IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
AT&T MOBILITY LLC, and
AT&T MOBILITY CORPORATION,

Petitioners,

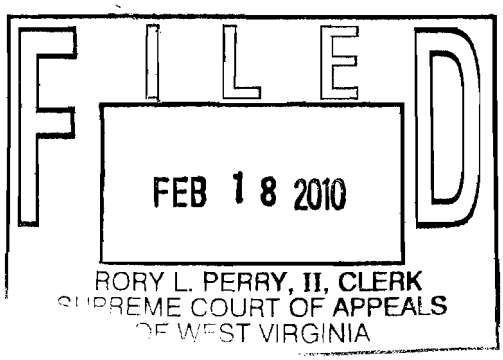
v.

Upon Original Jurisdiction
in Prohibition,
No. _____

THE HONORABLE RONALD E. WILSON,
Judge of the Circuit Court of Brooke County,
and CHARLENE A. SHORTS,

Respondents.

MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION



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Blitz v. AT&T Wireless Servs., Inc.,
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TABLE OF AUTHORITIES
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Brown v. KFC Nat'l Mgmt. Co.,
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Crandall v. AT&T Mobility, LLC,
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TABLE OF AUTHORITIES
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Edwards v. Blockbuster Inc.,
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Hubbert v. Dell Corp.,
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Hutcherson v. Sears Roebuck & Co.,
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Laster v. AT&T Mobility LLC,
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Lloyd v. MBNA Am. Bank, N.A.,
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Lux v. Good Guys,
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TABLE OF AUTHORITIES
(continued)

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Mastrobuono v. Shearson Lehman Hutton, Inc.,
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TABLE OF AUTHORITIES
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Pick v. Discover Fin. Servs., Inc.,
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Stachurski v. DirecTV, Inc.,
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State ex rel. Dunlap v. Berger,
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TABLE OF AUTHORITIES
(continued)

Page(s)

Thibodeau v. Comcast Corp.,
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Tillman v. Commercial Credit Loans, Inc.,
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Troy Mining Corp. v. Itmann Coal Co.,
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Tsadilas v. Providian Nat'l Bank,
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Walther v. Sovereign Bank,
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Weinstein v. AT&T Mobility Corp.,
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Wilson v. Mike Steven Motors, Inc.,
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Statutes

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N.M. Stat. § 44-7A-1 23

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W. Va. Code. § 50-2-1 20

W. Va. Code § 59-1-11(a)(1) 17

Other Authorities

AAA, *Supplementary Procedures for Consumer-Related Disputes* http://www.adr.org/sp.asp?id=22014 5

Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea?*, 7 Class Action Litig. Rep. (BNA) 768 (2006) 32

Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185 (2006) 32

John J.A. Burke, *Contract as a Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 290 (2000) 24

Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120, 120 (May 1994). 32

Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006) 20

Magistrate Courts—Annual Report, *available at* http://...///Magistrate2007.pdf (last visited Feb. 7, 2010) 20

INTRODUCTION

Petitioner AT&T Mobility LLC ("ATTM") is a nationwide provider of cellular phone service.[1] ATTM's wireless service agreements with its customers include an arbitration provision that a federal judge in West Virginia characterized as "unusually customer-centered" (*Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009)) and another federal judge said "contains perhaps the most fair and consumer-friendly provisions [he] has ever seen" (*Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009)). Among other things, the arbitration provision requires ATTM to pay the full cost of arbitrating all claims for less than $75,000, making arbitration free for most consumers. It specifies that arbitration will take place in the county of the customer's billing address, and gives the customer sole discretion to decide whether to have an in-person hearing, a telephonic hearing, or a "desk arbitration"—*i.e.*, one decided on the papers without a hearing. It affords the customer the option of proceeding in small claims court—*i.e.*, the West Virginia Magistrate Court—in lieu of arbitration. It imposes no limits on the remedies that the arbitrator may award. Finally, and most innovatively, it creates affirmative incentives for consumers to pursue claims on an individual basis by specifying that if an arbitrator awards a consumer more than ATTM's last settlement offer, ATTM must pay the consumer either the amount of the award or $10,000, whichever is greater, plus ***double*** attorneys' fees. In sum, ATTM has gone to substantial lengths to design an arbitration agreement that provides customers an effective and efficient method to vindicate their rights on an individual basis.

