate claims other than by instituting a class action. In addition, the class action  
 24 bar is itself unconscionable. That clause states: “However, even for those claims that may  
 25 be taken to court, you and we both waive any claims for punitive damages and any right  
 26 to pursue claims on a class or representative basis.” *See Exhibit C.* Not only did the  
 27 Plaintiffs have no meaningful basis to reject this contract term, that term is burdened with  
 28 other provisions in the contract that limit the Plaintiffs’ ability to obtain relief in a cost

1 effective manner, including, but not limited to, the costs of arbitration compared to the  
 2 amount of any individual claim.

3                   **V.     CLASS ACTION ALLEGATIONS**

4       49. Plaintiffs bring this action as a putative class action for equitable,  
 5 injunctive, declaratory, and monetary relief pursuant to Rule 23 of the Federal Rules of  
 6 Civil Procedure on behalf of the following Class and Sub-Class:

7                   **The "Class" is defined as all subscribers of AT&T Wireless in the  
 8                   United States as of October 26, 2004.**

9                   **The "Sub-Class" is defined as all subscribers of AT&T Wireless in the  
 10                  United States who have been advised that they will incur an  
 11                  additional \$4.99 monthly fee for access to the TDMA/Analog network.**

12       50. Plaintiffs recognize that there is no class, nor is there a class action, until  
 13 the Court certifies the case as a class action and appoints class counsel. That is why  
 14 Plaintiffs refer to the putative class throughout.

15       51. Plaintiffs Marygrace Coneff, Christine Aschero, Joanne Aschero, Alex  
 16 Aschero, Jennie Bragg, Gina Franks, Amy Frerker, Addie Christine Lowry, Jeff Haymes,  
 17 Harold Melendez, Michelle Johns, Kelly Petersen, Steven Knott, Liesa Krausse, Steven  
 18 Shulman, S. Leonard Shulman, and Devin Gilker are members of the putative Class.  
 19 Plaintiffs Addie Christine Lowry, Joanne Aschero, and Alex Aschero are also members of  
 20 the putative Sub-Class.

21       52. The members of the putative Class are readily ascertainable but are so  
 22 numerous that joinder is impracticable. The exact number and names of the members of  
 23 the putative Class are presently unknown to Plaintiffs, but can be ascertained readily  
 24 through appropriate discovery. Plaintiffs believe that there are hundreds of thousands, if  
 25 not millions, of members of the putative Class, whose names and addresses can be readily  
 discovered upon examination of the records in the custody and control of Defendants.

26       53. There are questions of law and fact common to the putative Class.  
 27 Defendants pursued a common course of conduct toward the putative Class as alleged  
 28                    ///

1 herein. This action arises out of a common nucleus of operative facts. Common  
 2 questions include, but are not limited to, the following:

- 3       a. whether Cingular has maintained the AT&T Wireless network since  
           its acquisition of AT&T Wireless;
- 4       b. whether Defendants fulfilled their service obligations to Plaintiffs  
           and the putative Class pursuant to the AT&T Wireless Contracts;
- 5       c. whether Defendants charged Plaintiffs and the putative Class fees in  
           violation of the AT&T Wireless Contracts;
- 6       d. whether Defendants concealed from Plaintiffs and the putative Class  
           that they would not have access to a higher network quality as  
           promised by Defendants;
- 7       e. whether Defendants caused AT&T Wireless customers to migrate to  
           Cingular by virtue of the conduct herein alleged;
- 8       f. whether Plaintiffs and the putative Class were wrongfully induced to  
           cancel their AT&T Wireless plans, thereby incurring termination  
           fees;
- 9       g. whether Plaintiffs and the putative Class were wrongfully induced to  
           enter into service contracts with Cingular, thereby incurring the fees  
           and costs associated with new service plans;
- 10      h. whether Defendants violated the Washington Consumer Protection  
           Act, Wash. Code Rev. § 19.86.010, *et seq.*, or alternatively, whether  
           Defendants violated the similar consumer protection laws of other  
           States; and
- 11      i. whether Defendants violated Sections 201 and/or 202 of the FCA.

12      54. The claims of the named Plaintiffs are typical of the claims of the putative  
 13 Class. Each of the named Plaintiffs suffered from degraded service due to Cingular's  
 14 dismantling of the AT&T Wireless network despite promises to the contrary which failed  
 15 to disclose materially adverse facts as herein alleged; paid transfer and SIM chip fees;

paid termination fees; paid the \$4.99 fee to remain on the AT&T Wireless network; and/or was forced to switch to Cingular under the terms of a less favorable service contract.

55. Plaintiffs will fairly and adequately represent and protect the interests of the putative Class, and common issues of law and fact predominate.

56. Plaintiffs have retained counsel competent and experienced in prosecuting complex nationwide consumer class actions.

57. Notice of this putative Class action can be provided to putative Class members by techniques and forms similar to those customarily used in consumer class actions. In this particular case, notice can be accomplished through the use of Defendants' lists of customers who can receive notice electronically in addition to other traditional methods.

58. Class certification is appropriate because Cingular has acted, or refused to act, on grounds generally applicable to the putative Class, making class-wide equitable, injunctive, declaratory, and monetary relief appropriate. In addition, the prosecution of separate actions by or against individual members of the putative Class would create a risk of incompatible standards of conduct for Defendants and inconsistent or varying adjudications for all parties. A class action is superior to other available methods for the fair and efficient adjudication of this action.

COUNT I

## **Unjust Enrichment/Common Law Restitution**

59. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

60. This Count I is brought on behalf of the putative Class and Sub-Class.

61. Through the scheme described above, Defendants have charged putative Class members fees in violation of their contractual rights, and statutory and common law, including but not limited to the charge of an \$18 “transfer” or “upgrade” fee and other fees and charges described above.

62. By stating its intent to charge AT&T Wireless customers with TDMA /Analog phones an additional \$4.99 per month on top of their contractually agreed monthly rates, Cingular has been unjustly enriched by any amounts paid by AT&T customers to “upgrade” to a new Cingular service plan, purchase new Cingular phones, or pay an early termination fee.

63. Defendants have reaped substantial profit from the aggressive marketing and sales of “upgraded” Cingular service plans as well as the sale of new phones. Ultimately, this resulted in Defendants’ wrongful receipt of profits and injury to Plaintiffs and the putative Class. As a direct and proximate result of Defendants’ misconduct as set forth above, Defendants have been unjustly enriched. Plaintiffs do not request any relief that would require Defendants to provide any particular infrastructure nor change any particular rate, and seek an award of monetary damages and/or restitution under common law.

WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

## COUNT II

## **Violations of the Washington Consumer Protection Act and Alternatively Violations of Similar Consumer Protection Laws in Other States**

64. Plaintiffs incorporate by reference all allegations of all prior paragraphs as though fully set forth herein.

65. This Count II is brought on behalf of the putative Class and Sub-Class.

66. The Defendants, by their conduct alleged herein, violated the Consumer Protection Act of the State of Washington, Wash. Code Rev. § 19.86. Specifically, Defendants' conduct constitutes deceptive and unfair acts or practices in the conduct of trade or commerce in violation of Wash. Code Rev. § 19.86.020. Defendants' acts adversely affected the public interest and are a proximate cause of injury, and monetary damages, to Plaintiffs and the putative Class in an amount to be proven at trial. Defendants are liable to Plaintiffs and the putative Class for damages. In addition to

1 actual damages, Plaintiffs and the putative Class are entitled to recover treble damages up  
 2 to \$10,000 per Plaintiff and putative Class member, costs, and attorneys' fees pursuant to  
 3 Wash. Code Rev. § 19.86.090.

4       67. Alternatively, Defendants' conduct as alleged herein violates the unfair and  
 5 deceptive acts and practices laws of each of the following jurisdictions, including  
 6 Washington:

- 7           a. **Washington:** Defendants' practices were and are in violation of  
                   8 Washington's Consumer Protection Act, Wash. Code Rev. §  
                   9 19.86.010, *et seq.*
- 10          b. **California:** Defendants' practices were and are in violation of  
                   11 California's Unfair Competition Law, Business and Professions  
                   12 Code § 17200, *et seq.*, California's False Advertising Act, Cal. Bus.  
                   13 & Prof. Code § 17500, *et seq.*, and the California Consumer Legal  
                   14 Remedies Act, Cal. Civ. Code § 1750, *et seq.*
- 15          c. **Florida:** Defendants' practices were and are in violation of  
                   16 Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §  
                   17 501.201, *et seq.*
- 18          d. **Illinois:** Defendants' practices were and are in violation of Illinois'  
                   19 Consumer Fraud and Deceptive Business Practices Act, 815 Ill.  
                   20 Comp. Stat. 505/1, *et seq.*; and the Uniform Deceptive Trade  
                   21 Practices Act, 815 Ill. Comp. Stat. 510/1, *et seq.*.
- 22          e. **Maryland:** Defendants' practices were and are in violation of  
                   23 Maryland's Consumer Protection Act, Md. Com. Law Code §  
                   24 13-101, *et seq.*
- 25          g. **Massachusetts:** Defendants' practices were and are in violation of  
                   26 Massachusetts' Consumer Protection Act, Mass. Gen. Laws ch. 93A.

27       ///

28       ///

- h. **Michigan:** Defendants' practices were and are in violation of Michigan's Consumer Protection Act, Mich. Comp. Laws Serv. § 445.901., *et seq.*
  - i. **Missouri:** Defendants' practices were and are in violation of Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*
  - j. **New Jersey:** Defendants' practices were and are in violation of New Jersey's Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1, *et seq.*
  - k. **New York:** Defendants' practices were and are in violation of New York's Gen. Bus. Law § 349, *et seq.*
  - l. **North Carolina:** Defendants' practices were and are in violation of North Carolina's Unfair Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1, *et seq.*
  - m. **Tennessee:** Defendants' practices were and are in violation of Tennessee's Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*
  - n. **Texas:** Defendants' practices were and are in violation of Texas' Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41, *et seq.*
  - o. **Virginia:** Defendants' practices were and are in violation of Virginia's Consumer Protection Act, Va. Code Ann. § 59.1-196, *et seq.*

WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

COUNT III

## **Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing**

27       68. Plaintiffs incorporate by reference all allegations of all prior paragraphs as  
28 though fully set forth herein.

1       69. This Count III is brought on behalf of the putative Class and Sub-Class.

2       70. Each member of the putative Class entered into a contract with AT&T  
3 Wireless under which AT&T agreed to provide wireless service to that putative Class  
4 member ("AT&T Wireless Contracts"). Although the AT&T Wireless Contracts are form  
5 contracts that were revised by AT&T Wireless from time to time, each of them is  
6 substantially in the form of the AT&T Wireless Terms and Conditions attached hereto as  
7 Exhibit C.

8       71. Every contract, including each of the AT&T Wireless Contracts, imposes  
9 upon each party a duty of good faith and fair dealing in its performance and enforcement.

10      72. The AT&T Wireless Contracts purport to govern the relationship between  
11 the subscriber and "the entity licensed to provide service in the area associated with [the  
12 subscriber's] assigned telephone, data, and/or messaging number(s)." *See Exhibit C.*  
13 Thus, as a result of Cingular's acquisition of AT&T Wireless, Cingular is a successor in  
14 interest to said contracts.

15      73. By failing to fulfill the promises made about a "seamless" transition after  
16 the merger, by causing the AT&T Wireless network to degrade, by charging an \$18 fee to  
17 "upgrade" or "transfer" to a Cingular plan, and by inducing AT&T Wireless customers to  
18 incur additional expenses (new phone, SIM chip, and additional services), Cingular and  
19 AT&T Wireless have breached the AT&T Wireless Contracts.

20      74. By unilaterally assessing AT&T Wireless subscribers an additional \$4.99  
21 monthly fee, Cingular and AT&T Wireless have further breached the AT&T Wireless  
22 Contracts.

23      75. Plaintiffs and the putative Class have suffered monetary damages from said  
24 breaches of contract and the covenant of good faith and fair dealing, including  
25 compensatory, special and economic damages to be set forth according to proof.  
26 Plaintiffs do not request any relief that would require Defendants to provide any  
27 particular physical or technical infrastructure nor change any particular rate, and seek an  
28 award of monetary damages and/or restitution under common law.

1 WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

2 **COUNT IV**

3 **Violation of the Federal Communications Act, §§ 201 and 202**

4 76. Plaintiffs incorporate by reference all allegations of all prior paragraphs as  
5 though fully set forth herein.

6 77. This Count IV is brought on behalf of the putative Class and Sub-Class.

7 78. At all times relevant hereto, there was in full force and effect the Federal  
8 Communications Act of 1934 ("FCA"), 47 U.S.C. § 201, *et seq.*

9 79. Section 201(b) of the FCA provides that all charges, practices,  
10 classifications, and regulations for and in connection with communication service, shall  
11 be just and reasonable. 47 U.S.C. § 201(b).

12 80. Each of the fees herein alleged is unjust or unreasonable within the meaning  
13 of Section 201(b), *supra*.

14 81. Section 202(a) of the FCA prohibits any common carrier from making any  
15 unjust or unreasonable discrimination in charges, practices, classifications, regulations,  
16 facilities, or services for or in connection with like communication service, or to make or  
17 give any undue or unreasonable preference or advantage to any particular person or class  
18 of persons. 47 U.S.C. § 202(a).

19 82. Notwithstanding the prohibitions of Section 202(a), *supra*, Plaintiffs and  
20 other AT&T Wireless customers who migrated to Cingular following its merger with  
21 AT&T were to receive the same service as Cingular customers who did not pay such fees.

