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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JAIME WING, et al., **Plaintiffs and Respondents,** **v.** **CINGULAR WIRELESS, LLC,** **Defendant and Appellant.**	**A105906** **(San Mateo County Super. Ct. No. 432021)**

Plaintiff Jaime Wing and two coplaintiffs, William Bucy and Michael Mitchell, filed suit against Cingular and other wireless service providers to challenge the practice of charging customers a fee for local number portability. Of the three named plaintiffs, only Wing is a customer of Cingular. Cingular petitioned to compel arbitration of plaintiff Wing's claims based upon an arbitration clause included among the terms and conditions of the wireless service agreement.[1] The trial court denied the petition, citing two grounds: (1) Cingular failed to establish the existence of an agreement to arbitrate between Cingular and Wing, and (2) the alleged arbitration agreement is unconscionable and unenforceable. In this appeal by Cingular, we reverse the order denying arbitration.

[1] The plaintiffs' lawsuit named other wireless service providers as well, but this appeal concerns only Cingular. Appeals by other service providers arising from the same lawsuit are pending before us in *Bucy v. AT&T*, A105910, and *Mitchell v. Sprint*, A105911. Cingular sought to compel arbitration only by plaintiff Wing because Wing is the only named plaintiff who is a Cingular customer.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Wing purchased a wireless telephone from the Costco store in South San Francisco in April 2001. The phone came in a shrink-wrapped box inside a cardboard sleeve, and on that cardboard sleeve were instructions for activating wireless service with Cingular. Beneath the shrink wrap on top of the box were several documents, including a notice advising the customer not to open the box until service had been activated. Also on top of the box were a welcome letter, the written terms and conditions of Cingular's wireless service, and a handbook of Cingular services. The written terms and conditions of Cingular's wireless service included an arbitration clause requiring arbitration of all disputes arising out of the wireless service agreement.

In April 2003, Cingular began charging its customers a "Regulatory Cost Recovery Fee" that included a fee for local number portability. In June 2003, plaintiff Wing and her two coplaintiffs brought a class action alleging unfair business practices under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), violations of the False Advertising Act (Bus. & Prof. Code, § 17500 et seq.), fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing.[2]

In July 2003, Cingular modified the arbitration clause in its wireless service agreement, making it more advantageous to the customers, and Cingular notified its

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[2] Plaintiffs brought their lawsuit not only as a class action but also on behalf of the general public. At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel . . . or any [qualified] city attorney . . . or by *any person acting for the interests of* itself, its members or *the general public*." (Bus. & Prof. Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal. Whether plaintiff Wing is entitled to pursue her claims under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions that plaintiff's claims under the UCL should be dismissed are not properly addressed to us.

customers of the change by way of an insert included with the customers' monthly bill. Both the original and the modified versions of the arbitration clause provide that either party may bring an individual action in small claims court, notwithstanding the agreement to arbitrate all disputes. The modified version significantly changed the procedure for payment of fees: If the customer initiates arbitration, Cingular will promptly reimburse the customer for the filing fee. Moreover, Cingular will pay all filing, administration, and arbitrator fees unless the arbitrator finds that the customer's claim is frivolous, in which case payment of fees will be governed by the American Arbitration Association (AAA) rules and thereby apportioned by the arbitrator. And, if the arbitration award is equal to or greater than the customer's demand, Cingular will pay the customer's attorney fees and expenses.

Most significantly, both the original and the modified version of the arbitration clause allow only individual claims to be heard in arbitration. The modified version reads as follows: "The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. . . . YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that [if] this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void." (Capitalization in original.)[3]

Based upon the arbitration clause in its wireless service agreement, Cingular petitioned to compel arbitration of plaintiff Wing's claim. Plaintiff opposed the petition, arguing that the arbitration clause was procedurally and substantively unconscionable.

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[3] The original version provided that the arbitrator had no authority to order consolidation or class arbitration.

Plaintiff Wing also disputed the existence of an arbitration agreement. Wing submitted a declaration to the court stating that when she activated her account with Cingular she was not informed of the arbitration provision and she did not recall receiving any written agreement: "I do not think I ever got an agreement setting forth the terms of my service other than what was included in my bills."

