

D.3 Unconscionability of Standard Form Arbitration Agreement (Ting)

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR ALAMEDA COUNTY

_____)	CLASS ACTION
DARCY TING, individually and)	COMPLAINT FOR
on behalf of all others similarly)	VIOLATIONS OF THE
situated, and CONSUMER)	CONSUMER LEGAL
ACTION, a non-profit)	REMEDIES ACT, THE
membership organization, both as)	UNFAIR BUSINESS
private attorneys general,)	PRACTICES ACT, AND
Plaintiffs,)	FOR DECLARATORY AND
v.)	INJUNCTIVE RELIEF
AT & T, a New York corporation,)	Type of Case: (Other):
Defendant.)	Unfair Business Practices
_____)	JURY TRIAL DEMANDED

INTRODUCTORY STATEMENT

1. This is a lawsuit charging AT & T with unconscionably and unilaterally attempting to deprive plaintiff Ting and its other customers of their constitutional rights to due process and a jury trial without their consent. In the last several months, AT & T has sent plaintiff Ting and its other customers a “Consumer Services Agreement” that would eliminate their ability to obtain compensation for most wrongs AT & T might commit against them by, among other things, requiring plaintiff Ting and AT & T’s other customers to submit to mandatory, binding, secret arbitration and prohibiting them from participating in class actions.

2. AT & T’s “Consumer Services Agreement” is unlawful, unfair, fraudulent and unconscionable—and therefore in violation of California’s Consumer Legal Remedies Act and the Unfair Competition Law—for several distinct reasons. First, while the proposed changes contained in the “Consumer Services Agreement” would effectively immunize AT & T from liability for most wrongs it might commit against its customers, AT & T has made no effort to ensure that plaintiffs and its other California customers actually learned of these proposed changes or knowingly consented to them. Instead, AT & T simply sent the “Consumer Services Agreement” to plaintiff Ting and its other customers with their bills, knowing that most customers were unlikely even to read it, and simply included a provision that any time one of its customers simply used his/her telephone, this would constitute consent to the proposed changes. Such “consent,” however, is neither voluntary nor meaningful under the law, and renders the “Consumer Services Agreement” unenforceable in its entirety.

3. Second, even if plaintiff Ting and AT & T’s other customers knowingly consented to AT & T’s unilateral attempt to change its contract, the “Consumer Services Agreement” is nonetheless unconscionable and unenforceable because it expressly forbids any AT & T customers from bringing, or participating in, any class actions, an important provision of California’s public policy for protecting consumers. AT & T is well aware that class actions are the only realistic means that plaintiff Ting and AT & T’s other customers have for pursuing many if not most claims they are ever likely to have against AT & T. Thus, if the “Consumer Services Agreement” is enforced, AT & T will be insulated from most liability to its customers and be free to cheat and damage its customers without being held accountable.

4. Finally, AT & T’s “Consumer Services Agreement” is unconscionable and unenforceable because it requires class members to submit their claims to an arbitration service provider—the American Arbitration Association (“AAA”)—that has strong incentives to be biased in favor of AT & T and against plaintiff Ting and AT & T’s other customers.

5. For these and other reasons, this Court should declare that AT & T’s provisions requiring customers to submit to mandatory arbitration and prohibiting customers from participating in class actions are unlawful and unfair on their face within the meaning of the Consumer Legal Remedies Act and the Unfair Competition Law, and enjoin their further enforcement.

THE PARTIES

Plaintiffs

6. Plaintiff Ting is over 18 years of age and is a resident of Berkeley, California. For at least seven years, Ms. Ting has been an AT & T customer.

7. Plaintiff Consumer Action (“CA”) is a non-profit membership organization committed to consumer education and consumer education and advocacy. CA was established nearly 30 years ago, and has approximately 1,500 members. CA is headquartered in San Francisco and has members throughout California and nationwide. As a service to consumers in California and elsewhere, CA publishes and distributes approximately 2,000,000 pieces of literature a year, in 8 different languages, on banking and utility issues, including an annual survey on long distance rates. In addition, CA is actively involved in policy and legislative advocacy on telephone and utility issues, among others, on behalf of consumers at

both the state and national levels.

8. Plaintiffs are not authorized to enforce observance by defendant AT & T of federal laws and regulations. Plaintiffs do not seek to control defendant AT & T but merely to obtain a declaration of rights and responsibilities and injunctive relief relying on state law.