22 83. As a direct and proximate result of Defendants' violation of 47 U.S.C. §§  
23 201(b) and 202(a) described above, Plaintiffs and the putative Class have been damaged.  
24 Plaintiffs do not request any relief that would require Defendants to provide any  
25 particular infrastructure or change any particular rate, and seek an award of monetary  
26 damages and/or restitution under common law.

27   ///

28   ///

1 WHEREFORE, Plaintiffs and the putative Class pray for relief as set forth below.

2 **VI. PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs and the putative Class pray for relief as follows:

- 4 1. For an Order certifying this action as a class action on behalf of the putative  
5 Class and Sub-Class described above;
- 6 2. For restitution and/or disgorgement of all amounts wrongfully charged to  
7 Plaintiffs and members of the putative Class;
- 8 3. For damages according to proof;
- 9 4. For a judicial declaration that Defendants have breached the AT&T  
10 Wireless Contracts and, by reason of such breach, members of the putative  
11 Class may terminate those contracts without incurring a penalty in the form  
12 of an early termination fee;
- 13 5. For costs of suit herein incurred;
- 14 6. For both pre- and post-judgment interest on any amounts awarded;
- 15 7. For an award of treble or punitive damages under applicable law;
- 16 8. For an award of attorneys' fees as appropriate pursuant to the provisions of  
17 the Consumer Protection Act of Washington and other similar State laws;
- 18 9. For declaratory judgment and injunctive relief declaring the mandatory  
19 arbitration clauses and class action waiver of rights to participation as  
20 unconstitutional, unconscionable and unenforceable and enjoining  
21 enforcement thereof;
- 22 10. For declaratory judgment and injunctive relief prohibiting Defendants from  
23 charging the \$4.99 monthly fee to TDMA/Analog users, declaring said fee  
24 to be unenforceable, a violation of the contract, and enjoining enforcement  
25 thereof, including any efforts to collect;
- 26 11. For corrective advertising to ameliorate consumers' mistaken impressions  
27 created by Defendants' prior advertising; and

28 // /

12. For such other and further relief as the Court may deem proper.

2 DATED this 6<sup>th</sup> day of October, 2006.

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1                   **VII. DEMAND FOR JURY TRIAL**

2                   Plaintiffs, on behalf of themselves and all others similarly situated, request a jury  
 3 trial on the claims so triable.

4 DATED this 6-1 day of October, 2006.

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# **EXHIBIT B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARYGRACE A. CONEFF, *et al.*, ) CASE NO. C06-944 RSM  
Plaintiffs, )  
v. ) ORDER DENYING DEFENDANTS'  
AT&T CORP. *et al.*, ) MOTION TO COMPEL ARBITRATION  
Defendants. )

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## **I. INTRODUCTION**

This matter comes before the Court on ‘Defendants’ Amended Motion to Compel Arbitration Pursuant to the Federal Arbitration Act and to Dismiss Action.” (Dkt. #133). Defendants argue that pursuant to a binding arbitration clause entered into between the parties, Plaintiffs must pursue their disputes through individualized arbitration. Defendants also argue that the Federal Arbitration Act preempts any state law defenses Plaintiffs can bring to the enforceability of the arbitration clause.

Plaintiffs respond that the arbitration provisions are unenforceable because they are substantively unconscionable. Additionally, Plaintiffs indicate that Defendants' preemption arguments have been rejected by the Ninth Circuit.

For the reasons set forth below, the Court agrees with Plaintiffs, and DENIES Defendants' motion to compel.

ORDER  
PAGE - 1

## II. DISCUSSION

### A. Background

The instant putative class action lawsuit was brought by several individuals across the United States against Defendants Cingular Wireless LLC (“Cingular”), Cingular Wireless Corporation, AT&T Wireless Services, Inc. (“AT&T Wireless”), and New Cingular Wireless Services, Inc. (*See* Dkt. #45, Second Am. Compl., ¶¶ 22-25). Plaintiffs, who were or are currently AT&T Wireless customers, allege that after Cingular merged with AT&T Wireless in October of 2004, Cingular deliberately degraded AT&T Wireless’ network in order to induce AT&T Wireless customers to transfer their plans to Cingular plans, which they allege are generally more expensive and less favorable to customers. Plaintiffs also contend that Cingular’s intention was to charge AT&T Wireless customers with various fees and costs in connection with those new plans.

Plaintiffs allege that Cingular's specific scheme was to encourage AT&T Wireless customers to "upgrade" to Cingular's network. These "upgrades" required customers to do one or more of the following: (1) pay an \$18 transfer fee to Cingular; (2) purchase one or more new phones from Cingular; (3) pay \$18 for a SIM chip to operate their current phone; and/or (4) enter into a new service contract with Cingular. Plaintiffs allege that AT&T Wireless customers who did not agree to such an "upgrade" were left with a choice to either fulfill their contract term with a degraded AT&T Wireless service, or pay a \$175 early termination fee to cancel service.

Plaintiffs also allege that Cingular began charging an unnecessary and mandatory fee to all AT&T Wireless customers. As a condition for approval of the merger, the Federal Communication Commission required Cingular to keep AT&T Wireless' network in place until February of 2008. Significantly, Cingular offered its wireless services through a new and improved GSM network, whereas AT&T Wireless offered service through a TDMA/Analog network. Plaintiffs allege, however, that in July of 2006, Cingular began imposing a mandatory \$4.99 monthly fee to any AT&T Wireless customer still using the TDMA/Analog network. Plaintiffs note in their complaint that major publications, including

1 the Wall Street Journal, reported that Cingular had “been spending next to nothing to maintain  
 2 the [AT&T Wireless] network, leaving customers who don’t upgrade [to the Cingular  
 3 network] in the lurch.” (Second Am. Compl., ¶ 35).

4 As a result of this conduct, Plaintiffs initiated the instant class action against Defendants  
 5 in this Court on July 6, 2006. Plaintiffs assert claims under the consumer protection acts of 14  
 6 different states, the Federal Communications Act as codified by 47 U.S.C. §§ 201 *et seq.*, and  
 7 several common-law doctrines. Plaintiffs also seek, among other things, a declaratory  
 8 judgment that an arbitration provision contained in their contracts with Defendants is  
 9 unconscionable and therefore unenforceable.

10 Defendants now bring the instant motion to compel arbitration on an individual basis,  
 11 and to dismiss Plaintiffs’ claims pursuant to the arbitration provision that Plaintiffs argue is  
 12 unconscionable.<sup>1</sup> Although the exact wording of the various AT&T Wireless Service  
 13 Agreements (“WSAs”) that Plaintiffs entered into with Defendants has changed over time, the  
 14 arbitration agreements have remained substantially intact. Each expressly requires customers  
 15 to pursue their dispute in either individual arbitration or small claims court. The WSAs also  
 16 preclude customers from bringing or participating in any class action, regardless of whether  
 17 the action is brought in arbitration or in court. Counsel for Plaintiffs acknowledged during  
 18 oral argument that the 2006 WSA controls in this case. This version of the WSA provides:

19 YOU AND [CINGULAR/AT&T] AGREE THAT EACH MAY BRING CLAIMS  
 20 AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND  
 21 NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR  
 22 REPRESENTATIVE PROCEEDING. Further, unless both you and [Cingular/AT&T]  
 agree otherwise, the arbitrator may not consolidate more than one person’s claims, and  
 may not otherwise preside over any form of a representative or class proceeding.