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[1] Petitioner AT&T Mobility Corporation is a member of AT&T Mobility LLC, which is the real party in interest. AT&T Mobility LLC was previously known as Cingular Wireless LLC. In 2007, the company changed its name to AT&T Mobility LLC. Thus, "AT&T Mobility LLC" and "Cingular" refer to the same entity. We refer to the company as "ATTM" throughout.

Notwithstanding her agreement to arbitrate, respondent Charlene A. Shorts sought to pursue a class action against ATTM in the circuit court. ATTM moved to compel arbitration, but the respondent circuit court judge (Hon. Ronald E. Wilson) denied the motion. Circuit Op. 10-11 (attached as Exhibit A). Although Judge Wilson noted the "consumer oriented" provisions in ATTM's agreement (*id.* at 5), he concluded that this Court's decision in *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), rendered Shorts's arbitration agreement unconscionable under West Virginia law because it—like virtually all consumer arbitration agreements—requires that arbitration proceed on an individual basis, thereby precluding class actions. Circuit Op. 8.

At the same time, Judge Wilson invited ATTM to seek this Court's review and strongly implied that such review is warranted. Judge Wilson noted that if he "had the right to rule upon a clean slate, this decision might be different." Circuit Op. 8. But he held that the "interpretation of *Dunlap* is reserved for our highest Court and not a state court judge." *Id.* at 10.

We submit that the circuit court erred in two fundamental ways. First, the court incorrectly held that *Dunlap* "led irresistibly" to the conclusion that ATTM's arbitration provision is unconscionable merely because it requires that arbitration be conducted on an individual basis. Circuit Op. 8. In fact, however, *Dunlap* creates no such blanket rule. Rather, it declares unconscionable only those arbitration agreements that "would prohibit or substantially limit a person from enforcing and vindicating rights and protections." Syl. Pt. 2, *Dunlap*, 211 W. Va. at 550, 567 S.E.2d at 266. Indeed, a number of federal courts in West Virginia have upheld agreements to arbitrate on an individual basis after *Dunlap*, concluding that the arbitration provisions at issue—including, in one case, the immediately prior version of the provision at issue here—provided consumers with a meaningful opportunity to pursue claims on an

individual basis. And unlike the provision at issue in *Dunlap*, ATTM's arbitration provision is extraordinarily favorable to consumers, ensuring that they can readily vindicate their rights. In construing *Dunlap* as an across-the-board ban on agreements to arbitrate on an individual basis—even when the customer is fully able to vindicate his or her claims under the agreement at issue—the circuit court committed a clear legal error that justifies this Court's review.

That construction of *Dunlap* also runs afoul of the Federal Arbitration Act ("FAA"). As we will explain in greater detail below, an across-the-board ban on agreements that require arbitration on an individual basis is the functional equivalent of a ban on consumer arbitration agreements because no rational business will agree to class-wide arbitration, a procedure that offers none of the benefits of individual arbitration, yet multiplies the risks exponentially. Because one of the core purposes of the FAA is to encourage the use of arbitration, a rule that will cause wholesale abandonment of arbitration is preempted.

For these reasons, a federal district court in West Virginia recently enforced the precise arbitration agreement at issue here, effectively rejecting the circuit court's reasoning in this case. *Wince v. Easterbrooke Cellular Corp.*, 2010 WL 392975 (N.D. W. Va. Feb. 2, 2010). The *Wince* court held that ATTM's arbitration provision is fully enforceable under *Dunlap*, explaining that "in light of [the] * * * incentives" contained in ATTM's arbitration provision, "the class action restriction [in ATTM's provision] cannot be deemed unfair." *Id.* at *4. The court went on to say that a broader reading of *Dunlap* would be preempted by the FAA. *See id.* These holdings in *Wince*, which are directly at odds with the decision below, further justify this Court's review and reversal of the decision below.

