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11
 12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN JOSE DIVISION**

15
 16
 17
 18 IN RE APPLE & AT&TM ANTI-TRUST
 19 LITIGATION

Case No. 07-05152-JW

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION OF DEFENDANT AT&T
 MOBILITY LLC TO COMPEL
 ARBITRATION AND TO DISMISS
 CLAIMS PURSUANT TO THE
 FEDERAL ARBITRATION ACT**

Date: September 12, 2008
 Time: 9:00 a.m.

Honorable James Ware

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STATEMENT OF ISSUE TO BE DECIDED

Whether the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1–16, requires plaintiffs to pursue their claims against defendant AT&T Mobility LLC (“ATTM”) in accordance with their arbitration agreements.

INTRODUCTION

When plaintiffs obtained wireless service from ATTM, they each agreed to resolve their disputes with ATTM in individual arbitration or small claims court. The FAA requires them to honor their promises.

We expect plaintiffs to oppose this motion by arguing that (1) their arbitration agreements are unconscionable because they require that disputes be resolved on an individual basis and (2) their claim under the Magnusson-Moss Warranty Act (“MMWA”) is not arbitrable. Those arguments should be rejected. First, the unprecedentedly pro-consumer features of ATTM’s arbitration provision more than adequately substitute for the class-action device. Under that provision, customers arbitrate for free and would recover at least \$5,000 and *double* attorneys’ fees if the arbitrator awards them an amount greater than ATTM’s settlement offer. Accordingly, even if state law did preclude enforcement of ATTM’s arbitration provision merely because the provision requires traditional, individual arbitration, that state law would be preempted by the FAA. Second, the Supreme Court has made clear that federal statutory claims are arbitrable unless Congress intends to preclude arbitration under a given statute, and as the weight of authority makes clear, Congress did not intend to do so in enacting the MMWA.

BACKGROUND

The plaintiffs—residents of New York, California, and Washington—each purchased at least one iPhone and activated it for use with ATTM’s network. Rev. Consol. Am. Compl. ¶¶ 13–21, 31. They allege that ATTM and Apple, Inc., which manufactures the iPhone, have violated Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2), the MMWA (15 U.S.C. §§ 2301–12), and the consumer laws of 42 states and the District of Columbia. Rev. Consol. Am. Compl. ¶ 1.¹ Plaintiffs request actual, treble, and punitive damages, injunctive relief, and

¹ A number of counts in the complaint are directed at Apple alone. See Rev. Consol. Am. Compl. ¶¶ 13–21, 31. (cont’d)
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ATTM’S MOTION TO COMPEL ARBITRATION AND TO DISMISS CLAIMS; CASE NO. 07-05152-JW

1 attorneys' fees and costs (*id.* pp. 36–37) on behalf of classes of (i) iPhone purchasers nationwide
2 and (ii) iPhone purchasers in 42 states and the District of Columbia (*id.* ¶¶ 108–09).

3 In filing their lawsuit, however, plaintiffs have ignored that, when they activated their
4 iPhones, they expressly agreed to pursue their disputes against ATTM in individual arbitration or
5 small claims court. Whether a purchaser of an iPhone is an existing ATTM subscriber or a new
6 customer, he or she must use the iTunes program to activate the iPhone for use with ATTM's
7 network. Declaration of Neal S. Berinhout ¶¶ 28–29. During that activation process, the
8 customer must click on a check box next to the statement “I have read and agree to the AT&T
9 Service Agreement”; the text of that Agreement, in turn, is displayed immediately above the
10 check box in a printable text box. *Id.* ¶ 28 & Ex. 9. The first sentence in the text box explains
11 that, by clicking on the check box below, the customer agrees to be “bound” to “the Terms of
12 Service, including the binding arbitration clause.” *Id.*

13 The arbitration provision in the Service Agreement states that “[ATTM] and you agree to
14 arbitrate **all disputes and claims between us**” or to pursue such disputes in small claims court.
15 *Id.* Ex. 9 at 4 (emphasis in original). The provision specifies that arbitration must be conducted
16 on an individual rather than class-wide basis. *Id.* Ex. 9 at 5–6.

17 To ATTM's knowledge, its revised arbitration provision is the most pro-consumer
18 arbitration provision in the country. *See* Declaration of Richard A. Nagareda ¶ 11. The
19 provision includes the following pro-consumer features (Berinhout Dec. Ex. 9 at 4–6):

- 20 • **Cost-free arbitration:** “[ATTM] will pay all [American Arbitration Association
21 (“AAA”)] filing, administration and arbitrator fees” unless the arbitrator determines that
22 the claim “is frivolous or brought for an improper purpose (as measured by the standards
set forth in Federal Rule of Civil Procedure 11(b))”;²
- 23 • **\$5,000 or \$7,500 minimum award:** If the arbitrator awards the customer relief that is
24 greater than “[ATTM]'s last written settlement offer made before an arbitrator was
25 selected,” ATTM must pay the customer *the greater of:* the amount of the award; \$5,000;
or the jurisdictional maximum of the customer's local small claims court—which in
California is \$7,500 (Cal. Code Civ. Proc. § 116.221);

26 Compl. ¶¶ 8, 11, 122–32, 163–74.

27 ² In the event that an arbitrator concludes that a consumer's claim is frivolous, the AAA's
28 consumer arbitration rules would cap a consumer's arbitration costs at \$125. *See* Berinhout Dec.
Ex. 7 (AAA, *Supplementary Procedures for Consumer-Related Disputes* § C-8).

- 1 • **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last
2 written settlement offer, then "[ATTM] will * * * pay [the customer's] attorney, if any,
3 twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney
4 reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";³
- 5 • **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM]
6 may have a right to an award of attorneys' fees and expenses if it prevails in an
7 arbitration, [ATTM] agrees that it will not seek such an award [from the customer]";
- 8 • **Small claims court option:** Either party may bring a claim in small claims court;
- 9 • **No confidentiality requirement:** The parties need not keep the arbitration confidential;
- 10 • **Full remedies available:** The arbitrator can award the same remedies to individual
11 consumers (including punitive damages and injunctions) that a court could award;
- 12 • **Flexible consumer procedures:** Arbitration will be conducted under the AAA's
13 Commercial Dispute Resolution Procedures and the Supplementary Procedures for
14 Consumer-Related Disputes, which the AAA designed with consumers in mind;
- 15 • **Conveniently located hearing:** Arbitration will take place "in the county * * * of [the
16 customer's] billing address"; and
- 17 • **Choice of in-person, telephonic, or no hearing:** For claims of \$10,000 or less,
18 customers have the exclusive right to choose whether the arbitrator will conduct an in-
19 person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration
20 will be conducted solely on the basis of documents submitted to the arbitrator."⁴

21 In addition, ATTM has tailored other aspects of the dispute-resolution process to ensure
22 its effectiveness for consumers. In particular, customers can obtain redress informally without
23 the need for arbitration by contacting ATTM's customer care department by phone or by e-mail.
24 *Id.* ¶ 18. In April 2008, for example, representatives dispensed more than 6.5 million credits
25 worth about \$139 million for customer concerns and complaints. *Id.* ¶ 19. From April 2007 to
26 April 2008, representatives dispensed more than \$1.3 billion in credits. *Id.*

27 A customer who is dissatisfied with the resolution offered by the customer care
28 department can take the next step—as required by ATTM's arbitration provision—of providing
ATTM with notice of the dispute. *Id.* ¶ 21. That is as simple as sending a letter to ATTM or

³ This attorney premium "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." Berinhout Dec. Ex. 9 at 5. Thus, even if an arbitrator were to award a customer less than ATTM's last settlement offer, the customer would be entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

⁴ Under the AAA rules that would otherwise apply, either party may insist on a hearing in cases involving claims of \$10,000 or less. *See* Berinhout Dec. Ex. 7 (AAA, *Supplementary Procedures for Consumer-Related Disputes* §§ C-5, C-6). For claims exceeding \$10,000, a hearing would be held unless both parties agreed to forgo it. *See id.*