23 (Dkt. #52, Decl. of Berinhout, Ex. 4 at 35; Dkt. #134, Ex. 23 at 124).

24 Defendants also contend that each WSA contains a choice-of-law clause selecting the  
 25 Plaintiff’s home state as the governing law. Defendants argue that under the law of each  
 26 applicable state, the class-waiver provisions in the WSAs are neither procedurally nor

27 <sup>1</sup> It is noteworthy that Defendants’ original motion to compel was filed on October 30, 2006.  
 28 (Dkt. #51). However, due to extensive discovery and repeated continuances requested by the  
 parties, the motion finally became ripe for review on March 11, 2009.

1 substantively unconscionable. The applicable state laws include: Alabama, Arizona,  
 2 California, Florida, Illinois, Missouri, New Jersey, Virginia and Washington.

3 Alternatively, Defendants argue the Section 2 of the FAA preempts Plaintiffs' state-law  
 4 unconscionability arguments. Defendants suggest that the FAA preempts general principles  
 5 of contract law such as unconscionability if those doctrines are employed in ways that subject  
 6 arbitration clauses to special scrutiny. Given the unique and "pro-consumer" nature of the  
 7 arbitration agreements at-issue, Defendants contend that the Court should overlook any state-  
 8 law standard that is at odds with the FAA's liberal policy in favor of arbitration.

9 Notably, and prior to the merger, Cingular was the second largest provider of wireless  
 10 communication services in the U.S. in terms of subscribership with approximately 24 million  
 11 customers, and AT&T was the third largest with over 22 million customers. After the merger,  
 12 in which Cingular acquired AT&T Wireless for \$41 billion, the new consolidated corporation  
 13 branded as AT&T Mobility became the largest provider of wireless services. At the end of  
 14 2007, AT&T Mobility had over 70 million customers and reported approximately \$42.7  
 15 billion in revenue. (Dkt. #138, Decl. of Coluccio, Ex. Q).

16 **B. The Federal Arbitration Act**

17 It is well settled that Congress enacted the Federal Arbitration Act ("FAA") to  
 18 "overcome judicial resistance to arbitration . . . and to declare a national policy favoring  
 19 arbitration of claims that parties contract to settle in that matter." *Vaden v. Discover Bank*,  
 20 129 S.Ct., 1262, 1271 (2009) (internal quotations and citations omitted). The primary  
 21 purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according  
 22 to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489  
 23 U.S. 468, 479, (1989). The FAA clearly manifests a liberal federal policy favoring  
 24 arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).

25 Nevertheless, courts should consider "ordinary state-law principles that govern the  
 26 formation of contracts" in determining whether the arbitration provision is valid. *First*  
 27 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citations omitted). Thus,  
 28 "generally applicable contract defenses such as fraud, duress, or unconscionability, may be

1 applied to invalidate arbitration agreements[.]” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S.  
 2 681, 687 (1996) (citations omitted). The party opposing arbitration bears the burden of  
 3 showing that the agreement is not enforceable. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531  
 4 U.S. 79, 91-92 (2000).

5 Here, the parties do not dispute that Plaintiffs’ claims fall within the scope of the  
 6 arbitration agreements in the WSAs. As a result, the Court must determine whether the  
 7 arbitration agreements are enforceable.

8 **C. Applicable Law**

9 The first issue for the Court to determine is whether the choice-of-law provisions  
 10 contained in the WSAs are valid. It is undisputed that the WSAs select the law of the  
 11 individually-named Plaintiff’s home state or the state of the wireless phone number. (Dkt.  
 12 #133 at 19, n.8). Plaintiffs maintain, however, that applying the choice-of-law clauses would  
 13 violate Washington’s fundamental public policy against class-action waivers in arbitration  
 14 agreements.

15 A court sitting in diversity, as is the case here, applies the choice-of-law rules of the  
 16 forum state. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). In  
 17 Washington, “there must be an actual conflict between the laws or interests of Washington  
 18 and the laws or interests of another state before Washington courts will engage in a conflict of  
 19 laws analysis.” *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 692 (2007) (citations  
 20 omitted). Consequently, and as this district court has noted, choosing the applicable law is a  
 21 two-part inquiry: first, a court must determine whether there is an actual and meaningful  
 22 difference between the potentially applicable laws; and second, a court must determine  
 23 whether the parties’ choice-of-law is actually effective. *Carideo v. Dell, Inc.*, 520 F.Supp.2d  
 24 1241, 1244-45 (W.D. Wash. 2007).

25 With respect to the first inquiry, there is no question that an actual conflict exists  
 26 between Washington law and the law of other states that are implicated in this lawsuit. In  
 27 Washington, a class-action waiver is unenforceable in certain circumstances. *Scott v.*  
*Cingular Wireless*, 160 Wash.2d 843, 859 (2008). On the other hand, in Virginia, Illinois,

1 and Alabama – three states that are potentially applicable in the instant case – courts have  
 2 upheld class action waivers based on a strict interpretation of the FAA, or when the corporate  
 3 defendants have agreed to pay the administrative fees associated with arbitration. *See, e.g.*,  
 4 *Gay v. CreditInform*, 511 F.3d 369, 390-92 (3d Cir. 2007) (applying Virginia law);  
 5 *Hutcherson v. Sears Roebuck & Co.*, 342 Ill.App. 3d 109, 121-124 (2003) (applying Illinois  
 6 law); *Billups v. Bankfirst*, 294 F.Supp.2d 1265, 1276-77, n. 6 (M.D. Ala. 2003) (applying  
 7 Alabama law). Indeed, there is a split of authority in this country over the enforceability of  
 8 class-action waivers. *See Scott*, 160 Wash.2d at 850-851 (collecting cases).

9 As a result, the Court must ask whether the parties' express contractual choice-of-law is  
 10 effective. Washington applies § 187 of the *Restatement* to make this determination. *See*  
 11 *Erwin*, 161 Wash.2d at 694. Section 187(2) of the *Restatement* specifically provides:

- 12       (2)     The law of the state chosen by the parties to govern their contractual rights and  
                   duties will be applied, even if the particular issue is one which the parties could  
                   not have resolved by an explicit provision in their agreement directed to that  
                   issue, unless either
  - 15           (a) the chosen state has no substantial relationship to the parties or the  
                   transaction and there is no other reasonable basis for the parties' choice, or
  - 16           (b) application of the law of the chosen state would be contrary to a fundamental  
                   policy of a state which has a materially greater interest than the chosen state  
                   in the determination of the particular issue and which, under the rule § 188,  
                   would be the state of the applicable law in the absence of an effective choice  
                   of law by the parties.