Defendant

9. Defendant AT & T is a long distance telephone carrier and a corporation in New York, New York. It is, through its officers, agents, and employees, engaged in and sells communication services, including long distance telephone services, and is doing such business in California with offices located in Oakland, California and many other California locations.

CLASS ALLEGATIONS

10. Pursuant to California Civil Code § 1781 and California Code of Civil Procedure § 382, plaintiff Ting brings this action on behalf of herself and all other persons similarly situated. The class that plaintiff Ting represents (hereinafter the “Plaintiff Class”) is composed of all California persons who have or have had long distance telephone service with defendant AT & T at any time from July 30, 1997 forward, and whose long distance service is subject to AT & T’s Consumer Services Agreement challenged by this action.

11. Plaintiff Ting is informed and believes and on that basis alleges that the Plaintiff Class numbers in excess of hundreds of thousands of persons and is so numerous that joinder of all members would be impracticable. The exact size of the Plaintiff Class, and the identity of the members of the class are ascertainable from the business records of AT & T.

12. Questions of law and fact common to the Plaintiff Class exist that predominate over questions affecting only individual members, including, *inter alia*, the following:

a. Whether defendant AT & T’s Consumer Services Agreement with members of the Plaintiff Class is unconscionable;

b. Whether the terms of AT & T’s Consumer Services Agreement violated the Consumer Legal Remedies Act, Civil Code §§ 1770(a)(5), 1770(a)(9), and 1770(a)(14);

c. Whether AT & T’s Consumer Services Agreement is unlawful, unfair and fraudulent in violation of the Unfair Competition Law, Business & Professions Code § 17200, *et seq.*; and

d. Whether plaintiff Ting and the other members of the Plaintiff Class suffered damage by reason of the unlawful, unfair and/or fraudulent conduct of AT & T and the class-wide measure of damages.

13. The claims asserted by plaintiff Ting in this action are typical of the claims of the members of the Plaintiff Class as described above, the claims arise from the same course of conduct by AT & T, and the relief sought is common.

14. Plaintiff Ting will fairly and adequately represent and protect the interests of the members of the Plaintiff Class. Plaintiff Ting has retained counsel competent and experienced in both consumer protection and class action litigation.

15. A class action is superior to other methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, because the economic damages suffered by the individual class members may be relatively modest, albeit significant, compared to the expense and burden of individual litigation, it would be impracticable for

members of the Plaintiff Class to seek redress individually for the wrongful conduct alleged herein. There will be no undue difficulty in the management of this litigation as a class action.

PRIVATE ATTORNEY GENERAL ALLEGATIONS

16. This action is brought by plaintiffs acting as private attorneys general pursuant to the Unfair Business Practices Act. A private attorney general action pursuant to Business and Professions Code §§17203 and 17204 is appropriate and necessary because AT & T has engaged in the acts described herein as a general business practice. Plaintiffs request in this claim that this court decide that the arbitration requirements unilaterally imposed on its customers by AT & T are each unlawful, unfair, deceptive and unenforceable, and enjoin AT & T from unilaterally imposing these requirements on its customers.

VENUE

17. Venue is appropriate in the County of Alameda pursuant to California Code §1780(c) because defendant is doing business in Oakland.

GENERAL ALLEGATIONS

18. Plaintiff Ting recently received a document with the heading “Dear AT & T Customer,” and entitled “AT & T Consumer Services Agreement.” This document was included with several other documents in a monthly statement from AT & T. A copy of the “Consumer Services Agreement” document sent to plaintiff Ting is attached as Exhibit A hereto.

19. The “Consumer Services Agreement” Document contains, in small print, an arbitration provision (“AT & T’s Arbitration Provision”). This provision provides that “You have the right to take any qualifying dispute to small claims court rather than arbitration. All other disputes arising out of or related to this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory) must be resolved by final and binding arbitration.”

20. AT & T’s Arbitration Provision further provides:

THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION.

(Capitals in original).

21. AT & T’s Arbitration Provision further states that “NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS-WIDE BASIS.” (Capitals in original).

22. AT & T’s Arbitration Provision also provides

BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THE PRICES, CHARGES,

TERMS AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE SERVICES IMMEDIATELY BY CALLING AT & T AT 1(888) 288-4099 FOR FURTHER DIRECTIONS .

(Capitals in original).