1 filling out and mailing a one-page Notice of Dispute form that ATTM has posted on its web site.
2 *Id.* ¶ 18 & Ex. 8. ATTM generally responds to a notice of dispute with a written settlement
3 offer. *Id.* ¶ 23. If ATTM and the customer cannot resolve the dispute within 30 days, the
4 customer may begin the formal arbitration process. *Id.* Ex. 2 at 2. To do so, the customer need
5 only fill out a one-page Demand for Arbitration form and send copies to the AAA and to ATTM.
6 Customers may obtain a copy of the form from the AAA’s web site or use a simplified form that
7 ATTM has posted on its website. *See id.* ¶ 16 & Exs. 4–5. To further assist its customers,
8 ATTM’s website includes a layperson’s guide on how to arbitrate a claim. *Id.* ¶ 15 & Ex. 3.⁵

9 In response to plaintiffs’ lawsuit, ATTM sent plaintiffs’ counsel a letter advising them of
10 the parties’ agreements to arbitrate and requesting that plaintiffs dismiss their complaint and
11 pursue their claims against ATTM in arbitration (or small claims court) in accordance with their
12 agreements. Plaintiffs failed to respond.⁶

13 ARGUMENT

14 I. THE FAA MANDATES ENFORCING THE ARBITRATION AGREEMENTS.

15 The FAA mandates that written agreements to arbitrate disputes “shall be valid,
16 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the
17 revocation of any contract.” 9 U.S.C. § 2. Congress enacted the FAA to “reverse the
18 longstanding judicial hostility to arbitration agreements * * *[,] to place [these] agreements upon
19 the same footing as other contracts[,] * * * [and to] manifest a liberal federal policy favoring
20 arbitration agreements.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal
21 quotation marks omitted).

22 An arbitration agreement must meet two basic conditions for the FAA to apply: (1) the

23 ⁵ Many ATTM customers have found individual arbitration to be a viable dispute
24 resolution mechanism: From December 23, 2006 through June 13, 2008, ATTM received more
25 than 600 notices of disputes or demands for arbitration. *Berinhout* Dec. ¶ 22. In addition, as
noted above, ATTM’s provision gives customers the option of filing claims in small claims
court. ATTM responded to more than 1,100 such claims from 2005 through 2007. *Id.* ¶ 25.

26 ⁶ Because ATTM has moved to compel arbitration, the issue before the Court with respect
27 to plaintiffs’ claims against ATTM is whether those claims should proceed in an arbitral forum
rather than in this Court. Nevertheless, ATTM agrees that, on the merits—for the reasons stated
28 in Apple’s motion to dismiss—plaintiffs have failed to state a claim upon which relief can be
granted against either defendant.

1 agreement must be “written”; and (2) it must be in a contract “evidencing a transaction involving
2 commerce.” 9 U.S.C. § 2. These conditions are satisfied here: Plaintiffs’ arbitration agreements
3 are in writing (*see* page 2, *supra*), and their service agreements involve commerce, as
4 “telephones, even when used intrastate, are instrumentalities of interstate commerce.” *United*
5 *States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004) . Because plaintiffs’ claims indisputably fall
6 within the all-encompassing scope of their arbitration agreements, the Court should compel
7 arbitration and stay this action. We nonetheless expect plaintiffs to contend that their arbitration
8 agreements are unenforceable, but as we explain below, any such arguments would lack merit.

9 **II. PLAINTIFFS CANNOT AVOID THEIR OBLIGATION TO ARBITRATE ON AN**
10 **INDIVIDUAL BASIS BY INVOKING STATE UNCONSCIONABILITY LAW.**

11 The choice-of-law provision in each plaintiff’s service agreement states that “[t]he law of
12 the state of your billing address shall govern this Agreement except to the extent that such law is
13 preempted by or inconsistent with applicable federal law.” Berinhout Dec. Ex. 9 at 6.
14 Kliegerman has a New York billing address, Holman has a Washington billing address, Lee has
15 either a New York or California billing address, and the remaining plaintiffs have California
16 billing addresses. *See* Rev. Consol. Am. Compl. ¶¶ 14–21.⁷ Accordingly, any unconscionability
17 attack would arise under the laws of those three states. As we explain below, ATTM’s
18 arbitration provision is fully enforceable under those states’ laws. But if ATTM’s arbitration
19 provision were unenforceable under the law of a particular state, that law would be preempted by
20 the FAA.

21 **A. Plaintiffs’ Arbitration Agreements Are Not Unconscionable Under New**
22 **York, Washington, Or California Law.**

23 **1. Kliegerman’s Arbitration Agreement Is Enforceable Under New York**
24 **Law.**

25 Under New York law, “[a]n unconscionable contract has been defined as one which ‘is so
26 grossly unreasonable or unconscionable in the light of the mores and business practices of the
27 time and place as to be unenforceable according to its literal terms.’” *Gillman v. Chase*

28 ⁷ ATTM has not been able to identify plaintiff Michael G. Lee. *See* Berinhout Dec. ¶ 49.
But based on his allegation that he activated his iPhone in California and now lives in New York
(Rev. Consol. Am. Compl. ¶ 17), he likely has either a California or New York billing address.

1 *Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (quoting *Mandel v. Liebman*, 100
2 N.E.2d 149, 152 (N.Y. 1951)); *see also La Salle Nat'l Bank Ass'n v. Kosarovich*, 820 N.Y.S.2d
3 144, 146 (App. Div. 2006) (a contract is unconscionable if “no reasonable and competent person
4 would accept [its] terms, which are so inequitable as to shock the conscience”) (internal
5 quotation marks omitted). Agreeing to arbitrate on an individual basis does not meet that
6 standard. To the contrary, New York courts have repeatedly held that arbitration agreements that
7 prohibit class-wide adjudication are not unconscionable. For example, New York’s intermediate
8 appellate court has held that “a contractual proscription against class actions” contained in a
9 standardized cellular service agreement “is neither unconscionable nor violative of public
10 policy.” *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div. 2003).⁸ ATTM’s
11 arbitration provision therefore is not substantively unconscionable under New York law.

12 Moreover, other than in “exceptional cases” in which a contract is “so outrageous as to
13 warrant holding it unenforceable on the ground of substantive unconscionability alone,” a party
14 claiming unconscionability must establish procedural unconscionability as well. *Gillman*, 534
15 N.E.2d at 829. Under New York law, procedural unconscionability “requires an examination of
16 the contract formation process” for such matters as “whether deceptive or high-pressured tactics
17 were employed, the use of fine print in the contract, the experience and education of the party
18 claiming unconscionability, and whether there was disparity in bargaining power.” *Id.* at 828.

19 Kliegerman cannot claim that he was pressured or deceived into agreeing to arbitration.
20 To activate his iPhone, he clicked on a box stating that he had “read and agree[d] to the AT&T
21 Service Agreement” that was displayed immediately above in a printable text box. Berinhout
22 Dec. ¶ 28 & Ex. 10 at 7. And the very first sentence in the text box notified him that the terms of
23 service included a “binding arbitration clause.” *Id.* Kliegerman was free to decline arbitration

24 ⁸ *See also Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006); *Tsadilas v.*
25 *Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004); *Brower v. Gateway 2000, Inc.*,
26 676 N.Y.S.2d 569, 573 (App. Div. 1998) (a consumer’s preference for a class-action lawsuit
27 “does not alter the binding effect of the valid arbitration clause contained in [his] agreement”);
28 *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70 74–75 (App. Div. 1981), *aff'd*, 435
N.E.2d 1097 (N.Y. 1982); *accord, e.g., Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062, 1068 (9th Cir.
2007) (“[class] waivers aren’t substantively unconscionable under New York law”), *cert denied*
sub nom. Talk Am., Inc. v. Douglas, 128 S. Ct. 1472 (2008).

1 and to obtain wireless service elsewhere; indeed, at least one wireless carrier does not require
2 arbitration as a condition of service.⁹ See Declaration of Kevin Ranlett ¶¶ 8–9; see also
3 *Rosenfeld v. Port Auth. of New York*, 108 F. Supp. 2d 156, 164–65 (E.D.N.Y. 2000) (E-ZPass
4 agreement was not procedurally unconscionable because customers “remain[ed] free” to reject
5 their form contracts and “continue to use traditional cash toll lanes”). Moreover, following
6 activation, ATTM mailed Kliegerman a Terms of Service booklet that disclosed the arbitration
7 provision at the top of the very first page. Berinhout Dec. Ex. 12 at 1 (“**This Agreement**
8 **requires the use of arbitration to resolve disputes * * ***”) (emphasis in original). And
9 Kliegerman had 14 days to cancel service without having to pay an early-termination fee. See *id.*
10 Ex. 13.¹⁰ In addition, Kliegerman claims on his web site to be a sophisticated real estate broker
11 and thus has a great deal of experience with reading contracts.¹¹ Accordingly, Kliegerman’s
12 arbitration agreement is not procedurally unconscionable.¹²

13 2. The Arbitration Agreements Are Enforceable Under California Law.