19 *Restatement (Second) of Conflict of Laws* § 187 (1971).

20 Here, there is no dispute that Defendants' chosen state has a substantial relationship to  
 21 the parties of the transaction. The states are those in which the individually named Plaintiffs  
 22 respectively reside. Therefore Plaintiffs must show that the elements of § 187(2)(b) of the  
 23 *Restatement* are met.

24       1. Washington Law Governs Absent an Enforceable Choice-of-Law Clause

25       As the Washington Supreme Court recently explained, the first inquiry in the choice-of-  
 26 law analysis is to determine whether Washington law would apply without the provision.

27       *McKee v. AT&T Corp.*, 164 Wash.2d 372, 384 (2008). Washington courts have applied  
 28 various tests when making this inquiry, including the "most significant relationship" test from

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1       § 188 of the *Restatement*. This test specifies that courts should consider: (1) the place of  
 2 contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the  
 3 location of the subject matter of the contract, and (5) the domicile, residence, or place of  
 4 incorporation of the parties. *Restatement, supra*, § 188; *see also Mulcahy v. Farmers Ins. Co.*  
 5 *of Washington*, 152 Wash.2d 92, 101 (2004) (employing the same five factors).

6       Other courts have examined factors outside of those listed in the *Restatement*. For  
 7 example, this district court held that in a class-action lawsuit involving plaintiffs from across  
 8 the nation, “the place of injury is of lower importance . . . In such a case, the state in which  
 9 *the fraudulent conduct arises* has a stronger relationship to the action.” *Kelley v. Microsoft*  
 10 *Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (emphasis added). Likewise, a Washington  
 11 state court acknowledged that even though a defendant corporation was incorporated outside  
 12 of Washington state, Washington law nevertheless applied because “all defendants reside or  
 13 conduct business in Washington . . . a Seattle attorney was involved in preparing and  
 14 reviewing many transaction documents . . . and [] many of the acts of alleged fraud occurred  
 15 in Washington.” *Ito Intern. Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290 (1996).

16       In the instant case, the Court finds that the first four factors in the *Restatement* analysis  
 17 are neutral. The reality of the situation presented by this case is that there is simply no place  
 18 of contracting, no place of negotiation of the contract, no place of performance, and no central  
 19 location of the subject matter of the contract. Instead, Defendants sent the WSAs to  
 20 customers who were existing AT&T Wireless customers, and there is no evidence that the  
 21 Plaintiffs repeatedly communicated with Defendants to either change or otherwise modify  
 22 their plans. Therefore no true negotiation between the parties took place. Additionally, in a  
 23 case involving wireless phones, there is no central place of performance, as Defendants  
 24 undoubtedly have satellite towers all across the country, and customers often use their phones  
 25 in multiple states. Indeed, wireless phone use is a nation-wide practice.

26       With respect to the last factor, this weighs in favor of applying Washington law.  
 27 Defendants concede that AT&T Wireless is a Washington corporation, and Plaintiffs also  
 28 allege that Washington was the primary residence of AT&T Wireless’ officers, directors, and

1 legal department. (Dkt. #136 at 19). Defendants do not dispute these contentions. In  
2 addition, at least one named Plaintiff of the putative class is a Washington resident.

3 Moreover, when considering that AT&T Wireless has strong connections to this state,  
4 application of Washington law is the logical choice. Plaintiffs indicate that the AT&T  
5 Wireless executives responsible for “designing, implementing, and operating [AT&T  
6 Wireless’] national network, including network footprint expansion plans, capacity path  
7 growth, and the deployment strategy for the company’s next generation wireless network”  
8 were located in Redmond, Washington. (Decl. of Coluccio, Ex. CC). Plaintiffs further  
9 indicate that the AT&T Wireless executives responsible for “marketing strategy and  
10 programs, including products and offers, advertising and marketing communications,  
11 partnerships and direct marketing” were also located in Redmond. (*Id.*, Ex. DD). In addition,  
12 AT&T Wireless’ legal department was located in Washington, and it appears that the initial  
13 drafts of the arbitration provisions were drafted here. (*Id.*, Ex. L, Dep. of Berinhout, 105:17-  
14 22; 111:17-113:1). Defendants also do not dispute these contentions.

15 Nevertheless, counsel for Defendants indicated at oral argument that an unpublished  
16 Ninth Circuit case is controlling on this issue. *See In re Detwiler*, 305 Fed.Appx. 353 (9th  
17 Cir. 2008). In that case, a customer to a telecommunications provider argued that the district  
18 court erred in holding that Florida law applied if no choice-of-law clause existed in the  
19 parties’ contract. The Ninth Circuit affirmed the district court’s decision because the majority  
20 of the *Restatement* factors weighed against the customer, who was seeking to apply  
21 Washington law. The Ninth Circuit held that Washington law would not apply because  
22 “Florida is the place of contracting, the place of negotiation, the place of performance, the  
23 location of the subject matter, and the residence of one of the parties.” *Id.* at 355.  
24 Significantly, the customer had contact with the telecommunications provider 11 times over a  
25 period of six years, and had received several guides regarding her agreement.

26 The Court finds that *Detwiler* is not controlling. As explained previously, the Plaintiffs  
27 in this case did not have extensive contacts or negotiations with the Defendants, and the first  
28 four factors of the *Restatement* simply have no compelling effect. Conversely, the only factor

1 that clearly applies weighs in favor of applying Washington law. Ultimately, the Court agrees  
 2 with Plaintiffs' counsel's characterization during oral argument that Washington's choice-of-  
 3 law analysis is a "messy test." It is clear that Washington courts examine various factors in  
 4 determining whether Washington law would apply.

5 As a result, and similar to the *Kelley* and *Prescott* cases above, it is clear that a  
 6 substantial portion of the allegedly fraudulent activity occurred in Washington. The  
 7 application of Washington law in this case "would encourage Washington residents involved  
 8 in business transactions to behave responsibly." *Prescott*, 83 Wn. App. at 290. Coupled with  
 9 the fact that the *Restatement* analysis weighs slightly in favor of applying Washington law,  
 10 the Court finds that Washington has the most significant relationship to this case, and that  
 11 Washington law would apply absent a choice-of-law provision in the WSAs.

## 12       2. Fundamental Public Policy of Washington

13       There can be no doubt that Washington has a strong public policy of refusing to enforce  
 14 exculpatory class action bans. *See Scott*, 160 Wash.2d at 859.<sup>2</sup> This policy has been  
 15 reinforced by *McKee*, wherein the court stated that Washington has a "fundamental public  
 16 policy to protect consumers through the availability of class action." *McKee*, 164 Wash.2d at  
 17 385. The *McKee* court further stated that "Washington's strong [CPA] policy favoring class  
 18 adjudication of small-dollar claims is a 'fundamental policy' contemplated by [the  
 19 *Restatement*.]" *Id.* at 386.