FACTUAL STATEMENT

A. Shorts's Agreement To Arbitrate Her Disputes.

In February 2003, Shorts activated an account for wireless service with AT&T Wireless ("AWS"), which merged with Cingular (ATTM's predecessor) in October 2004. Her service agreement with AWS included an arbitration provision requiring the parties to arbitrate disputes on an individual basis. Circuit Op. 2; *see also* Decl. of Neal S. Berinhout Ex. 1 (attached as Exhibit H) (2003 AWS agreement). In 2005, Shorts entered into another wireless service agreement with Cingular (now ATTM). That agreement also required her to arbitrate any disputes with ATTM or its predecessors on an individual basis. Circuit Op. at 5 ("[ATTM] and [Shorts] (such references include * * * predecessors in interest [and] successors * * *) agree to arbitrate all disputes and claims * * * arising out of or relating to this Agreement, or to any prior oral or written agreement, for equipment or services between [ATTM] and [Shorts]"); *see also* Berinhout Decl. Ex. 2 (2005 Cingular agreement).

Since that time, ATTM has twice revised its arbitration clause to make arbitration even more attractive to customers—once in December 2006 and again in early 2009. *See* Berinhout Decl. ¶¶ 10-11 & Ex. 3 (attached as Exhibit H) (2006 ATTM Arbitration Agreement); Letter from Jeffrey Wakefield to Hon. Ronald E. Wilson, June 29, 2009 (hereinafter "Letter to Judge Wilson") (attached as Exhibit C) (2009 ATTM Arbitration Agreement). Each time, ATTM has "made its current arbitration provision available to all current and former customers—including customers who were customers of Cingular Wireless [and] the former [AWS]" and announced that it "will abide by the terms of its current arbitration provision in all instances." Aff. of Neal S. Berinhout Ex. 2 (attached as Exhibit D); Letter to Judge Wilson, June 29, 2009. The 2009 provision contains the following features that are designed to make arbitration fair, inexpensive, and convenient for ATTM's customers:

- **The AAA Rules for consumer disputes apply:** Arbitration will be conducted under the American Arbitration Association's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Cost-free arbitration for claims up to $75,000:** "[ATTM] will pay all [AAA] filing, administration, and arbitrator fees" for all claims up to $75,000 unless the arbitrator determines that 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]
- **Conveniently located hearing:** Arbitration will take place "in the county * * * of [the customer's] billing address";
- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator";[3]
- **Full remedies available:** The arbitrator can award the same remedies (including punitive damages, statutory attorneys' fees, and injunctions) that a court could award;
- **No confidentiality requirement:** The parties need not keep the arbitration confidential; and

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[2] Even if an arbitrator concludes that a customer's claim is frivolous, the AAA's consumer arbitration rules would cap the customer's arbitration costs at $125 for claims of $10,000 or less. *See* AAA, *Supplementary Procedures for Consumer-Related Disputes* § C-8, http://www.adr.org/sp.asp?id=22014 (attached as Ex. 7 to Berinhout Aff.).

[3] 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* AAA, *Supplementary Procedures for Consumer-Related Disputes* §§ C-5, C-6, http://www.adr.org/sp.asp?id=22014 (attached as Ex. 7 to Berinhout Aff.). For claims exceeding $10,000, a hearing would be held unless both parties agreed to forgo it. *Id.*

- **Small claims court option:** Either party may bring a claim in small claims court in lieu of arbitration.

The 2009 provision also provides affirmative incentives for customers to pursue claims through individual arbitration:

- **$10,000 minimum award if arbitral award exceeds ATTM's last settlement offer:** If the arbitrator awards the customer more than ATTM's "last written settlement offer made before an arbitrator was selected," ATTM will pay the customer the greater of $10,000 or the arbitral award;[4]
- **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last written settlement offer, then "[ATTM] will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses * * * that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[5] and
- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an award [from the customer]."

Moreover, ATTM has tailored the dispute-resolution process to the needs of its customers. A formal arbitration proceeding between ATTM and one of its customers is the last

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[4] Under the 2006 version, the minimum recovery was tied to the jurisdictional maximum for the small claims court in the customer's home state, which in West Virginia is $5,000. Circuit Op. 7. In 2009, ATTM revised this aspect of the arbitration provision to make the minimum payment a uniform amount—$10,000—across the country. The upshot is that, for West Virginia customers like Shorts, the minimum payment doubled from $5,000 to $10,000.