14 The California plaintiffs—Rivello, Smith, Macasaddu, Morikawa, Scotti, and Sesso (and
15 possibly Lee (see page 5 n.7, *supra*))—must prove both procedural and substantive
16 unconscionability. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669,

17 ⁹ Before obtaining his iPhones, Mr. Kliegerman had activated ATTM wireless service in
18 March 2007. See Berinhout Dec. ¶ 40. In doing so, he would have received and agreed to the
19 terms of service in effect at that time, including the agreement to arbitrate “**all disputes and**
20 **claims between us**,” See *id.* ¶ 40 & Ex. 12 at 12. Kliegerman, therefore, was on notice before
21 purchasing his iPhone that ATTM requires arbitration as a condition of service. Moreover, the
22 March 2007 arbitration agreement independently requires arbitration of Kliegerman’s claims,
23 which are within the broad scope of that earlier agreement.

24 ¹⁰ Customers who return opened iPhones may be assessed a 10 percent restocking fee.
25 Berinhout Dec. Ex. 13. But the Appellate Division has made clear that it is not procedurally
26 unconscionable to require customers to pay the cost of returning a product in order to reject an
27 arbitration provision in the terms enclosed with that product. See *Brower*, 676 N.Y.S.2d at 573
28 (“While returning the goods to avoid the formation of the contract entails affirmative action by
the consumer, and even some expense, this may be seen as a trade-off for the convenience and
savings for which the consumer presumably opted when he or she chose to make a purchase of
such consequence by phone or mail as an alternative to on-site retail shopping.”).

¹¹ According to his web site, Kliegerman is a licensed real estate broker with “40+ years
experience” in sales, leasing, and development of real estate. Ranlett Dec. ¶¶ 10–11 & Exs. 10–
11 (capitalization and emphasis omitted).

¹² As noted above (at page 5 n.7, *supra*), Lee may have a New York billing address. If so,
then for the reasons we have explained, his arbitration agreement also is not substantively or
procedurally unconscionable.

1 690 (Cal. 2000). Procedural unconscionability involves “oppression” or “surprise” in the making
2 of the agreement (*id.*), while substantive unconscionability focuses on whether the contractual
3 term in question is so “overly harsh” or “one-sided” (*id.*) as to “shock the conscience.” *Belton v.*
4 *Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 649–50 (Ct. App. 2007); *Aron v. U-Haul*
5 *Co.*, 49 Cal. Rptr. 3d 555, 564 (Ct. App. 2006). Put another way, the bargain that the term
6 represents must be one that ““no man in his senses, and not under delusion, would make on the
7 one hand, and [that] no honest and fair man would accept on the other.”” *Herbert v. Lankershim*,
8 71 P.2d 220, 257 (Cal. 1937) (quoting *Odell v. Moss*, 62 P. 555, 557 (Cal. 1900) (quoting in turn
9 1 Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE § 244 (14th ed. 1918)); *see also Cal.*
10 *Grocers Ass’n, Inc. v. Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994).

11 In performing the unconscionability inquiry, California courts employ a “sliding scale”:
12 “the more substantively oppressive the contract term, the less evidence of procedural
13 unconscionability is required to come to the conclusion that the term is unenforceable, and vice
14 versa.” *Armendariz*, 6 P.3d at 690 (internal quotation marks omitted). In other words, if “the
15 procedural unconscionability, although extant, [is] not great,” the party attacking the term must
16 prove “a greater degree of substantive unfairness.” *Marin Storage & Trucking, Inc. v. Benco*
17 *Contracting & Eng’g, Inc.*, 107 Cal. Rptr. 2d 645, 656–57 (Ct. App. 2001). Under California’s
18 sliding-scale approach, ATTM’s arbitration provision is fully enforceable.

19 **a. The California Plaintiffs Can Establish At Most Only A**
20 **Modest Degree Of Procedural Unconscionability.**

21 We acknowledge that the manner in which iPhone purchasers agree to ATTM’s
22 arbitration provision involves a modest degree of procedural unconscionability under California
23 law as interpreted by the Ninth Circuit. Although the plaintiffs could have obtained wireless
24 service elsewhere without agreeing to arbitration (Ranlett Dec. ¶¶ 2–9), the Ninth Circuit held in
25 *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), that “a contract
26 may be procedurally unconscionable under California law when the party with substantially
27 greater bargaining power presents a ‘take-it-or-leave-it’ contract to a customer—even if the
28 customer has a meaningful choice as to service providers.” *Id.* at 985 (internal quotation marks

1 omitted).¹³ As the California Court of Appeal has made clear, however, the non-negotiable
2 nature of an agreement suffices only to establish “a minimal degree of procedural
3 unconscionability.” *Gatton*, 61 Cal. Rptr. 3d at 356.

4 The California plaintiffs cannot establish any greater measure of oppression or surprise.
5 An iPhone plainly is a “nonessential recreational” good that plaintiffs “always ha[d] the option of
6 simply forgoing.” *Belton*, 60 Cal. Rptr. 3d at 650 (cable music service is non-essential); *see also*
7 *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006) (personal computers are
8 non-essential); *cf. Riensche v. Cingular Wireless LLC*, 2007 WL 3407137, at *8 (W.D. Wash.
9 Nov. 9, 2007) (“telephone service, particularly cellular service, is not a necessity”). Moreover,
10 as explained above, ATTM’s arbitration provision is prominently disclosed during and after the
11 activation process, and customers have 14 days to review their contracts and to cancel them
12 without paying an early-termination fee. *See* page 7, *supra*. As Judge Hamilton recently has
13 explained, “providing a consumer with an opportunity to rescind an agreement greatly
14 diminishes any aspect of procedural unconscionability” under California law. *Omstead v. Dell,*
15 *Inc.*, 533 F. Supp. 2d 1012, 1036–37 (N.D. Cal. 2008).¹⁴

16 ¹³ Although this Court is bound by this aspect of *Shroyer*, we submit that the Ninth Circuit
17 erred in “follow[ing] the [California] courts that reject the notion that the existence of
18 ‘marketplace alternatives’ bars a finding of procedural unconscionability,” and declining to
19 follow the conflicting line of California cases that have held that there can be no procedural
20 unconscionability when the customer has meaningful alternatives to contracting with the
21 defendant. 498 F.3d at 985. The two competing lines of published cases reveal an unmistakable
22 pattern. The cases that find non-negotiable form contracts to be per se procedurally
23 unconscionable regardless of the availability of market alternatives all involve arbitration
24 provisions. *See Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 353–56 (Ct. App. 2007),
25 *cert den.*, 2008 WL 368871 (U.S. May 27, 2008); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d
26 862, 867 (Ct. App. 2002); *Villa Milano Homeowners Ass’n v. Il Davorge*, 102 Cal. Rptr. 2d 1, 5–
27 6 (Ct. App. 2000). In contrast, the cases that reject the argument that form contracts are
28 procedurally unconscionable when meaningful substitutes are available all involve other types of
contractual provisions. *See Belton*, 60 Cal. Rptr. 3d at 650 (requirement that cable music
subscribers receive basic cable television); *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556 (Ct.
App. 2006) (declared-value insurance for package shipping); *Aron*, 49 Cal. Rptr. 3d at 564
(rental truck refueling policy); *Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 807
(Ct. App. 2005) (termination fee); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 259 Cal. Rptr. 789,
795 (Ct. App. 1989) (termination and annual fee). Because the conflict hinges entirely on
whether an arbitration provision is at issue, reliance on the arbitration-specific rule violates the
FAA, which forbids states from applying a different standard of procedural unconscionability to
arbitration provisions than to other provisions. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9
(1987) (courts cannot “rely on the uniqueness of an agreement to arbitrate as a basis for a state-
law holding that enforcement would be unconscionable”).