In response, Cingular presented evidence that the shrink-wrapped box in which customers received their Cingular phones at Costco stores contained the written terms and conditions of Cingular's wireless service. Cingular presented a copy of the written terms and conditions that were given to customers at the time plaintiff bought her phone.

The trial court identified two reasons for denying Cingular's petition to compel arbitration. First, the court found that Cingular failed to prove an agreement to arbitrate. Second, the court found that even if an arbitration agreement exists the agreement is unconscionable. In particular, the court found that the arbitration agreement and its July 2003 modification were procedurally unconscionable, having been presented on a take-it-or-leave-it basis. Further, the court found the ban on class-wide arbitration to be substantively unconscionable.

DISCUSSION

I. Existence of Arbitration Agreement

An order compelling arbitration is warranted only upon a finding that "an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) General principles concerning the formation of a contract govern this threshold issue. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.) The appellate court will uphold the trial court's finding on the existence of an arbitration agreement when substantial evidence supports that finding. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.) However, when, as here, the evidence consists entirely of written declarations and documentary evidence, we make a de novo determination of whether the parties agreed to arbitrate their disputes. (*Marcus & Millichap Real Estate Investment Brokerage Co. v.*

Hock Investment Co., supra, 68 Cal.App.4th at p. 89.) We conclude that an agreement to arbitrate exists.

Plaintiff argues that she did not assent to the arbitration agreement because she was unaware of the terms and conditions contained inside the shrink-wrapped box. Certainly a contract is not formed without mutual assent. (Civ. Code, §§ 1550, 1565; *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 993.) However, the existence of mutual assent is determined by objective criteria, not by one party's subjective intent. The test is whether a reasonable person would, from the conduct of the parties, conclude there was a mutual agreement. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.)

This is not a case in which the contractual nature of the document was not obvious to an unsuspecting customer. (Cf. *Windsor Mills, Inc. v. Collins & Aikman Corp., supra,* 25 Cal.App.3d at pp. 993-994.) Plaintiff does not dispute that she entered into a contract with Cingular for the provision of wireless service. Plaintiff admitted in her complaint that she is a customer of Cingular, and she admitted in her declaration that she had activated her wireless service. The complaint expressly alleges that plaintiffs "*entered into written contracts* with Defendants wherein Defendants promised to provide wireless telephone service to Plaintiffs . . . in exchange for . . . a monthly fee." (Italics added.) Indeed, the causes of action for breach of contract and breach of the implied covenant of good faith rest upon the existence of a contract.

Cingular presented evidence that the shrink-wrapped box had a notice on top cautioning the customer not to open the box until service had been activated. Inside the box was a written document entitled "Terms and Conditions" stating that Cingular "will provide its services on the following Terms and Conditions." The opening paragraph of the written terms and conditions warns in all capital letters that "this agreement contains mandatory arbitration and other important provisions limiting the remedies available to you in the event of a dispute. Please refer to the section entitled 'Arbitration' for details." Plaintiff presented no evidence to dispute the presence of the arbitration clause. Wing's

declaration that she did not recall finding the written terms and conditions in the box with her phone does not negate either her judicial admission that she had a written agreement with Cingular or Cingular's showing on the contents of that written agreement.

The wireless service agreement was a contract of adhesion—a standardized contract imposed upon the subscriber without any opportunity to negotiate the terms. (See generally, *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694; accord *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.) However, a contract of adhesion is nonetheless a valid and existing contract. (28 Cal.3d at p. 819.) Such contracts "are, of course, a familiar part of the modern legal landscape . . . . They are also an inevitable fact of life for all citizens—businessman and consumer alike." (*Id*. at pp. 817-818, fns. omitted.) A finding of adhesion merely begins another inquiry--whether a particular provision within the contract should be denied enforcement on the ground that it is unconscionable. (*Id*. at pp. 819-827; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., supra,* 89 Cal.App.4th at p. 1052.)

II. Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[4] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ. Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ. Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review

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4 The statutory reference to grounds for revocation of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to rescind the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851*; Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)[5]

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The procedural element focuses on the way in which the disputed provision was presented--i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The substantive element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz, supra,* 24 Cal.4th at p. 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra,* 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., supra,* 89 Cal.App.4th at p. 1056.)