23. AT & T's Arbitration Provision incorporates the AAA's Consumer Arbitration Rules (for disputes involving \$10,000 or less) or its Commercial Arbitration Rules (for disputes in excess of \$10,000). It does not explain, however, what either of these sets of rules provides. To obtain a copy of the current version of either set of the AAA rules, a customer must go to either AT & T's or the AAA's website.

24. AT & T's Arbitration Provision also makes clear that both sets of the AAA rules can be unilaterally changed without further notice to or agreement by plaintiff Ting or AT & T's other customers, as the rules that apply are those "which are in effect on the date a dispute is submitted to the AAA.

25. The AAA requires a claimant to pay certain fees to proceed with the claim. Under the Commercial Arbitration Rules, as the amount of damages claimed by a plaintiff increases, so do these fees increase.

26. AT & T's Arbitration Provision provides that "[t]he prevailing party may, however, seek to recover the AAA's fees and the expenses of the arbitrator from the other party."

27. AT & T's Arbitration Provision states that the decision of the arbitrator will be "final and binding."

28. The Consumer Services Agreement further provides that "We can assign all or part of our rights and duties under this Agreement without notifying you. If we do that, we have no further obligations to you. You may not assign this Agreement or the Services without our prior written consent."

29. The AT & T Consumer Services Agreement further states that "We [AT & T] may change this Agreement, including the incorporated AT & T Service Guides, from time to time."

30. The AT & T Consumer Services Agreement further provides that, if AT & T decides to exercise its self-declared right unilaterally to change the agreement, it will notify the consumer of the changes "by one or more of the following: posting on our Website, recorded announcement, bill message, bill insert, newspaper ad, postcard, letter, call to your billed telephone number, or e-mail to an address provided by you." Thus, the agreement provides that it can be unilaterally amended with as little notice as a posting on AT & T's website and with no specified time period for notice.

31. The Consumer Services Agreement also provides for limitations on the remedies that a customer may have against AT & T:

IF OUR NEGLIGENCE CAUSES DAMAGE TO PERSON OR PROPERTY, WE WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF DIRECT DAMAGES TO THE PERSON OR PROPERTY. FOR ANY OTHER CLAIM, WE WILL NOT BE LIABLE FOR MORE THAN THE AMOUNT OF OUR CHARGES FOR THE SERVICES DURING THE AFFECTED PERIOD. . . . WE ALSO WILL NOT BE LIABLE FOR PUNITIVE, RELIANCE OR SPECIAL DAMAGES. THESE LIMITATIONS APPLY EVEN IF THE DAMAGES WERE FORESEEABLE OR WE

WERE TOLD THEY WERE POSSIBLE, AND THEY APPLY WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE THEORY.

32. The "Frequently Asked Questions" portion of the cover note transmitted with AT & T's Consumer Service Agreement states that "Arbitration is a quicker and more convenient way to settle disputes without the hassle and cost of a court case."

33. The "Frequently Asked Questions" portion of the cover note transmitted with AT & T's Consumer Service Agreement states that the arbitrator will be "an objective third party," and the arbitration provision itself refers to "neutral" arbitrators.

AT & T's ARBITRATION PROVISION PURPORTS TO STRIP CONSUMERS OF THEIR SUBSTANTIVE RIGHTS UNDER THE LAW

34. Under both the Federal Arbitration Act and California law, arbitration clauses are unenforceable unless they permit a claimant effectively to vindicate the substantive rights that they could enforce in court.

35. Despite this authority, AT & T's Arbitration Provision purports to shorten the limitations period applying to its customers' claims. The provision states that "ANY CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT MUST BE BROUGHT WITHIN TWO YEARS AFTER THE DATE THE BASIS FOR THE CLAIM OR DISPUTE FIRST ARISES." This is shorter than the three-year limitations provision that applies to most statutory causes of action in California, than the four-year limitations period that applies to claims under the Unfair Competition Law, than the four-year limitations period that applies to written agreements and the three-year limitations period that applies to a cause of action for fraud.