¹⁴ Additionally, plaintiffs Scotti, Rivello, Macasaddu, and Morikawa had previously

1 In short, the fact that ATTM’s arbitration provision is contained in a form contract
2 implicates, at most, only a minimal quantum of procedural unconscionability.¹⁵ Accordingly,
3 under California’s sliding-scale approach, the California plaintiffs would have to “make a **strong**
4 **showing** of substantive unconscionability to render [their] arbitration provision unenforceable.”
5 *Gatton*, 61 Cal. Rptr. 3d at 356 (emphasis added). As we next explain, plaintiffs cannot
6 demonstrate that ATTM’s arbitration provision is substantively unconscionable at all, much less
7 make the requisite “strong showing” of substantive unfairness.

8 **b. Under California Law, ATTM’s Arbitration Provision Is Not**
9 **Substantively Unconscionable At All, Much Less Greatly So.**

10 (1). In *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California
11 Supreme Court held that a class-arbitration prohibition in a credit-card issuer’s arbitration
12 provision was substantively unconscionable because it effectively “insulate[d]” the company
13 from liability for the \$29 claims at issue in that case. *Id.* at 1109. But the court made clear that it
14 was not holding “that **all** class action waivers are necessarily unconscionable.” *Id.* at 1110
15 (emphasis added). Rather, whether such a provision is substantively unconscionable turns on

16 _____
17 activated service with ATTM or its predecessor AT&T Wireless Services, Inc.. See Declaration
18 of Cynthia Hennessy ¶¶ 9–10; Berinhout Dec. ¶¶ 44, 50–53, 56–61, 64. Each therefore had
19 previously agreed to arbitration with ATTM (*see id.*) and was aware before purchasing his or her
20 iPhone that arbitration is a condition of service with ATTM. ATTM also sent a copy of the
21 revised 2006 arbitration provision to each of these plaintiffs in December 2006. See Berinhout
22 Dec. ¶¶ 11, 45, 54, 62, 65. The 2006 revision to their existing arbitration agreements separately
23 mandates arbitration of these plaintiffs’ claims, which are within its broad scope. In addition,
24 Scotti, Sesso, and Rivello each activated or renewed ATTM service for cell phone devices other
25 than the iPhone (in March and October 2007 and May 2008, respectively), and in doing so again
26 agreed to ATTM’s revised 2006 arbitration provision. For that reason, too, those plaintiffs are
27 required to arbitrate their claims. See *id.* ¶¶ 46–47, 66, 69 & Exs. 12, 19).

28 ¹⁵ Judge Armstrong recently has ruled that the manner in which iPhone purchasers agree to
ATTM’s arbitration provision involves more than minimal procedural unconscionability based
on her conclusion that the iPhone is unique and that the plaintiffs in the case before her were not
given a copy of ATTM’s terms of service at the time of purchase. See *Stiener v. Apple*
Computer, Inc., 2008 WL 691720, at *8–*10 (N.D. Cal. Mar. 12, 2008), *appeal pending*, No. 08-
15612 (9th Cir.). But California law does not require that alternatives be perfect substitutes. See
Belton, 60 Cal. Rptr. 3d at 650 (FM radio, internet broadcasts, CD players, and satellite music
services are acceptable alternatives for cable television music service). And it is routine to delay
the “revelation of full terms” until after the customer has paid for a product. *Hill v. Gateway*
2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997); see also *Bischoff v. DirecTV, Inc.*, 180 F. Supp.
2d 1097, 1105 (C.D. Cal. 2002) (applying California law) (“the economic and practical
considerations involved in selling services to mass consumers * * * make it acceptable for terms
and conditions to follow the initial transaction”).

1 whether the plaintiff may feasibly vindicate “small” claims without using the class-action
2 mechanism and, conversely, whether the class waiver threatens to insulate the company from
3 liability for cheating its customers. *Id.*

4 ATTM’s revised arbitration provision is fully enforceable under *Discover Bank* as well as
5 *Shroyer*, in which the Ninth Circuit held that the class waiver in an earlier version of ATTM’s
6 arbitration provision was substantively unconscionable under *Discover Bank*. *Shroyer*, 498 F.3d
7 at 986–87. The earlier arbitration provision specified that ATTM (then Cingular) would pay the
8 full cost of arbitration and, in addition, would pay the plaintiff’s attorneys’ fees if the arbitrator
9 awarded the plaintiff the amount of his or her demand or more. *Id.* at 986. The Ninth Circuit
10 held that those features were insufficient to render the class waiver enforceable under *Discover*
11 *Bank* because “when the potential for individual *gain* is small, very few plaintiffs, if any, will
12 pursue individual arbitration or litigation * * *. [*Discover Bank*] did not suggest that a [class
13 action] waiver is unconscionable only when or because a plaintiff in arbitration may experience a
14 net loss (including attorneys’ fees and costs).” *Id.* (emphasis in original; citation omitted).

15 ATTM’s *revised* arbitration provision squarely addresses these concerns. As noted
16 above, ATTM has built the necessary “individual gain” into its arbitration provision by providing
17 that any California customer who obtains an arbitral award in excess of ATTM’s last settlement
18 offer will receive at least **\$7,500**, while the customer’s counsel (if any) will receive **double**
19 attorneys’ fees. *See* pages 2–3 & n.3, *supra*. These amounts far exceed the level of damages that
20 Congress and the California Legislature have deemed sufficient to encourage individuals and
21 their counsel to pursue statutory claims.¹⁶ The premiums available under ATTM’s arbitration
22 procedures also substantially exceed the typical incentive payments awarded to class
23 representatives as part of court-approved class settlement agreements. *See* Theodore Eisenberg

24
25 ¹⁶ *See* Nagareda Dec. ¶ 14 (citing \$500 statutory damages provision in Telephone
26 Consumer Protection Act and \$1,000 statutory damages provision in Cable Act); 15 U.S.C.
27 § 1681n(a) (statutory damages of between \$100 and \$1,000 available under Fair Credit
28 Reporting Act); Cal. Civ. Code § 54.3(a) (\$1,000 statutory damages under Disabled Persons
Act). These legislative determinations of the amount needed to encourage vindication of
statutory rights are entitled to great (if not dispositive) weight. *See Santisas v. Goodin*, 951 P.2d
399, 413 (Cal. 1998) (noting court’s “reluctan[ce] to declare contractual provisions void or
unenforceable on public policy grounds without firm legislative guidance”).

1 & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53
2 UCLA L. REV. 1303, 1333 & tbl. 5 (2006) (finding median incentive award for class
3 representatives in consumer and consumer credit cases to be \$2,089 and \$1,045, respectively).

4 In light of the opportunities for “individual gain” that are built into ATTM’s arbitration
5 provision, the concerns that caused the California Supreme Court and the Ninth Circuit to
6 invalidate the class-arbitration prohibitions in *Discover Bank* and *Shroyer* are inapplicable here.
7 ATTM has not immunized itself from liability because ATTM’s arbitration provision, and the
8 premiums that are available under it, serve as affirmative inducements for customers to pursue
9 their claims in arbitration and for lawyers to represent such customers. By contrast, studies of
10 consumer class action settlements show that few consumers bother to file a claim when the
11 amount that they would receive is small—as it inevitably would be if this case were certified as a
12 class action and then settled.¹⁷

13 Moreover, ATTM’s revised provision reduces burdens on customers by allowing them to
14 choose to arbitrate by telephone or even by mail. *See* page 3, *supra*. The premium provisions
15 also encourage ATTM to resolve disputes quickly—*i.e.*, before arbitration—by making
16 settlement offers that satisfy its customers. If it fails to resolve a claim, ATTM risks paying
17 large premiums to the customer and counsel, as well as the full costs of arbitration, which can be
18

19 ¹⁷ *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*,
20 18 GEO. J. LEGAL ETHICS 1443, 1445–46 (2005) (noting that the redemption rate of class action
21 coupons ranges from one to three percent); Christopher R. Leslie, *A Market-Based Approach to*
22 *Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991,
23 1035 (2002) (reporting a study of ten consumer class action settlements in which the redemption
24 rates varied from 3 to 13.1 percent); Gail Hillebrand & Daniel Torrence, *Claims Procedures in*
25 *Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV.
26 747, 753 (1988) (discussing three settlements in which the claims rates were 3, 10.5, and 18
27 percent); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649–50 (7th Cir. 2006)
28 (noting that only a “paltry three percent” of class members had filed claims under the
settlement); *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22,
2008) (“approximately 165 class members” out of 291,000 “had obtained a voucher” under the
settlement, yielding a take rate of under 0.06 percent); *Yeagley v. Wells Fargo & Co.*, 2008 WL
171083, at *2 (N.D. Cal. Jan. 18, 2008) (“less than one percent of the class chose to participate in
the settlement”); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct.
May 7, 2007) (“only 337 valid claims were filed out of a possible class of 1,500,000,” yielding a
take rate of just over 0.02 percent); *see also* Class Action Fairness Act of 2005, PUB. L. NO. 109-
2, 119 Stat. 4, § 2(a)(3) (congressional finding that “[c]lass members often receive little or no
benefit from class actions, and are sometimes harmed”).