[5] This attorney premium "supplements any right to attorneys' fees and expenses [the customer] may have under applicable law." Circuit Op. 7 (quoting provision). 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.

step of the dispute-resolution process—one that is rarely necessary because the overwhelming majority of disputes are resolved through less formal means. Like most large service providers, ATTM has a customer care department whose job it is to handle customer complaints. But unlike most companies, ATTM's arbitration provision makes resolving complaints to customers' satisfaction particularly imperative. Because the provision requires ATTM to pay the full cost of any arbitration for all but the largest consumer claims, and further requires ATTM to pay the customer a $10,000 minimum award plus double attorneys' fees if the arbitral award exceeds ATTM's last settlement offer, it is almost always in ATTM's interest for its customer service representatives to make adjustments to bills or provide credits against future bills in order to resolve customer complaints. Berinhout Aff. ¶ 15. In a one-year period, for example, ATTM representatives provided customers with over $1 billion in manual credits to individual bills to resolve individual complaints. *Id.* ¶ 16.

It is only if a customer cannot resolve his or her dispute informally through ATTM's customer service department that the arbitration provision comes directly into play. The first step of the formal dispute-resolution process is for the customer to notify ATTM of the dispute in writing. Berinhout Aff. ¶¶ 12-14. That is as simple as mailing a letter to ATTM or submitting a one-page Notice of Dispute form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). *Id.* If ATTM and the customer cannot resolve the dispute within 30 days, the customer may begin the formal arbitration process. To do so, the customer need only fill out a one-page Demand for Arbitration form and send copies to the AAA and to ATTM. Customers may either obtain a copy of the demand form from the AAA's web site (at http://www.adr.org) or use the simplified form that ATTM has posted on its web site (at

http://.att.com/forms). To further assist its customers, ATTM has posted on its web site a layperson's guide on how to arbitrate a claim (at http://www.att.com/arbitration-information).

B. Shorts Files A Class Action Against ATTM Notwithstanding Her Agreement To Arbitrate Her Disputes On An Individual Basis, And ATTM Moves To Compel Arbitration.

The underlying dispute in this case developed after Shorts had failed to make payments on her account with AWS, causing AWS to terminate her service in May 2003 and assess early termination fees in accordance with her contract. Circuit Op. 2. AWS eventually sold Shorts's debt to Palisades Collections LLC ("Palisades"), which then sued Shorts in the Magistrate Court of Brooke County, West Virginia, seeking to recover $1,037.39—$794.87 in unpaid charges, plus $242.52 in prejudgment interest. *See* Civil Complaint (attached as Exhibit E). Shorts filed an answer denying liability and asserted a counterclaim against Palisades under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code §§ 46A-1-101 *et seq.* Circuit Op. 2. Palisades then removed the action to the Circuit Court of Brooke County, West Virginia.

Thereafter, Shorts amended her counterclaim to add class-action claims against ATTM. *See* Def.'s First Am. Counterclaim (attached as Exhibit F). She seeks to represent a class of all ATTM customers in West Virginia from June 23, 2002 to the present. *Id.* ¶ 11. Her amended counterclaim includes three claims under the WVCCPA and seeks actual damages, statutory damages, statutory attorneys' fees, and cancellation of her debt. *Id.* at 4-6; *see also* Circuit Op. 2. ATTM removed the action to federal court pursuant to the Class Action Fairness Act, ("CAFA"), 28 U.S.C. § 1332(d)(2)(A), but the district court remanded (*Palisades Collections LLC v. Shorts*, 2008 WL 249083 (N.D. W. Va. Jan. 29, 2008)), the Fourth Circuit affirmed (552 F.3d 327 (4th Cir. 2008)), and the U.S. Supreme Court denied certiorari (*AT&T Mobility LLC v. Shorts*, 129 S. Ct. 2826 (2009)).