36. AT & T's Arbitration Provision also provides that "THE ARBITRATOR MAY NOT AWARD DAMAGES THAT ARE NOT EXPRESSLY AUTHORIZED BY THIS AGREEMENT" and that "YOU AND AT & T BOTH WAVE ANY CLAIMS FOR AN AWARD OF DAMAGES THAT ARE EXCLUDED UNDER THIS AGREEMENT." This incorporates into the arbitration provision as an express limitation on the arbitrator's power the section of the AT & T Customer Services Agreement which states that "IF OUR NEGLIGENCE CAUSES DAMAGE TO PERSON OR PROPERTY, WE WILL BE LIABLE FOR NO MORE THAN THE AMOUNT OF DIRECT DAMAGES TO THE PERSON OR PROPERTY. FOR ANY OTHER CLAIM, WE WILL NOT BE LIABLE FOR MORE THAN THE AMOUNT OF OUR CHARGES FOR THE SERVICES DURING THE AFFECTED PERIOD. FOR ALL CLAIMS, WE WILL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOST PROFITS OR REVENUE OR INCREASED COSTS OF OPERATION. WE ALSO WILL NOT BE LIABLE FOR PUNITIVE, RELIANCE OR SPECIAL DAMAGES. THESE LIMITATIONS APPLY EVEN IF THE DAMAGES WERE FORESEEABLE OR WE WERE TOLD THEY WERE POSSIBLE, AND THEY APPLY WHETHER THE CLAIM IS BASED ON CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL OR EQUITABLE THEORY." The arbitration provision prohibits

all punitive damages claims even though Section 3294 of the California Civil Code provides for such relief for a variety of types of conduct that AT & T could potentially commit against its customers.

**AT & T'S ARBITRATION PROVISION SEEKS TO
IMMUNIZE AT & T FROM LIABILITY BY PREVENTING
ITS CUSTOMERS FROM PARTICIPATING
IN CLASS ACTIONS**

37. As set forth above, AT & T's Arbitration Provision prohibits its customers from proceeding against AT & T on a class action basis. By doing so, AT & T's Arbitration Provision seeks to eliminate the only realistic remedy that its customers have for most wrongs it might commit against them.

38. The recent history of consumer litigation establishes that most individual claims against telecommunications companies are for very modest sums of a few hundred or (at the most) a few thousand dollars.

39. It is not economically feasible for consumers to pursue such relatively small claims on an individual basis against a large corporation such as AT & T. Very few, if any, attorneys are financially able or willing to pursue individual claims for modest sums against large, powerful companies such as AT & T. And when a consumer's claims are quite small on an individual basis, it is economically infeasible for him/her to hire an attorney to represent his/her interests on a billable-hour basis.

40. Consumer attorneys *are*, however, often able to pursue such claims on a class action basis. When similar claims are aggregated, the amount in controversy becomes sufficiently large for consumers to be able to locate counsel who will represent them and defend their interests. Indeed, there have been several cases across the nation in recent years where consumer companies were held accountable for widespread wrongdoing through consumer class actions. As the California Supreme Court recently held, "class actions offer consumers a means of recovery for most individual damages. . . ." *Linder v. Thrift Oil Co.* (2000) 23 Cal. 4th 429, 445.

41. California's public policy demonstrates the importance of class actions as an instrumentality of consumer protection.

42. If AT & T's customers are barred from pursuing class litigation, then they will likely be denied any meaningful remedy for most wrongs that AT & T might commit against them. Accordingly, AT & T's Arbitration Provision does not offer customers an equally effective alternative method of dispute resolution; rather it eliminates the only realistic method of dispute resolution available.

43. If AT & T successfully immunizes itself from any class-wide legal accountability, it will free itself to commit widespread wrongdoing. As the California Supreme Court has recognized, class actions "often produce several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, [and] aid to legitimate business enterprises by curtailing illegitimate competition. . . ." *Linder, supra*, 23 Cal. 4th at 445 (internal quotation marks and citations omitted). The Supreme Court went on to state that "defendants should not profit from their wrongdoing simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *Id.* at 446 (internal quote, citation omitted).

44. It is unconscionable for a contract to compel an individual to submit his or her claims to arbitration when the arbitrator cannot provide the same opportunity to effectively vindicate those claims

that could have been provided in court.

**AT & T'S ARBITRATION PROVISION REQUIRES ITS
CUSTOMERS WITH CLAIMS GREATER THAN \$10,000
TO PAY ENORMOUS ARBITRATION FEES**

45. If plaintiff Ting or any of AT & T's customers were to have a dispute with AT & T in which he/she claim damages of more than \$10,000, under AT & T's Arbitration Provision he/she would be required to arbitrate this dispute under AAA's Commercial Rules.