1 substantial.¹⁸ That is true not only of the small number of disputes that might be susceptible to
2 class-wide adjudication, but also for the vast majority of other disputes that are individualized.¹⁹

3 In short, ATTM’s revised arbitration provision does not operate as an exculpatory clause.
4 As Professor Nagareda explains, although some arbitration provisions containing class-
5 arbitration prohibitions may result in “the effective elimination of consumers’ private rights of
6 action” (Nagareda Dec. ¶ 7), *ATTM’s* arbitration provision is not of that ilk. It “reduces
7 dramatically the cost barriers to the bringing of individual consumer claims, is likely to facilitate
8 the development of a market for fair settlements of such claims, and provides financial incentives
9 for consumers (and their attorneys, if any) to pursue arbitration in the event that they are
10 dissatisfied with whatever offer ATTM has made to settle their dispute.” *Id.* ¶ 11. It therefore is
11 not substantively unconscionable at all. At minimum, taking into account the (at most) modest
12 level of procedural unconscionability, this unprecedentedly pro-consumer arbitration provision
13 does not rise sufficiently high on the spectrum of substantive unconscionability to warrant
14 refusing to enforce it. *See Gatton*, 61 Cal. Rptr. 3d at 356 (requiring “strong showing” of
15 substantive unconscionability when the only basis for finding procedural unconscionability is the
16 fact that contract is non-negotiable).

17 (2). Two federal district court judges recently held that ATTM’s revised arbitration
18 provision is unconscionable under California law. *See Kaltwasser v. Cingular Wireless LLC*,
19 543 F. Supp. 2d 1124 (N.D. Cal. 2008), *appeal pending*, No. 08-15962 (9th Cir.); *Stiener, supra*,
20 2008 WL 691720. Those decisions, however, are fundamentally mistaken.

21 First, the *Kaltwasser* court entirely failed to address the special premiums that ATTM’s
22 arbitration provision makes available to customers. Instead, the court treated *Discover Bank* as
23 an across-the-board holding that all class-arbitration prohibitions in consumer form contracts are

24 ¹⁸ If a customer selects an in-person hearing, ATTM must pay at least \$1,700 in arbitration
25 costs: \$750 in administrative fees, a \$200 case service fee, and \$750 in arbitrator fees. *See*
26 *Berinhout Dec. Ex. 7 (AAA, Supplementary Procedures for Consumer-Related Disputes § C-8)*.

26 ¹⁹ Moreover, the millions of customers who never have a dispute of any kind benefit from
27 ATTM’s arbitration provision in the form of lower prices for wireless services. *See, e.g.,*
28 *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (“arbitration offers cost-saving
benefits * * * and these benefits are reflected in a lower cost of doing business that in
competition are passed along to customers”) (internal quotation marks omitted).

1 unconscionable (*see* 543 F. Supp. 2d at 1131), no matter how pro-consumer the arbitration
2 procedures may be. Yet the California Supreme Court distinctly warned that it was “*not*
3 hold[ing] that *all* class action waivers are necessarily unconscionable.” *Discover Bank*, 113 P.3d
4 at 1110 (emphasis added). *Kaltwasser’s* holding also rested on the court’s conclusion that the
5 arbitration provision is not mutual because ATTM is unlikely to bring a class action against its
6 customers (543 F. Supp. 2d at 1131). Because California has no generally applicable
7 requirement that all obligations in a contract be entirely mutual (*see Foley v. Interactive Data*
8 *Corp.*, 765 P.2d 373, 381 n.14 (Cal. 1988)), however, this differential treatment of an arbitration
9 provision violates the FAA.²⁰

10 The *Stiener* court likewise erred in treating California law as imposing an across-the-
11 board ban on class-arbitration waivers. It held that ATTM “needs to show its Arbitration
12 Agreement functions as well as a class action would” (2008 WL 691720, at *12) by proving
13 “that *all*” putative class members “would recover more, on average,” in individual arbitration
14 than in the plaintiff’s class action (*id.* at *13 (emphasis in original)). In so holding, the court
15 erroneously reversed the burden of proof: It is the party opposing arbitration who must prove
16 unconscionability. *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 915–16 (Cal. 1997).
17 Moreover, the court’s premise is misguided. What matters is whether the plaintiffs *themselves*
18 would be effectively foreclosed from pursuing claims in individual arbitration. If
19 unconscionability were measured by reference to the total *potential* relief for a putative class,
20 then no class waiver could be enforceable, an outcome disavowed in *Discover Bank* itself.

21 3. Holman’s Arbitration Agreement Is Enforceable Under Washington 22 Law.

23 Under Washington law, a contractual term may be invalidated if the party resisting its
24 enforcement proves that it is substantively unconscionable without reference to the manner in
25 which the contract was formed. *Adler v. Fred Lind Manor*, 103 P.3d 773, 781–82 (Wash. 2004).

26 ²⁰ *See Preston v. Ferrer*, 128 S. Ct. 978, 985 (2008) (FAA preempts provision of California
27 Labor Code that “imposes prerequisites to enforcement of an arbitration agreement that are not
28 applicable to contracts generally”); *Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL
830262, at *10 (E.D. Ark. Mar. 25, 2008) (“Arkansas law requiring mutuality within the
arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on
unequal footing with other contract terms that do not each have to be mutual.”).

1 By contrast, the Washington Supreme Court has not yet resolved whether procedural
2 unconscionability alone suffices to invalidate a contract. But as we explain below, Holman’s
3 arbitration agreement is fully enforceable under Washington law because it is neither
4 substantively nor procedurally unconscionable.

5 **a. ATTM’s Arbitration Provision Is Not Substantively**
6 **Unconscionable Under Washington Law.**

7 Under Washington law, “[s]ubstantive unconscionability involves those cases where a
8 clause or term in the contract is alleged to be one-sided or overly harsh. ‘Shocking to the
9 conscience,’ ‘monstrously harsh,’ and ‘extremely calloused’ are terms sometimes used to define
10 substantive unconscionability.” *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 759 (Wash.
11 2004) (citations omitted); *see also Adler*, 103 P.3d at 781 (same). ATTM’s arbitration provision
12 comes nowhere near that high threshold.

13 In *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), the Washington Supreme
14 Court invalidated an earlier arbitration provision used by ATTM’s predecessor, Cingular
15 Wireless LLC, in part because it contained a class waiver. *Id.* at 1003. But *Scott* did not create a
16 categorical rule that all class waivers contained in arbitration provisions are substantively
17 unconscionable. Rather, the court held that “only * * * class waivers that *prevent* vindication of
18 rights secured by the [Washington Consumer Protection Act (“CPA”), RCW 19.86] are invalid.”
19 *Id.* at 1009 n.7 (emphasis in original). The court added that it “can ***certainly conceive of***
20 ***situations*** where a class action waiver ***would not prevent*** a consumer from vindicating ***his or her***
21 substantive rights under the CPA and would thus be enforceable.” *Id.* (emphases added).