20       Here, there is no doubt that the claims alleged by Plaintiffs implicate a fundamental  
 21 public policy of Washington. A prohibition on the Plaintiffs' ability to initiate a class-action  
 22 lawsuit would violate the rights protected by the Washington CPA and the case law that has  
 23 interpreted these rights. Furthermore, and as mentioned above, there exists the possibility that  
 24 in at least three of the jurisdictions that Defendants contend apply in this case, a court may

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25       <sup>2</sup> In *Carideo*, this district court found that the analysis of whether a contract would violate a  
 26 fundamental public policy is similar to whether it would be substantively unconscionable.  
 27 520 F.Supp.2d at 1245. However, the *McKee* court found that "[t]his question is different  
 28 than determining whether a class action ban under some circumstances is substantively  
 unconscionable." 164 Wash.2d at 385. The Ninth Circuit remanded the *Carideo* decision in  
 light of *McKee*. Accordingly, the Court separates the analysis as well.

1 uphold class-action waivers under certain circumstances. *See Gay*, 511 F.3d at 392;  
2 *Hutcherson*, 342 Ill.App. 3d at 121-124; *Billups*, 294 F.Supp.2d at 1276-77, n. 6. Therefore  
3 the Court finds that this element of § 187 of the *Restatement* has been met.

4       3. Washington's Materially Greater Interest

5       The last factor for this Court to consider is whether Washington has a materially greater  
6 interest in adjudicating this dispute than the other potentially applicable states. The Court has  
7 effectively already performed this analysis in its discussions above. There can be no doubt  
8 that Washington has an interest in regulating the conduct of businesses that reside in this state.  
9 This interest is materially greater than the interests of the eight other states whose laws  
10 Defendants contend apply in this case. In those states, the only connection to this lawsuit is  
11 that the individually-named Plaintiffs reside there. Defendants do not conduct any significant  
12 business activity in such states, and therefore the states have limited interest in adjudicating  
13 the case at bar.

14       As a result, because the elements of § 187(2) have been met, Washington law shall  
15 apply in this case.

16       **D. Unconscionability**

17       Washington law recognizes two types of unconscionability, substantive and procedural.  
18 *Zuvver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 303 (2004) (citations omitted).  
19 “Substantive unconscionability involves those cases where a clause or term in the contract is  
20 alleged to be one-sided or overly harsh, while procedural unconscionability relates to  
21 impropriety during the process of forming a contract.” *Schroeder v. Fageol Motors, Inc.*, 86  
22 Wash.2d 256, 260 (1975) (citation omitted). In Washington, courts may hold that contracts  
23 are unenforceable based upon substantive unconscionability only. *See Scott*, 160 Wash.2d at  
24 854, n.4 (“Because we find the class action waiver substantively unconscionable, we find it  
25 unnecessary to address plaintiffs’ claims of procedural unconscionability.”).

1           1. Substantive Unconscionability in Washington

2           Both parties are fully aware that the Washington Supreme Court has recently held that a  
 3 class-action waiver provision in an arbitration agreement is substantively unconscionable.  
 4 *See Scott*, 160 Wash.2d at 859. Other recent decisions involving class-action waivers and  
 5 applying Washington law have found similarly. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d  
 6 1213, 1219 (9th Cir. 2008); *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1179  
 7 (W.D. Wash. 2002); *Riensche v. Cingular Wireless, LLC*, 2006 WL 3827477, \*12 (W.D.  
 8 Wash. 2006).

9           Despite this recent case law, Defendants contend that there is no categorical rule that all  
 10 class-action waivers contained in arbitration provisions are substantively unconscionable.  
 11 Defendants argue that *Scott* only bans class-action waivers where such a waiver would  
 12 prevent vindication of consumer rights secured by the Washington CPA. Defendants further  
 13 point out that the court in *Scott* held that it could “certainly conceive of situations where a  
 14 class action waiver would not prevent a consumer from vindicating his or her substantive  
 15 rights under the CPA and would thus be enforceable.” *Scott*, 160 Wash.2d at 860, n.7.

16           The Court agrees that there is no *per se* ban on a class-action waiver. As this district  
 17 court has previously held, “*Scott* requires the court to examine the enforceability of a class-  
 18 action waiver given the totality of the circumstances.” *Carideo*, 520 F.Supp.2d at 1243. As a  
 19 result, the heart of this dispute is whether the specific terms of the class-action waivers are  
 20 substantively unconscionable.

21           2. Cingular and AT&T’s class-action waiver provisions

22           Defendants contend that there are several aspects of the applicable arbitration  
 23 provisions in the WSAs that make them uniquely “pro-consumer,” and therefore enforceable.  
 24 These features include, among other things, the following incentives: (1) cost-free arbitration  
 25 wherein Defendants agree to pay all filing, administration, and arbitrator fees; (2) the option  
 26 to bring a claim in small claims court; (3) the availability of punitive damages; (4) a  
 27 guaranteed minimum recovery of at least \$5,000 under certain conditions; and (5) the

1 availability of double attorneys' fees under certain conditions while Defendants  
 2 simultaneously disclaim their right to seek attorneys' fees. (Dkt. #133 at 16-17).

3 Defendants' expert witness Richard A. Nagareda, a law professor at Vanderbilt  
 4 University, also testifies that he has "never seen an arbitration provision that has gone as far  
 5 as this one to provide incentives for consumers and their prospective attorneys to bring  
 6 claims." (Dkt. #53, Decl. of Nagareda, ¶ 11). Mr. Nagareda continues that the applicable  
 7 arbitration provision "reduces dramatically the cost barriers to the bringing of individual  
 8 consumer claims . . . and provides financial incentives for consumers (and their attorneys, if  
 9 any) to pursue arbitration in the event that they are dissatisfied with whatever offer Cingular  
 10 has made to settle their disputes." (*Id.*).

11 Notwithstanding these arguments and the allegedly unique and "pro-consumer" nature  
 12 of the agreements between AT&T and Cingular and their customers, the Court finds that the  
 13 class-waiver provisions are substantively unconscionable for the following five reasons.

14 First, the class-action waiver serves to protect Defendants "from legal liability for any  
 15 wrong where the cost of pursuit outweighs the potential amount of recovery." *Scott*, 160  
 16 Wash.2d at 855. Here, there can be no doubt that the purported class in this case alleges  
 17 injuries that consist of small sums of money. Specifically, Plaintiffs' second amended  
 18 complaint describes the putative class members' damages as ranging from \$4.99 to \$175.  
 19 (Second Am. Compl., ¶¶ 7-21). Such small claims are undoubtedly dwarfed by the legal  
 20 complexity presented by the facts alleged in Plaintiffs' complaint. These include claims that  
 21 Cingular, a multi-billion dollar corporation, intentionally degraded AT&T's pre-existing  
 22 wireless network in order to exponentially increase their profits by assigning small fees to  
 23 customers switching to the new network. There can be no question that the cost of pursuit  
 24 would be prohibitively expensive for a customer proceeding on an individual basis.