46. Under the AAA's Commercial Rules, the minimum filing fee for a claimant is \$500, and filing fees then quickly escalate as the amount of the claim increases. A claimant must also pay one half of the fees of the arbitrator(s) handling the case. AAA arbitrators frequently charge fees of \$300 to \$400 per hour and more for each hour spent on the matter, including research and preparation.

47. The total fees billed by AAA for arbitrations conducted under its commercial rules are often very high:

a. In one sexual harassment case brought in California captioned *Warner v. Von Buettner Ristow*, a claimant was required to pay \$18,260 to AAA. When she did not prevail on the claim, the AAA Arbitrator assessed the claimant \$207,271 for the defendant employer's attorneys' fees.

b. In a legal malpractice case bought in California captioned *Paul v. Alred*, a claimant was required to pay \$15,000 to AAA, even though she waited for more than four years for the arbitrator even to hold a hearing on the merits of her claim.

c. In a dispute between a small chicken farmer and a large agribusiness brought in Mississippi captioned *Gatlin v. Sanderson Farms*, AAA informed the farmer that he would be required to pay a minimum of \$11,000 to have his claim heard.

d. In a personal injury case brought in Connecticut captioned *Mahler v. Terminex*, two homeowners were charged \$7,000 each to arbitrate their claims.

48. As a result of such high AAA arbitration fees, many consumers are unable to pursue their claims against corporations such as AT & T.

**AT & T'S ARBITRATION PROVISION REQUIRES ITS
CUSTOMERS TO SUBMIT TO ARBITRATION WITH A
PROVIDER (THE AAA) THAT IS BIASED IN FAVOR OF
CORPORATE DEFENDANTS SUCH AS AT & T**

49. Plaintiff Ting and all of AT & T's customers are entitled by law to have any legal disputes that they may have with AT & T resolved according to law by a genuinely unbiased, neutral, independent decision maker.

50. AT & T's Arbitration Provision is unfair and unconscionable because AT & T has chosen an arbitrator—the AAA—with very strong incentives to be biased in its favor. AAA is very sympathetic to and favorable towards corporate defendants.

51. AAA's arbitrators know that there are numerous other providers of arbitration services, and AAA's development staff directly competes for corporate business with other providers such as JAMS and the National Arbitration Forum. All or nearly all of the business for AAA's for-profit arbitrators comes from having corporations designate AAA as the arbitration service provider for the corporations' customers in their standard form contracts. AAA has a development team that focuses upon convincing corporations to select it as the corporations' arbitration service providers.

52. AAA's arbitrators know that if they were to rule for con-

sumers too often by the standards of the corporations selecting them or their defense lawyers, or enter awards for consumers that were too large by the standards of these corporations and their defense lawyers, these companies would cancel or not renew their contracts with the AAA, and the arbitrators would lose this lucrative business.

53. In addition to the filing fees that AAA receives when cases are lodged with it, and the arbitrators' fees that its arbitrators receive for handling particular cases, AAA also receives regular and substantial cash stipends, retainers, or payments from a large number of corporations.

54. AAA regularly files *amicus* briefs with courts that support the efforts of corporate defendants to force individuals to submit their claims to arbitration. In a series of cases before the U.S. Supreme Court and other courts, AAA has filed supposedly "neutral" *amicus* briefs that were purportedly in support of neither party. In each of these cases, a corporate defendant was attempting to compel an individual claimant to arbitrate his or her claims, and the individual claimant was seeking to pursue his or her constitutional right to have his or her day in court and right to a trial by jury. In each case, despite AAA's claims of neutrality, AAA's *amicus* brief set forth legal and/or factual arguments in support of compelling arbitration in these cases, which was the ultimate position sought by the corporate defendant and opposed by the individual plaintiff. After AAA filed an ostensibly neutral brief with the Supreme Court in a recent case involving employment disputes, one AAA arbitrator wrote AAA that "Taking the strong position the Association took in this brief, where half of its clients in the employment arena—claimants—take the opposing position, is not only unseemly, but destroys AAA's hard earned neutrality." Michael Joe, *Embattled Brief: AAA Faces Criticism from Two of Its Own for Weighing In On a Mandatory ADR Case*, *The Recorder*, September 27, 2000 (quoting Oakland arbitrator R. Elaine Leitner).