22 The *Scott* court struck down Cingular’s provision because it concluded that, despite the
23 provision’s “laudable” features—including cost-free arbitration and the right to recover
24 attorneys’ fees in some circumstances—those features were not enough to “ensure that a remedy
25 is practically available” when claims are “small” (such as with respect to the \$45 monthly
26 overcharge alleged in that case). *Id.* at 1003, 1007. The court held that even cost-free arbitration
27 might not be “worth the time, energy, and stress to pursue such individually small claims.” *Id.* at
28 1007. The court also deemed the provision relating to attorneys’ fees to be inadequate because

1 the court interpreted it to permit the arbitrator to discount the award when the “amount in
2 controversy” is small and to provide for an award “only if the plaintiffs recover at least the *full*
3 *amount* of their demand”—meaning that a claimant recovering “99 percent of a claim” could
4 still “not be awarded any attorney fees.” *Id.* (emphasis added).

5 In *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008), *pet. for cert. pending*,
6 No. 07-1330 (U.S.), the Ninth Circuit applied *Scott* to invalidate T-Mobile’s arbitration
7 provision. *Id.* at 1219. T-Mobile’s provision was *less* consumer-friendly than the provision
8 invalidated in *Scott*: It required customers to pay \$25 in arbitration costs to pursue claims worth
9 between \$25 and \$1,000 and barred the recovery of punitive damages or statutory attorneys’
10 fees. *Id.* at 1215–17 (quoting T-Mobile’s arbitration clause and citing district court’s discussion
11 of that clause). The Ninth Circuit concluded that the “unconscionability analysis in *Scott* applies
12 as forcefully to T-Mobile’s agreement” as it did to Cingular’s provision. *Id.* at 1219.

13 The arbitration provision that the Washington Court of Appeals recently invalidated in
14 *Olson v. The Bon, Inc.*, 183 P.3d 359 (Wash. Ct. App. 2008), also was less consumer-friendly
15 than the provision invalidated in *Scott* because it too required customers to pay some of the costs
16 of arbitration and did not guarantee that customers could arbitrate at a convenient location. *Id.* at
17 364. Although the court described the defendant’s stipulation to pay all arbitration costs and to
18 permit arbitration to occur wherever the plaintiffs’ choose in their home state as “laudable,” the
19 court noted that those stipulations alone “do not ensure that a remedy is practically available”
20 and that the “stipulations ignore the other potential class members who have not been offered
21 this remedy * * *.” *Id.* at 365.

22 ATTM’s revised provision fully addresses the concerns expressed in *Scott*, *Lowden*, and
23 *Olson*. ATTM’s provision includes all of the “laudable” features identified in *Scott* and *Olson*,
24 including cost-free arbitration and the right to arbitrate in a convenient place. But it goes much
25 further than that by making arbitration easier for customers and making unprecedented special
26 premiums available to them to ensure that they and their attorneys have an adequate incentive to
27 pursue claims. In fact, the consumer lawyer who represented the plaintiff in *Scott* indicated that
28 he “will generally turn away individual claims for less than \$5,000” (*Carideo v. Dell, Inc.*, 520 F.

1 Supp. 2d 1241, 1248 (W.D. Wash. 2007)), implying that he *will* consider and accept claims that
2 are for \$5,000 or more. Under ATTM’s provision, a potential \$5,000 premium is available to
3 Washington customers, *and* their attorneys may recover double their fees. *See* pages 2–3, *supra*.

4 Indeed, ATTM’s provision is even more consumer-friendly than Dell’s arbitration
5 provision, which Judge Robart of the Western District of Washington recently found to be in
6 compliance with *Scott*. *Id.* at 1245–49 & n.6. In *Carideo*, Judge Robart determined that the
7 class waiver in Dell’s arbitration provision did not prevent the plaintiffs from vindicating their
8 substantive rights because the damages at issue (\$1,300 to \$1,700) were not so trivial in relation
9 to potential arbitration costs as to discourage a consumer from seeking relief, given that Dell was
10 required to pay “nearly all” of the plaintiffs’ arbitration costs and any statutory fee award. *Id.* at
11 1248–49. Because ATTM’s provision responds fully to the concerns expressed by the *Scott*,
12 *Lowden*, and *Olson* courts and surpasses Dell’s arbitration provision in facilitating the redress of
13 even small claims, it neither shocks the conscience nor is “monstrously harsh.”

14 **b. Holman’s Arbitration Agreement Is Not Procedurally**
15 **Unconscionable Under Washington Law.**

16 Under Washington law, the procedural unconscionability inquiry requires an analysis of
17 the “circumstances surrounding the[] transaction to determine whether [the plaintiffs] lacked
18 meaningful choice.” *Zuver*, 103 P.3d at 760. Although ATTM’s arbitration provision is part of a
19 form contract, “the fact that an agreement is an adhesion contract does not necessarily render it
20 procedurally unconscionable.” *Id.*; *see also Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d
21 1166, 1175 (W.D. Wash. 2002). Holman could have declined ATTM’s arbitration provision and
22 obtained wireless service elsewhere. *See* page 7, *supra*. And his arbitration provision was not
23 “hidden in a maze of fine print.” *Zuver*, 103 P.3d at 760 (internal quotation marks omitted). Far
24 from it: The arbitration provision is prominently disclosed in ATTM’s terms of service. *See*
25 page 7, *supra*. In Washington, as elsewhere, “[o]ne who accepts a written contract is
26 conclusively presumed to know its contents and to assent to them * * *.” *Tjart v. Smith Barney,*
27 *Inc.*, 28 P.3d 823, 829 (Wash. Ct. App. 2001). Accordingly, Holman cannot establish that his
28 agreement is procedurally unconscionable.

1 **B. The FAA Would Preempt Any State-Law Rule Under Which ATTM’s**
2 **Arbitration Provision Could Be Deemed Unenforceable.**

3 Even if the Court were to conclude that the class waiver is unconscionable under the laws
4 of one or more states, those laws, as applied here, would be preempted by the FAA. We
5 acknowledge that the Ninth Circuit rejected ATTM’s arguments that California law is preempted
6 under the doctrines of express and conflict preemption in *Shroyer*. 498 F.3d at 987–93. The
7 Ninth Circuit rejected T-Mobile’s similar arguments that Washington law is preempted in
8 *Lowden*. 512 F.3d at 1219–22. For reasons we discuss below, the preemption holdings in these
9 cases are not binding on this Court.

10 **1. The FAA Expressly Preempts Any Distortion Of Unconscionability**
11 **Doctrine That Would Invalidate The Arbitration Clause Here.**

12 Section 2 of the FAA specifies that arbitration provisions “shall be valid, irrevocable, and
13 enforceable, save upon such grounds as exist at law or in equity for the revocation of *any*
14 contract.” 9 U.S.C. § 2 (emphasis added). As the Supreme Court has recently reiterated, Section
15 2 of the FAA forbids states from “impos[ing] prerequisites to enforcement of an arbitration
16 agreement that are not applicable to contracts generally.” *Preston*, 128 S. Ct. at 985.
17 Accordingly, a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a
18 state-law holding that enforcement would be unconscionable * * *.” *Perry*, 482 U.S. at 492–93
19 n.9; *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir.
20 2004) (Section 2 preempts even “general principle[s] of contract law, such as unconscionability”
21 if “those general doctrines” are “employ[ed] * * * in ways that subject arbitration clauses to
22 special scrutiny”). The Ninth Circuit itself has recognized that this principle means that a law
23 that applies to only “a limited set of transactions * * * is not a law of ‘general applicability’” and
24 therefore is preempted by Section 2. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). That
25 would be precisely the situation if this Court were to hold that the class-arbitration prohibition in
26 ATTM’s arbitration provision is unenforceable under state unconscionability law
27 notwithstanding the ample opportunities for “individual gain” (*Shroyer*, 498 F.3d at 986
28 (emphasis omitted)) that ATTM built into the arbitration provision.