25 Furthermore, Plaintiffs submit the declarations of several consumer lawyers across the  
 26 country, all of whom testify "that the relatively small amount in controversy makes cases  
 27 against large corporations such as AT&T impractical to pursue on an individual basis." (Dkt.  
 28 #136 at 10). Each consumer lawyer additionally testifies that he or she would not represent

1 the named Plaintiffs in individual actions, either in court or in arbitration. (*Id.*). The Court  
 2 finds the testimony of North Carolina lawyer Jerome Hartzell particularly compelling. He  
 3 states that “the hourly charge would generally or invariably exceed the entire amount in  
 4 controversy.” (Dkt. #43, Decl. of Hartzell, ¶ 23). “[N]o lawyer concerned with *ethical*  
 5 *propriety* would be comfortable charging a client by the hour for such services.” (*Id.* at ¶ 34)  
 6 (emphasis added).

7 Given the significant disparity presented by the facts of this case, the Court finds it clear  
 8 that the cost of pursuit significantly outweighs the potential recovery if each of the Plaintiffs  
 9 was to proceed on an individual basis. Indeed, “[t]he *realistic* alternative to a class action is  
 10 not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for  
 11 \$30.” *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in  
 12 original) (J. Posner).

13 The second reason in support of a finding of substantive unconscionability is that  
 14 Defendants significantly overstate the “premiums” contained in their WSAs. The Court gives  
 15 no weight to the fact that Defendants will pay for arbitration fees as well as attorneys’ fees in  
 16 the event a customer wishes to pursue individual arbitration. As *Scott* clearly held, “[s]hifting  
 17 the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and  
 18 stress to pursue such individually small claims.” *Scott*, 160 Wash.2d at 855-56; *see also*  
 19 *McKee v. AT&T Corp.*, 164 Wash.2d at 398 (“The agreement allows for small claims court  
 20 action, but even the availability of small claims court or low-cost arbitration does not make it  
 21 practicable for an individual to pursue such small amounts.”).

22 In addition, Defendants also overstate the provision in their WSAs that allow consumers  
 23 to potentially recoup a \$5,000 award. Defendants repeatedly argue throughout their briefings  
 24 that this \$5,000 minimum payment is clearly a meaningful recovery that would turn the  
 25 concept of unconscionability on its head. However, the \$5,000 payment is awarded *only upon*  
 26 *the condition* that “the arbitrator awards the customer more than [AT&T Mobility’s] last  
 27 written settlement offer before an arbitrator was selected.” (Dkt. #133 at 16) (internal  
 28 quotations omitted). Therefore the award is not guaranteed. Defendants are in full control of

ensuring that such an amount is never awarded by offering a settlement offer that is significantly lower than \$5,000, but remains significantly higher than the nominal claims that the individuals are bringing in this case. This reasoning applies with equal force to the provision in Defendants' WSAs that awards double attorneys' fees should this condition occur. As a result, and as the *Scott* court pointed out, while these "premiums" are laudable, "it appears . . . that these provisions do not ensure that a remedy is practically available." *See Scott*, 160 Wash. 2d at 856.

Third, and perhaps most compelling, is that the Court has tangible evidence which reveals that Defendants' "pro-consumer" provisions are not having their intended effect. For example, Plaintiffs indicate that since 2003, fewer than 200 consumer arbitrations involving Defendants have been conducted nationwide, and only 265 small claims court cases have been filed against Defendants nationwide. (Dkt. #136 at 33). To place this in perspective, it is worthwhile to reiterate that Defendants' client base is currently over 70 million customers. Therefore the actual percentage of customers utilizing Defendants' allegedly "pro-consumer" provisions represents an infinitesimal amount.<sup>3</sup>

Plaintiffs further point out that the Foundation for Taxpayer and Consumer Rights – a non-profit consumer advocacy organization – received more than 4,700 complaints regarding service after the merger, and over 1,800 web-based complaints within 24 hours of the press announcement that followed the filing of this class action lawsuit. (Dkt. #144, Decl. of Heller, ¶¶ 8, 11). Thus, the minuscule amount of customers pursuing arbitration proves that the customers are either unaware of their right to take advantage of these "pro-consumer" provisions, or the customers have no incentive to bring their claims against Defendants given the prohibitively expensive costs of individual adjudication. In either circumstance, Defendants are utilizing the provisions in the WSAs to effectively exculpate themselves from any potential liability for unfair or deceptive acts or practices in commerce, conduct that is expressly barred by the Washington Supreme Court. *Scott*, 160 Wash.2d at 854 ("Contract

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<sup>3</sup> Defendants report that they have conducted nearly 270 arbitrations. Regardless, the tiny fraction of those pursuing individual arbitration remains essentially the same.

provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good.”). This Court will not condone such a broad and exculpatory practice.

Relatedly, and in light of *Scott*’s holding that not all class-waivers are *per se* unconscionable, Defendants’ consistently challenged Plaintiffs during oral argument to imagine an arbitration provision that would not violate substantive unconscionability. No such burden exists. Plaintiffs must only show that the WSAs in this case are shielding Defendants from a substantial amount of potential liability. Defendants attempts to focus this Court’s attention on the “pro-consumer” provisions of the WSAs are not persuasive.

The fourth reason in support of a finding of substantive unconscionability is that class action lawsuits are necessary and effective avenues for consumers whose economic positions vis-à-vis their corporate opponents would not allow them to proceed on a case-by-case basis. Washington clearly has “a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice.” *Scott*, 160 Wash.2d at 851. “[A] class-based remedy is the only effective method to vindicate the public’s rights.” *Id.* at 852.

Nevertheless, Defendants contend that class action settlements are often worth nothing to individuals, given that the actual award to individuals is nominal. However, the actual award to the individuals that comprise a class is only one of the principal aims of a class action lawsuit. Another primary purpose of a class action lawsuit is to allow “[p]rivate citizens [to act] as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott*, 160 Wash.2d at 853 (citing *Lightfoot v. MacDonald*, 86 Wash.2d 331, 335-36 (1976)). Curbing fraudulent business practices is a fundamental principle of any class action lawsuit. As the *Scott* court noted when citing a California Supreme Court decision:

Individual actions by each of the defrauded consumers [are] often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; *thus an unscrupulous seller retains the benefits of its wrongful conduct*. A class action by consumers produces several salutary by-products, *including a therapeutic effect upon those sellers who indulge in fraudulent practices*, aid to legitimate business enterprises by *curtailing illegitimate competition*, and avoidance to

1 the judicial process of the burden of multiple litigation involving identical claims. The  
 2 benefit to the parties and the courts would, in many circumstances, be substantial.