55. AAA also sometimes assists corporations in their efforts to pitch their mandatory arbitration clauses to individual consumers and/or employees. In a case involving Red Lobster Restaurants, for example, a man identified as Bruce Chapin, an AAA arbitrator, appeared in a corporate-produced video tape aimed at convincing employees to accept Red Lobster's new mandatory arbitration policy. When an employee (or an actor pretending to be an employee) asks about the right to a jury trial, Mr. Chapin states: "Certainly anyone who is ever charged with a crime should insist upon a jury trial. But in a civil setting, a dispute in the workplace, for instance, this is not a matter that would be best tried in front of a jury." Thus, AAA is so eager to help corporate clients impose mandatory pre-dispute arbitration upon individuals that its representatives will urge those individuals to conclude that it is "best" for them to waive their constitutional rights.

56. In a number of cases with mandatory pre-dispute arbitration clauses specifying AAA as the arbitration service provider, individual claimants have initiated the arbitration process against corporations only to have AAA select an arbitrator who was in the same business as the corporate defendant or who represented other corporations in that business, or to identify a list of potential arbitrators primarily or solely composed of such individuals.

57. Plaintiffs are informed and believe that AAA's arbitrators are overwhelmingly and disproportionately drawn from the ranks of attorneys who principally represent corporations in defending actions brought by individuals.

58. AAA places such an emphasis on developing new lucrative

corporate business that in its San Francisco office Paul Loon, the Regional Vice President of AAA, on January 14, 2000, sent a memorandum to all AAA arbitrators in that area asking for the arbitrators' help, as "[part of our marketing effort for 2000 will be to develop business contracts with corporations headquartered in Northern California." He asked the arbitrators to "make the introduction for us" to any contacts they might have with any corporation listed on an attachment to the memo. This memorandum was circulated despite the fact that AAA's Code of Ethics for Arbitrators in Commercial Disputes states, Canon I at B, that "[i]t is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves."

59. AAA represents that individuals forced to arbitrate their claims before it will have their rights protected by its Consumer Due Process Protocol, a set of rules that AAA asserts will protect the rights of consumers required to take part in mandatory arbitration. In fact, despite its representations to the contrary, AAA regularly administers arbitrations or otherwise endorses the validity of mandatory pre-dispute arbitration clauses that do not comply with its Due Process Protocol. In at least one case, AAA refused to even respond to correspondence from individuals facing a motion to compel arbitration (or to correspondence from state and elected officials writing on the individuals' behalf) that requested that AAA state that it would not administer arbitration pursuant to an arbitration clause that did not comply with AAA's Consumer Due Process Protocol. In February of 2000, one AAA representative publicly announced that AAA had never yet refused to administer arbitration under an arbitration clause on the grounds that it did not comply with its Due Process Protocol.

AT & T'S ARBITRATION PROVISION WAS COMMUNICATED TO CONSUMERS IN SUCH A WAY THAT FEW OF ITS CONSUMERS WOULD VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY CONSENT TO THE ARBITRATION PROVISION

60. AT & T's Arbitration Provision was communicated to plaintiff Ting and AT & T's other customers in such a way that ensures that few would have read it, much less have voluntarily, knowingly, and intelligently consented to it.

61. AT & T did not send its Arbitration Provision to plaintiff Ting or to its other customers in a document that they must read, sign and return.

62. AT & T's prior version of its Customer Agreement does not refer specifically to dispute resolution.

63. No AT & T employee telephoned or contacted plaintiff Ting to inform her about its Arbitration Provision or to notify her that she would be losing her federal and state constitutional rights to trial by judge or jury.

64. Upon information and belief, no AT & T employee telephoned or contacted any of AT & T's other customers to inform them about its Arbitration Provision or to notify them that they would be losing their federal and state constitutional right to trial by judge or jury.

65. In short, AT & T did not use any method or marketing device that would insure that plaintiff Ting or its other customers would actually read and understand the AT & T Arbitration Provision.

66. Major telecommunications companies such as AT & T are extremely sophisticated with respect to marketing, and with respect to consumer behavior in response to communications from finan-

cial services companies. Like other companies in the telecommunications industry, AT & T retains and employs a number of persons who study the number of consumers who read and respond to various sorts of mailings.

67. The California Constitution recognizes that the right to jury trial is a fundamental right for all citizens of California protected by Cal. Const. art. I, § 16. In addition, the Seventh Amendment to the United States Constitution recognizes the right to a jury trial in all federal cases. The California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution protect the right of all citizens to Due Process of law.