 As discussed above, under applicable state law, contracts generally are not deemed

1 unconscionable unless they are extremely unfair. It is simply impossible to conclude that such is
2 the case here. Although customers may give up the right to bring a class action, that right is
3 rarely used. On the other hand, all customers receive the benefit of lower priced wireless service
4 and a convenient method of resolving disputes that provides special premiums to ensure that they
5 and their attorneys can afford to pursue even small claims. To deem ATTM’s arbitration
6 provision to be unconscionable merely because it incorporates a traditional characteristic of
7 arbitration—the lack of class relief—is to condemn the provision on the impermissible ground
8 that traditional, individual arbitration “should be disparaged as second-class adjudication.”
9 *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

10 To be sure, the Ninth Circuit held in *Shroyer* and *Lowden* that its holdings that Cingular’s
11 and T-Mobile’s arbitration provisions were unconscionable under California and Washington
12 law were a mere “refinement” of those states’ generally applicable unconscionability standards
13 and hence were not precluded by Section 2 of the FAA. *Shroyer*, 498 F.3d at 987–88; *see also*
14 *Lowden*, 512 F.3d at 1221. Even accepting that conclusion for the sake of argument, however, it
15 would take far more than a mere “refinement” of California’s, Washington’s, and New York’s
16 unconscionability standards—which require that a contractual term must “shock the
17 conscience”—to justify invalidating *ATTM’s* arbitration provision. To declare this exceptionally
18 pro-consumer provision unconscionable would require a total distortion of what it means to
19 “shock the conscience”—one that would enable courts to justify striking down any contractual
20 provision that they think ends up being unfair to one of the parties. That is manifestly not New
21 York, Washington, or California law—at least not with respect to any contractual provisions
22 other than agreements to resolve disputes on an individual basis. As the California Court of
23 Appeal put it, ““with a concept as nebulous as “unconscionability,” it is important that courts not
24 be thrust into the paternalistic role of intervening to change contractual terms that the parties
25 have agreed to merely because the court believes the terms are unreasonable.”” *Koehl v. Verio,*
26 *Inc.*, 48 Cal. Rptr. 3d 749, 769 (Ct. App. 2006) (quoting *Am. Software, Inc. v. Ali*, 54 Cal. Rptr.
27 2d 477, 480 (Ct. App. 1996)); *accord Childs v. Levitt*, 543 N.Y.S.2d 51, 54 (App. Div. 1989)
28 (“Equity will not relieve a party of its obligations under a contract merely because subsequently,

1 with the benefit of hindsight, it appears to have been a bad bargain.”); *Montgomery Ward & Co.*
2 *v. Annuity Bd. of S. Baptist Convention*, 556 P.2d 552, 555 (Wash. Ct. App. 1976) (“People
3 should be entitled to contract on their own terms without the indulgence of paternalism by the
4 courts in the alleviation of one side or another from the effects of a bad bargain” or from
5 “contracts that actually may be unreasonable or which may lead to hardships on one side.”)
6 (internal quotation marks omitted). *Shroyer* and *Lowden* therefore do not control this case. The
7 Court is free to—and should—hold that Section 2 of the FAA requires rejection of any argument
8 that ATTM’s provision is unconscionable.

9 **2. A State-Law Rule That Precludes An Individual Arbitration**
10 **Requirement Under The Circumstances Here Would Conflict With**
11 **The Purposes of the FAA And Therefore Would Be Preempted.**

12 Any state-law rule that would preclude ATTM from requiring individual arbitration
13 notwithstanding the unprecedented incentives to invoke the arbitration process that ATTM has
14 provided would “stand[] as an obstacle to the accomplishment and execution of the full purposes
15 and objective of Congress” in enacting the FAA and would thus be preempted under the doctrine
16 of conflict preemption. *United States v. Locke*, 529 U.S. 89, 109 (2000) (quotation marks
17 omitted). When federal law encourages private parties to engage in or refrain from a certain
18 activity, as the FAA does in “declaring a liberal federal policy favoring arbitration agreements”
19 (*Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), state laws
20 producing contrary incentives must yield.²¹

21 We recognize that the Ninth Circuit rejected a similar argument in *Shroyer* (and again in
22 *Lowden*), concluding that Congress did not intend the FAA to “encourage individual arbitration
23 and disfavor class arbitration.” 498 F.3d at 990. The Ninth Circuit’s logic, however, cannot be

24 ²¹ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (state-
25 law protection of unpatentable inventions was preempted because it “could essentially redirect
26 inventive efforts away from the careful criteria of patentability developed by Congress over the
27 last 200 years”); *Edgar v. MITE Corp.*, 457 U.S. 624, 635 (1982) (holding that federal securities
28 laws preempt state tender offer regulation, which gave “incumbent management * * * a powerful
tool to combat tender offers,” because “[t]hese consequences are precisely what Congress
determined should be avoided”) (emphasis added); see also *New York State Conf. of Blue Cross
& Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (ERISA, which has the
purpose of promoting regulated plans’ flexibility in providing coverage, would preempt a state
law that “produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to
force an ERISA plan to adopt a certain scheme of substantive coverage”).

1 reconciled with the Supreme Court’s subsequent decision in *Preston*.²² In *Preston*, the Supreme
2 Court held that the FAA preempted a provision of the California’s Talent Agencies Act that
3 required the Labor Commissioner to decide a dispute before it could be submitted to arbitration.
4 See 128 S. Ct. at 981, 984–85. The Court rejected the argument that the California law is
5 “compatible with the FAA because [the California law] merely postpones arbitration until after
6 the Labor Commissioner has exercised her primary jurisdiction.” *Id.* at 985. The Court
7 explained that “[a] prime objective of an agreement to arbitrate is to achieve ‘streamlined
8 proceedings and expeditious results.’” *Id.* at 986 (quoting *Mitsubishi Motors Corp. v. Soler*
9 *Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). “That objective would be frustrated,”
10 however, because even the mere act of “[r]equiring initial reference of the parties’ dispute to the
11 Labor Commissioner would, at the least, hinder speedy resolution of the controversy.” *Id.*

12 Here, at the least, there can be no doubt that engrafting class proceedings onto arbitration
13 would “hinder speedy resolution of the controversy” (*id.*) between plaintiffs and ATTM:
14 Superimposing class-action procedures on arbitration “brings the burdens of litigation into the
15 arbitral forum” and “lessens the distinction between the two processes.” Jonathan R. Bunch,
16 Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement*
17 *Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP.
18 RESOL. 259, 272. Resolving this case as a class arbitration would take years.²³

19 ²² This Court is bound to follow *Preston* rather than *Shroyer*, as a circuit court decision is
20 abrogated whenever a Supreme Court decision “undercut[s] the theory or reasoning underlying
21 the prior circuit precedent in such a way that the cases are clearly irreconcilable,” even if “the
22 issues” in the two cases are not “identical.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.
23 2003).

24 ²³ Class actions invariably begin with a lengthy collateral proceeding to determine the
25 propriety of class certification, which generally entails (i) substantial discovery, including
26 depositions of all class representatives (and often other witnesses) for purposes of determining
27 such statutory prerequisites as typicality and adequacy of the class representatives and
28 commonality of the claims across class members; (ii) plenary briefing of the class certification
issue; (iii) an evidentiary hearing; (iv) a written ruling; and (v) the interlocutory appeal that
inevitably follows. If, after all of that, a class is certified, there would have to be full and
adequate notice to class members and an opportunity to opt out. Discovery commensurate with
the now-increased stakes of the litigation would then commence and likely continue for months,
if not years. Should the defendant then yield to the hydraulic pressure to settle that class
certification creates, due process would necessitate another round of notice followed by a
fairness hearing, complete with extensive briefing by both sides, as well as by any objectors.
And if the defendant chooses not to settle, there would need to be a class-wide trial—one in
which the plaintiffs are required to establish any individualized elements of their claims and the

(cont’d)

1 Moreover, conditioning the enforceability of arbitration agreements on the availability of
2 class arbitration would do more than “hinder” arbitration’s “speedy resolution”: Such a
3 requirement would force companies to abandon arbitration altogether. When a business decides
4 whether to include an arbitration provision in its agreements with its customers, it must consider
5 the advantages and disadvantages of doing so. The advantages of arbitration are that it “saves
6 time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the*
7 *Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles
8 Bernheimer, N.Y. Chamber of Commerce).²⁴ The risk is that the arbitrator will render an
9 erroneous—and unreviewable—decision. Arbitrators’ decisions are largely shielded from
10 judicial review and may be reversed only for fraud, bias, or “manifest disregard” of the law. *See*
11 *9 U.S.C. § 10; Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403–04 (2008); *see also*
12 *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005)
13 (standard for vacating an arbitral award is “among the narrowest known to law”). Many
14 businesses are willing to take that risk in an individual arbitration because of the cost savings and
15 their desire for a less adversarial method of resolving disputes with customers.