ATTM then moved the circuit court to compel Shorts to pursue her claims in accordance with her arbitration agreements. Circuit Op. 3. ATTM contended that Shorts's obligation to arbitrate arose from her 2005 service agreement with ATTM.[6] ATTM pointed out in its motion that it had revised its arbitration clause in 2006, and that this revised provision was available to Shorts, as well as all other current and former customers. *See* page 4, *supra*. When ATTM revised the provision again in 2009 to make it even more consumer-friendly, it notified Shorts and the court that this most recent version of the provision also was available to both Shorts and all other present and former customers. Letter to Judge Wilson at 2.

C. The Ruling Below.

On December 1, 2009, the circuit court denied ATTM's motion, relying exclusively on this Court's opinion in *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002). As an initial matter, Judge Wilson concluded that "[i]t is the 2005 arbitration agreement, with its consumer oriented revisions in December 2006 and March 2009, that the court finds to be the agreement that is the focus of the legal issue before the court." Circuit Op. 5. But despite the "consumer-oriented" nature of ATTM's arbitration provision, the circuit court concluded that the provision is unenforceable. Although the court determined that "[t]he facts in *Dunlap*, as they applied to the plaintiff in *Dunlap*, were a lot more inexcusable than the claims of wrongdoing suffered by Shorts in this case" (*id.* at 9), it held that *Dunlap* "led irresistibly to the conclusion" that ATTM's agreement is "not enforceable under West Virginia law" (*id.* at 8). The court relied on two factors: first, that the agreement requires arbitration on an individual rather than class-wide basis; and second, that the agreement "prohibit[s Shorts] from seeking punitive damages

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[6] Shorts had previously agreed to arbitrate her disputes with AWS when she entered into a service agreement with AWS in 2003. *See* page 4, *supra*. Her 2005 arbitration agreement with Cingular superseded the previous arbitration agreement and expressly covered disputes with Cingular's predecessors (such as AWS). *See* Berinhout Aff. Ex. 1 (attached as Exhibit D).

from a jury." *Id.* at 3; *see also id.* at 9 (stating that Shorts's arbitration agreements "prohibit punitive damages (at a trial to a jury)".[7] Based on these factors, the circuit court concluded that ATTM's arbitration provision is unenforceable under West Virginia law.

Even so, the court noted that if it were "rul[ing] upon a clean slate, this decision might be different." Circuit Op. 8. And it further acknowledged that ***this Court*** is free to conclude that the "circumstances presented in this case" make ATTM's arbitration agreement enforceable, and thus "do not remove the arbitration agreement from the protections provided to [ATTM] in the Federal Arbitration Act." *Id.* at 10. The circuit court further explained that ATTM's arbitration provision is one "that is used nationwide for a product used by consumers throughout the country, where there is an obvious need for uniform treatment of those agreements throughout the country." *Id.* Accordingly, the court pointed out that its "decision concerning the law is not subject to any deferential review" and thus that "when the Supreme Court considers * * * what law should be applied to the facts in this case, the trial court's opinion will be of no importance." *Id.* In addition, the circuit court took the extraordinary step of issuing a stay *sua sponte* to permit this Court an opportunity to exercise writ review. *Id.* at 11.

ISSUES RAISED BY THE PETITION

This petition presents two questions of law:

1. Whether an arbitration provision like ATTM's, which neither imposes undue costs on the consumer nor limits the consumer's remedies, is unenforceable under West Virginia law merely because it requires that arbitration be conducted on an individual basis.

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[7] As we discuss below (at page 16 n.10), insofar as the circuit court believed that the arbitration provision precludes arbitrators from awarding punitive damages, it was mistaken as a matter of fact; and insofar as the court believed that there is something problematic about allocating the responsibility for imposing punitive damages to an arbitrator rather than a jury, it was mistaken as a matter of law.

2. Whether the FAA precludes interpreting West Virginia law to deem arbitration provisions unenforceable merely because they require that arbitration be conducted on an individual basis.

STANDARD OF REVIEW

This Court reviews the legal determinations of the lower court *de novo*. *Dunlap*, 211 W. Va. at 555-56, 567 S.E.2d at 271-72; *see also* Circuit Op. 10 (noting that decision is subject to "a de novo review").