68. AT & T's Arbitration Provision deprives its customers of these constitutional rights.

69. Under California's generally applicable law of contracts, an individual will not be found to have waived a constitutional right (such as the rights to due process and a jury trial) by contract unless they have voluntarily, knowingly, and intelligently consented to waive those rights.

70. If an individual does not both actually read and fully comprehend a contractual document purporting to waive her or his constitutional rights, that individual cannot be said to have voluntarily, knowingly and intelligently consented to waive those rights.

71. It is therefore unlawful, unfair, fraudulent and unconscionable for AT & T to seek to force its customers into mandatory pre-dispute arbitration without a knowing, voluntary and intelligent waiver of their right to a day in court.

AT & T'S ARBITRATION PROVISION ENSHRINES SWEEPING SECRECY

72. AT & T's Arbitration Provision compels plaintiff Ting and all of AT & T's customers to submit to an entirely secretive system of dispute resolution, and deprives plaintiff and the other customers of their right to public, open, reviewable dispute resolution. It provides that "Any arbitration shall remain confidential. Neither you nor AT & T may disclose the existence, content, or results of any arbitration or award, except as may be required by law, or to confirm and enforce an award."

73. As a result of the secrecy enshrined in AT & T's Arbitration Provision, AT & T has the ability to conceal not only the truth about AAA's performance, but even its mere existence, eliminating any realistic check against any abuses that AAA arbitrators might commit. AAA could rule for AT & T in *every single* case it arbitrates (and thus give AT & T a strong incentive to continue to patronize AAA), and this fact would forever remain "confidential" from AT & T's customers and the public at large. The extraordinary secrecy enshrined in AAA's rules permits AT & T and AAA to exercise unchecked discretion.

74. The secrecy provisions of AT & T's Arbitration Provision also remove the resolution of disputes from the public domain, and deprive consumers of the benefit of discovering precedents in cases decided in their favor.

FIRST CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND DAMAGES (Violation of Consumer Legal Remedies Act, California Civil Code §§1750 *et seq.*, Brought by the Individual Plaintiff)

75. Plaintiff Ting realleges and incorporates herein as though set forth in full, the allegations of paragraphs 1 through 74 above, except paragraph 15.

76. Plaintiff Ting brings this action seeking injunctive relief pursuant to California Civil Code §§ 1770 and 1780. The Consumer Legal Remedies Act, Civil Code §§ 1750, *et seq.* is designed to protect consumers against unfair and deceptive business practices. It applies to AT & T's conduct because it covers transactions which are intended to result or which result in the sale or lease of goods and services to consumers. The Act specifically proscribes in § 1770(n) representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve or which are prohibited by law, and prohibits in § 1770(s) inserting an unconscionable provision in a contract.

77. AT & T possesses bargaining strength and power far superior to that of plaintiff Ting and its other customers. Without discussion or negotiation, it offers to its customers standardized form contracts, drafted by AT & T, which are contracts of adhesion because they are offered on a take-it-or-leave-it basis and the customer has the opportunity only to adhere to the contract or close his or her account. Many of its customer agreements with customers were entered into years ago.

78. The AT & T Arbitration Provision is substantially one-sided in favor of AT & T, and AT & T knows that the Arbitration Provision is substantially one-sided in its favor.

79. The AT & T Arbitration Provision does not fall within the reasonable expectations of plaintiff Ting or of AT & T's other customers, and is unduly oppressive. It is, therefore, unlawful, unfair, fraudulent and unconscionable.

80. AT & T's Arbitration Provision would unlawfully, unfairly, fraudulently and unconscionably deprive plaintiff Ting and all of AT & T's other customers of their state and federal constitutional rights to trial by judge and jury without their voluntary, knowing and intelligent consent.

81. AT & T's Arbitration Provision also unlawfully, unfairly, fraudulently and unconscionably deprives plaintiff Ting and AT & T's other customers of their constitutional right to Due Process of law by denying them any effective remedy for their legal claims without their voluntary, knowing and intelligent consent.

82. AT & T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably bars plaintiff Ting and its other Customers from participating in class actions.

83. AT & T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably requires plaintiff Ting and AT & T's other customers to submit to arbitration before AAA, which has strong incentives to be biased in favor of AT & T and against its customers, and who has created, at the least, a strong appearance of improper bias in favor of AT & T and against its consumers.