3       <sup>2</sup>*Scott*, 160 Wash.2d at 852 (citing *Vazquez v. Superior Court of San Joaquin County*, 4 Cal. 3d  
 4 800, 808 (1971)) (emphasis added).

5       Lastly, the Court recognizes that recent jurisprudence views class-action waivers  
 6 unfavorably. Dating back to the beginning of 2008, there have been at least seven different  
 7 courts in five different jurisdictions that have refused to enforce class-action waivers. See  
 8 *Hoffman v. Citibank (South Dakota)*, N.A., 546 F.3d 1078, (9th Cir. 2008); *In re Apple &*

9 *AT&T Antitrust Litig.*

10 , 596 F.Supp.2d 1288 (N.D. Cal. 2008); *In re American Express*  
 11 *Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009); *McKee v. AT&T Corp.*, 164 Wash.2d 372  
 12 (2008); *Olson v. The Bon, Inc.*, 144 Wn. App. 627 (2008); *Fiser v. Dell Comp. Corp.*, 144  
 13 N.M. 464 (2008); *Woods v. QC Financial Services*, --- S.W.3d ---, 2008 WL 5454124 (Mo.  
 14 App. E.D. 2008). And as the Court noted above, even the *Carideo* case in which Defendants  
 15 heavily rely upon has recently been remanded by the Ninth Circuit. See *In re Carideo*, 550  
 16 F.3d 846 (9th Cir. 2008). This ruling is therefore consistent with the modern trend.

17       As a result, the Court finds that class waiver provisions in the instant case are  
 18 unconscionable. Defendants are effectively exculpated from any liability as a result of the  
 19 provisions contained in their WSAs. This conduct contravenes Washington's fundamental  
 20 public policy favoring the availability of class actions as a mechanism for enforcing a  
 21 consumer's rights.

22       Defendants indicate that if the class-action waiver provision is unenforceable, the entire  
 23 arbitration agreement should be unenforceable. Accordingly, the Court finds that all language  
 24 in the applicable WSAs touching upon arbitration is unenforceable under Washington law.

25       **E. Preemption**

26       Defendants nevertheless argue that the FAA preempts the substantive unconscionability  
 27 laws of Washington State. In support of this argument, Defendants indicate that § 2 of the  
 28 FAA mandates that arbitration provisions "shall be valid, irrevocable, and enforceable, save  
 upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §

1       2. Defendants argue that this section preempts general principles of contract law where those  
 2       doctrines are employed in a way to subject arbitration clauses to special scrutiny. (Dkt. #133  
 3       at 53) (citing *Iberia Credit Bureau, Inc v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir.  
 4       2004)). In other words, courts “may not invalidate arbitration agreements under state laws  
 5       applicable *only* to arbitration provisions.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S.  
 6       681, 687 (1996) (emphasis in original).

7       However, the arguments raised by Defendants have been squarely rejected by the Ninth  
 8       Circuit. For example, in *Shroyer v. New Cingular Wireless Servs., Inc.*, the court recognized  
 9       that Congress never intended to place arbitration agreements on a different footing than other  
 10      contracts. 498 F.3d 976, 989 (9th Cir. 2007); *see also Prima Paint Corp. v. Flood & Conklin*  
 11      *Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967) (“As the ‘savings clause’ in § 2 indicates, the  
 12      purpose of Congress . . . was to make arbitration agreements as enforceable as other contracts,  
 13      but not more so.”). Nonetheless, the Court held that this purpose “does not appear to be  
 14      frustrated or undermined in any way by a holding that class arbitration waivers in contracts of  
 15      adhesion, like class action waivers in such contracts, are unconscionable.” *Shroyer*, 498 F.3d  
 16      at 990. The court concluded “that applying California’s generally applicable contract law to  
 17      refuse enforcement of the unconscionable class action waiver in this case *does not stand as an*  
 18      *obstacle to the purposes or objectives of the [FAA].*” *Id.* at 993 (emphasis added).

19       The Ninth Circuit subsequently upheld *Shroyer* in a case implicating Washington  
 20      State’s law on substantive unconscionability. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d  
 21      1213 (9th Cir. 2008). The court expressly held that “[j]ust as the FAA does not preempt  
 22      California’s unconscionability law, *it does not preempt Washington’s unconscionability law.*”  
 23      *Id.* at 1221 (emphasis added). The court based this finding on the concern that “when the  
 24      potential for individual gain is small, few if any plaintiffs will pursue either individual  
 25      arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when  
 26      it has exacted small sums from millions.” *Id.* (emphasis in original).

27       The same concerns raised in *Shroyer* and *Lowden* apply with equal force here. The  
 28      Court is not extending or otherwise employing a unique rule of law in finding that the class-

1 action waiver provisions in this case are substantively unconscionable. In fact, the principles  
 2 utilized by the Court are general doctrines of unconscionability law that would apply to any  
 3 two parties to a contract. The fact that the individuals here are precluded from proceeding as  
 4 a class is not strictly limited to situations where such a provision is embedded in an arbitration  
 5 provision. Whenever a party is effectively exculpating itself from allegedly fraudulent  
 6 activity, general principles of unconscionability would potentially apply.

7 Defendants attempt to make one last plea to escape from the umbrella of these holdings  
 8 by arguing that a recent Supreme Court case supersedes *Shroyer* and *Lowden*. See *Preston v.*  
 9 *Ferrer*, 128 S.Ct. 978 (2008). This argument is not persuasive. In *Preston*, the Supreme  
 10 Court addressed the narrow issue of whether a state statute assigning primary jurisdiction to a  
 11 state labor commission is superseded by the FAA. *Id.* at 981. In holding that the statute was  
 12 indeed preempted by the FAA, the Court upheld the general principle in favor of arbitrating  
 13 disputes. *Preston* did not discuss or otherwise impact the more specific principle that  
 14 “generally applicable contract defenses such as fraud, duress, or unconscionability, may be  
 15 applied to invalidate arbitration agreements[.]” *Casarotto*, 517 U.S. at 687.

### 16 III. CONCLUSION

17 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,  
 18 and the remainder of the record, and having considered the oral argument of the parties, the  
 19 Court hereby finds and ORDERS:

20 (1) “Defendants’ Amended Motion to Compel Arbitration Pursuant to the Federal  
 21 Arbitration Act and to Dismiss Action” (Dkt. #133) is DENIED. Defendants are directed to  
 22 file an answer to Plaintiffs’ second amended complaint no later than thirty (30) days from the  
 23 date of this Order. Once Defendants respond, the Court will issue its initial scheduling order.

24 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

25 DATED this 22<sup>nd</sup> day of May, 2009.

26   
 27

28 RICARDO S. MARTINEZ  
 UNITED STATES DISTRICT JUDGE