ARGUMENT

The FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[8] The circuit court concluded that unconscionability is such a ground and that any agreement that requires consumers to arbitrate claims on an individual basis is unconscionable under West Virginia law. That ruling both misconstrues this Court's decision in *Dunlap* and runs headlong into the FAA. Reversal is required.

I. ATTM'S ARBITRATION PROVISION IS FULLY ENFORCEABLE UNDER WEST VIRGINIA LAW.

Under West Virginia law, a contractual provision is unconscionable when "gross inadequacy in bargaining power combines with terms unreasonably favorable to the stronger party." *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005) (internal quotation marks omitted). Therefore, "[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful

[8] As the circuit court found (Circuit Op. 4) and Shorts has never denied, Shorts's agreement to arbitrate is controlled by the FAA because (1) the agreement is "written" (*see id.* at 5-7), and (2) the contract "evidenc[es] a transaction involving commerce" (*see United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004) ("It is well-established that telephones, even when used intrastate, are instrumentalities of interstate commerce.")).

alternatives available to the plaintiff, and the existence of unfair terms in the contract." *Id.* (internal quotation marks omitted); *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) (" Unconscionability in West Virginia * * * requires ***both*** 'gross inadequacy in bargaining power' ***and*** 'terms unreasonably favorable to the stronger party.'") (quoting *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 604, 346 S.E.2d 749, 753 (1986)) (emphasis added). Shorts cannot establish unconscionability under this high standard for two reasons. First, ATTM's "unusually customer-centered" arbitration provision cannot be described as "unreasonably favorable" to ATTM or somehow unfair to Shorts. Second, because Shorts had "meaningful alternatives" to obtaining wireless service from ATTM's predecessors, there was no "gross inadequacy in bargaining power."

A. ATTM's Customer-Friendly Arbitration Provision Is Neither Unfair To Shorts Nor Unreasonably Favorable To ATTM.

To begin with, ATTM's arbitration agreement is not "unfair" to Shorts or "unreasonably favorable" to ATTM.[9] Contrary to the circuit court's core premise, *Dunlap* does not hold that all

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[9] The circuit court correctly concluded that ATTM's 2009 arbitration provision is the applicable one for purposes of assessing Shorts's unconscionability argument. Circuit Op. 5. As the circuit court expressly found, when ATTM revised its arbitration provisions in 2006 and 2009, it stated on its web site (as well as in its filings with the circuit court) that it had adopted an across-the-board policy of making the revised provision—with its "consumer oriented revisions"—available to all current and former customers. *See id.* That finding is supported by an undisputed affidavit (*see* Berinhout Aff. Ex. 2 at 1) and therefore plainly is not "clearly erroneous." Syl. Pt. 3, *State ex rel. Zirkle v. Fox*, 203 W. Va. 668, 669, 510 S.E.2d 502, 503 (1998) ("'[T]he underlying factual findings are reviewed under a clearly erroneous standard.'") (quoting Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 241, 470 S.E.2d 193, 195 (1996)). *See also Wince*, 2010 WL 392975, at *4 n.4 ("ATTM has extended the benefits of the $10,000.00 premium to all current and former customers.").

Because ATTM made the revised provision available to ***all*** present and former customers, this Court's holding in *Dunlap* that the defendant there could not avoid a finding of unconscionability by offering to waive the problematic terms of its arbitration clause is inapplicable. *See Dunlap*, 211 W. Va. at 568, 567 S.E.2d at 284. A post hoc request for a one-time rewrite of an arbitration clause is a far cry from the across-the-board revisions involved here. Although the Illinois Supreme Court has held otherwise (*see Kinkel v. Cingular Wireless*

agreements that require arbitration to proceed on an individual basis are "unfair," and as the circuit court itself recognized, ATTM's arbitration provision is materially different from the one at issue in *Dunlap*. Indeed, *Dunlap*'s reasoning explains precisely why ***Shorts's*** arbitration agreement is enforceable under West Virginia law.