The wireless service agreement here was presented on a take-it-or-leave-it basis, placed inside the shrink-wrapped box along with the telephone. We agree with the trial court's conclusion that the wireless service agreement was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc.*,

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5 It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ. Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.)

supra, 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1533-1534.) We construe the trial court's ruling to include a finding that the July 2003 modification of the arbitration agreement, included as a bill insert, was likewise procedurally unconscionable.[6]

The more difficult question is whether the ban on class-wide relief is substantively unconscionable.[7] That issue was addressed in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, which held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. In that case the plaintiff was a credit cardholder who alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szeleta* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult

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[6] The trial court phrased its ruling as a finding of substantive unconscionability, but the court's reasoning demonstrates that the basis of the ruling was a finding of procedural unconscionability in that the July 2003 modification was presented on a take-it-or-leave-it basis: "[The July 2003 modification] became effective immediately without providing any reasonable time [for] Wing to cancel the agreement if she disagreed with the new terms."

The ban on class-wide arbitration is present in both the original and the modified versions of the arbitration clause; hence, we need not decide which of the two versions governs plaintiff's dispute. We find it puzzling, however, that plaintiff would challenge the July 2003 modification, inasmuch as the modified arbitration clause is more advantageous to her with respect to the rules of arbitration procedure and the payment of arbitration costs.

[7] The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money, such as the $29 sought by Szeleta. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szeleta*, *supra*, 97 Cal.App.4th at p. 1101.)

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra,* 24 Cal.4th at pp. 117-121.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at p. 1073 [allowing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc., supra,* 93 Cal.App.4th at p. 855 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].) However, not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at p. 1536; accord, *Armendariz, supra*, 24 Cal.4th at p. 117.)

Here, it is true that the ban on class-wide arbitration tends to favor Cingular; the obvious effect is to limit the scope of potential damages that Cingular would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. Class actions through <u>litigation</u> are necessarily precluded by the agreement to arbitrate. The limitation is only on the breadth of the arbitration proceeding--i.e., the <u>manner</u> in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela.* The

arbitration clause here expressly permits the customers to obtain relief in small claims court.[8] Moreover, the costs of arbitration are entirely borne by Cingular. Unlike the credit cardholders in *Szetela*, Cingular's customers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

Our analysis does not end there, however. The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable, and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra,* 24 Cal.4th at p. 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90; *Cruz v. PacifiCare Health Systems, Inc* (2003) 30 Cal.4th 303 [UCL and False Advertising Act]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084 [Consumer Legal Remedies Act].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90*; Armendariz, supra,* 24 Cal.4th at pp. 99-104.) In *Armendariz,* the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees--recovery that would otherwise have been available under FEHA. The Supreme Court held the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1539-

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8 Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szeleta, supra*, 97 Cal.App.4th at p. 1096.)

1540 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir. 1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

The *Szeleta* court apparently relied upon this principle in finding that the contractual ban on class arbitration violates public policy. The *Szeleta* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a 'get out of jail free' card while compromising important consumer rights." (*Szeleta, supra,* 97 Cal.App.4th at p. 1101.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL are arbitrable even though such claims vindicate important statutory rights.[9] What is restricted here is the

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[9] The California Supreme Court has held that claims under the UCL for *injunctive relief* to benefit the general public are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at pp. 315-316; see also *Broughton v. Cigna Healthplans, supra,* 21 Cal.4th at pp. 1079-1082 [claims for injunctive relief under the Consumer Legal Remedies Act].) Cingular conceded below and acknowledges on appeal that plaintiff's claims for injunctive relief are not arbitrable under existing precedent. The only question

breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration..

There is no statutory right to class arbitration. Class arbitration has been held permissible when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v. Superior Court* (1982) 31 Cal.43d 584, 609-614, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444; *Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at pp. 318-319.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration.

Arbitration is meant to resolve private disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans, supra,* 21 Cal.4th at p. 1080.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp., supra,* 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims." (*Iberia Credit Bureau v. Cingular Wireless* (5th Cir. 2004) 379 F.3d 159, 174.)

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before us, then, is whether plaintiff's claims for monetary damages and restitution of the local number portability fees are arbitrable.

DISPOSITION

The order denying arbitration is reversed, and the trial court is directed to enter a new order compelling arbitration on an individual basis. The parties shall bear their own costs on appeal.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.