84. AT & T's Arbitration Provision unlawfully, unfairly, fraudulently and unconscionably deprives plaintiff Ting and AT & T's other customers of their right to (and of the benefits of) a public forum for the resolution of their legal claims.

85. The statements in the Consumer Service Agreement about arbitration being cheaper and more convenient than litigation in court are fraudulent and misleading, in that (a) being forced to pay filing fees and individually pursue arbitration is certainly more of a "hassle" and involved greater costs than being a member of a class in a class action; and (b) for AT & T consumers subject to AAA's Commercial Rules, the arbitral and administrative filing fees and arbitrators' hourly fees will dwarf the filing fees that would be required in any court action.

86. The statements in the Consumer Service Agreement referring to "objective" arbitrators are deceptive in light of the facts set

forth above with respect to AAA's conduct, and none of those facts are disclosed in the Consumer Service Agreement.

87. Pursuant to California Civil Code §§ 1770 and 1780, plaintiffs are entitled to enjoin implementation of AT & T's Arbitration Provision and to recover their reasonable attorneys' fees and costs.

**SECOND CAUSE OF ACTION FOR INJUNCTIVE
RELIEF AND RESTITUTION
(Violation of the Unfair Competition Law, California
Business and Professions Code §§ 17200, et seq.,
Brought by All Plaintiffs)**

88. Plaintiffs reallege and incorporate herein by this reference each and every allegation set forth in paragraphs 1 through 87 above, except paragraph 15.

89. Plaintiffs file this Second Cause of Action acting as private attorneys general to challenge AT & T's requirement that its customers resolve disputes through arbitration. The Unfair Trade Practices Act defines unfair competition to include any "unlawful," "unfair" or "fraudulent" business act or practice. Business and Professions Code § 17200. The Act authorizes injunctive relief and restitution for violations. *Id.* at § 17203. Defendant AT & T has imposed its Arbitration Provision as a business practice. Plaintiffs request that this Court enjoin this practice as unlawful, unfair and fraudulent.

90. The imposition of AT & T's Arbitration Provision is an unlawful, unfair and fraudulent business practice for all of the reasons set forth in the preceding cause of action as to why it violates the Consumer Legal Remedies Act.

**THIRD CAUSE OF ACTION
(Declaratory Relief, Brought by the All Plaintiffs)**

91. Plaintiffs reallege and incorporate herein as though set forth in full the allegations of paragraphs 1 through 90 above, except paragraph 15.

92. An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that plaintiffs contend that the defendant's Arbitration Provision is unlawful, unfair, fraudulent, unenforceable, void and of no force or effect in all respects, whereas defendant contends that its Arbitration Provision is valid, creates binding contracts, and is enforceable in all respects. Plaintiffs maintain that each such notice is unlawful, unfair, fraudulent and unenforceable in that it is unconscionable, deceptive and misleading in violation of the Consumer Legal Remedies Act, violates the Unfair Competition Law, Business and Professions Code §17200, et seq., does not create a binding contract, infringes on protections guaranteed by the California Constitution and applicable statutes, and is oppressive and unfair. Defendant disputes these contentions and asserts that each notice of change of terms is valid, contractually binding, and enforceable.

93. Plaintiffs desire a declaration as to the validity and enforceability of the Arbitration Provision and whether defendant AT & T's unilateral attempt to impose it is unlawful, unfair or fraudulent. A judicial declaration is necessary and appropriate at this time so that plaintiffs may ascertain their rights and duties, and those of other affected persons in regard to the resolution of disputes with defendant Bank of America.

WHEREFORE, plaintiffs pray:

1. That this Court declare that AT & T's practice of imposing its Arbitration Provision on its customers violates the Consumer Legal Remedies Act;

2. That this Court declare AT & T's practice of imposing its Arbitration Provision on its consumers violates the Unfair Competition Law.

3. That this Court preliminarily and permanently enjoin AT & T from unilaterally imposing its Arbitration Provision on plaintiff Ting and all other customers;

4. That plaintiffs be awarded reasonable attorney's fees and costs of suit; and

5. That plaintiffs be awarded such other and further relief as the Court may deem appropriate, just and proper.

Dated: July 30, 2001

Respectfully submitted,

[Attorneys for Plaintiff]