16 That calculus changes dramatically, however, if the arbitration provision must allow for
17 class-wide arbitration. As noted above, in a class arbitration, the efficiencies of individual
18 arbitration are lost. More importantly, the stakes of a class arbitration are exponentially higher
19 than those of an individual arbitration. No business could afford to subject itself to the risk that
20 an arbitrator subject to only very limited judicial review—and thus only loosely bound by
21 substantive rules of law—would render a massive class award. *See* Tr. of Oral Argument, *Green*
22 *Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (observation of one Justice that “[y]ou might not
23 want to put your company’s entire future in the hands of one arbitrator”), *available at* 2003 WL
24 1989562, at *29. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512
25 U.S. 107, 116 (1994)) of the FAA to “achieve ‘streamlined procedures and expeditious results.’”

26 _____
defendant is afforded the opportunity to put on any individualized defenses.

27 ²⁴ As the Supreme Court has observed, these “advantages often would seem helpful to
28 individuals, say, complaining about a product, who need a less expensive alternative to
litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

1 *Preston*, 128 S. Ct. at 986 (quoting *Mitsubishi*, 473 U.S. at 633). Accordingly, under *Preston*,
2 any state-law rule requiring the availability of class arbitration is preempted by the FAA. *See*
3 *also Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007) (Pennsylvania rule that arbitration
4 provisions that prohibit class arbitration are unconscionable “interfere[s] with the appropriate
5 application of the FAA”).²⁵

6 **III. PLAINTIFFS’ MMWA CLAIM IS ARBITRABLE.**

7 This Court should also reject any argument by plaintiffs that their claim under the
8 MMWA is not arbitrable. The Fifth and Eleventh Circuits—the two courts of appeals that have
9 considered the question—have both concluded that MMWA claims must be arbitrated like any
10 other statutory claim. *See Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1275 (11th Cir. 2002);
11 *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475 (5th Cir. 2002).²⁶

12 This Court should do the same. The Supreme Court has held that “[t]he burden is on the
13 party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial
14 remedies for the statutory rights at issue.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S.
15 220, 226–27 (1987). In applying that test, the Supreme Court has *never* found a federal statutory
16 claim to be non-arbitrable.²⁷ To the contrary, it has explained that “even claims arising under a
17 statute designed to further important social policies may be arbitrated because” when as here, the
18 federal claim may be vindicated in arbitration, “the statute serves its functions.” *Green Tree Fin.*
19 *Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000). Under the *McMahon* test, MMWA claims must
20 be arbitrated if, as here, they are within the scope of an otherwise binding arbitration agreement.

21 It is true that the Federal Trade Commission has concluded that Congress implicitly

22 ²⁵ *Accord Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va.
23 2005); *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip. op. at 6 (Mo. Cir. Ct. Nov. 28,
24 2005) (attached as Exhibit 1); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct.
25 App. 2001).

26 ²⁶ Although the Ninth Circuit has not confronted this question, the only district court in this
27 Circuit to do so has agreed with the Fifth and Eleventh Circuits. *See Dombrowski v. Gen.*
28 *Motors Corp.*, 318 F. Supp. 2d 850, 850–51 (D. Ariz. 2004).

29 ²⁷ *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in
30 Employment Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)
31 (Securities Act of 1933); *McMahon, supra*, 482 U.S. 220 (Securities Exchange Act of 1934 and
32 Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors, supra*, 473 U.S. 614
33 (Sherman Act).

1 precluded arbitration of MMWA claims by authorizing warrantors to “establish [an] informal
2 dispute settlement mechanism” that a “consumer must resort to * * * before pursuing [any] legal
3 remedy” under the MMWA. See 64 Fed. Reg. 19,700, 19,701, 19,708–09 (1999) (citing 15
4 U.S.C. § 2310(a)(3)(C)). But as the Fifth and Eleventh Circuits have explained, the FTC’s
5 position rests on an unreasonable interpretation of the MMWA’s text: Because “binding
6 arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite”
7 (*Walton*, 298 F.3d at 475 (emphasis in original)), regulating “informal dispute settlement
8 procedures does not mean that the [MMWA] precludes a court from enforcing a valid binding
9 arbitration agreement” (*Davis*, 305 F.3d at 1275). Virtually every state appellate court to
10 consider the question has agreed with the Fifth and Eleventh Circuits.²⁸ And the Third Circuit
11 similarly has held that the MMWA’s use of the term “informal dispute resolution mechanism
12 * * * does not constitute [a reference to] arbitration within the meaning of the FAA.” *Harrison*
13 *v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3d Cir. 1997).

14 The legislative history of the MMWA further underscores why the FTC’s position does
15 not comport with *McMahon*. As several courts have noted, nothing in the congressional reports
16 or floor debate suggests that Congress intended to preclude binding arbitration of MMWA
17 claims. See, e.g., *Walton*, 298 F.3d at 476–77; *Davis*, 305 F.3d at 1275–76. Indeed, Congress
18 never “specifically discuss[ed] the availability of arbitration” at all. *Walton*, 298 F.3d at 476. By
19 contrast, a Senate report describing an earlier version of the MMWA stated that Congress
20 intended for “warrantors of consumer products * * * ‘to establish informal dispute settlement
21 mechanisms that take care of consumer grievances *without aid of litigation or formal*
22 *arbitration.*’” *In re Am. Homestar*, 50 S.W.3d at 488 (quoting S. REP. NO. 91-876, at 22–23
23 (1970)) (emphasis by the court). As the Texas Supreme Court concluded, “[t]his passage

24 ²⁸ See, e.g., *Patriot Mfg., Inc. v. Jackson*, 929 So. 2d 997 (Ala. 2005); *Borowiec v. Gateway*
25 *2000, Inc.*, 808 N.E.2d 957, 965–66 (Ill. 2004); *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325
26 (Mich. 2004); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001); *Howell v.*
Cappaert Manufactured Housing, Inc., 819 So. 2d 461, 464 (La. Ct. App. 2002); *Results*
Oriented, Inc. v. Crawford, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff’d*, 548 S.E.2d 342 (Ga. 2001);
27 *Walker v. DaimlerChrysler Corp.*, 856 N.E.2d 90, 93–99 (Ind. Ct. App.), *transfer denied*, 869
28 N.E.2d 455 (Ind. 2007); *McDaniel v. Gateway Computer Corp.*, 2004 WL 2260497, at *1–*4
(Ohio Ct. App. Sept. 24, 2004). *But see Koons Ford of Baltimore, Inc. v. Lobach*, 919 A.2d 722,
734 (Md. 2007); *Parkerson v. Smith*, 817 So. 2d 529, 530–35 (Miss. 2002).

1 arguably demonstrates that Congress contemplated a consumer’s resort to courts *or* binding
2 arbitration if the informal dispute settlement mechanism did not resolve the dispute.” *Id.* at 488–
3 89 (emphasis in original).

4 Under the long line of Supreme Court precedent holding that numerous important federal
5 statutory claims are arbitrable, the silence of the MMWA’s legislative history on this point is
6 fatal to the FTC’s position. *See, e.g., Walton*, 298 F.3d at 477 (observing that the Supreme Court
7 rejected a more persuasive legislative history argument in *McMahon*). Moreover, the FTC’s
8 position reflects the sort of “suspicion of arbitration as a method of weakening” statutory
9 protections that the Supreme Court has explained “has fallen far out of step with [its] current
10 strong endorsement of” arbitration. *Rodriguez de Quijas*, 490 U.S. at 481. Accordingly, this
11 Court should join the Fifth and Eleventh Circuits in rejecting the FTC’s position and hold that
12 MMWA claims, like other federal statutory claims, are arbitrable.

13 CONCLUSION

14 ATTM’s motion to compel arbitration should be granted, and plaintiffs’ claims against
15 ATTM should be dismissed.²⁹

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27 ²⁹ District courts may dismiss claims that are subject to arbitration. *See Thinket Ink Info.*
28 *Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004); *Sparling v. Hoffman*
Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (Section 3 of the FAA “did not limit the [district]
court’s authority to grant a dismissal”).

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