1. *Dunlap* does not categorically condemn all arbitration agreements that require arbitration to proceed on an individual basis. Rather, this Court held that arbitration agreements are unconscionable under West Virginia law only if they "would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public." Syl. Pt. 2, *Dunlap*, 211 W. Va. at 550, 567 S.E.2d at 266. Stated another way, *Dunlap* supports the invalidation of arbitration clauses only when they are so unfair to an individual consumer that the consumer cannot realistically vindicate his or her own claims in individual arbitration.

The arbitration agreement in *Dunlap* contained the following provisions:

- **Cost sharing:** The agreement specified that the customer was required to pay half of "[a]ll arbitrators' or mediators' fees" (211 W. Va. at 554-55, 567 S.E.2d at 270-71);

LLC, 857 N.E.2d 250, 257-60 (Ill. 2006)), that holding runs counter to the Supreme Court's declaration that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In this context, that mandate means that a plaintiff who is given access to a revised arbitration provision that makes it fully realistic to vindicate her claims on an individual basis may not avoid arbitration by contending that her original arbitration provision made it less realistic to pursue her claims in individual arbitration.

- **Prohibition of punitive damages:** The agreement expressly stated that "[n]o arbitrator may make an award of punitive damages" (*id.* at 555, 567 S.E.2d at 271); and
- **Non-mutuality:** The agreement preserved the defendant's "right to use the courts for its most important remedies, at the same time that it denie[d] that forum to [plaintiff] with respect to his most important remedies" (*id.* at 564 n.12, 567 S.E.2d at 280 n.12).

This Court found that these terms, in conjunction with the requirement that arbitration be conducted on an individual basis, "limited Mr. Dunlap's rights and remedies and were unconscionable." *Id.* at 567, 567 S.E.2d at 283.

Critically, this Court was clear that it was not announcing a blanket rule prohibiting agreements that require arbitration to be conducted on an individual basis. *Dunlap*, 211 W. Va. at 560 n.5, 567 S.E.2d at 276 n.5 ("[A] rule that admits of no exceptions is not appropriate."). Rather, it was the combination of factors in *Dunlap* that made the agreement unconscionable. *See id.* at 564, 567 S.E.2d at 280 ("***In the instant case***, we conclude that the prohibitions on punitive damages ***and*** class action relief * * * are clearly unconscionable.") (emphases added).

What Dunlap means, then, is that a court should determine whether, taken as a whole, an agreement to arbitrate disputes on an individual basis affords customers a fair and realistic opportunity to vindicate their claims. In this respect, Dunlap is a straightforward application of this Court's generally applicable unconscionability doctrine, which long has provided that "[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into * * * the fairness of the contract as a whole." Syl. Point 3, Troy Mining Corp., 176 W. Va. at 601, 346 S.E.2d at 750. Indeed, just last year, this Court confirmed that the enforceability of arbitration

provisions must be resolved on a case-by-case basis. *See State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693, 701 n.3 (2009) (per curiam) ("While we find this particular agreement to be enforceable, we limit the application of our holding to the facts of this case."); *see also State ex rel. Wells v. Matish*, 215 W. Va. 686, 692, 600 S.E.2d 583, 589 (2004) (per curiam) (distinguishing Dunlap "[i]n light of these facts").

The federal courts in West Virginia have consistently understood *Dunlap* in the same way. Those courts have reasoned that agreements to arbitrate on an individual basis are enforceable so long as they contain no other features that preclude a consumer or employee from "'effectively and cost-efficiently vindicat[ing] his rights through arbitration.'" *Miller v. Equifirst Corp.*, 2006 WL 2571634, at *16 (S.D. W. Va. Sept. 5, 2006) (quoting *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 690 (N.D. W. Va. 2005)); *see also e.g.*, *Wince*, 2010 WL 392975, at *1 (enforcing the 2009 version of ATTM's arbitration agreement); *Strawn*, 593 F. Supp. 2d at 900 (enforcing the 2006 version of ATTM's arbitration agreement); *Schultz*, 376 F. Supp. 2d at 689-91 (upholding AT&T Wireless's arbitration agreement); *accord Adkins*, 303 F.3d at 502-03 (rejecting argument that arbitration clause was substantively unconscionable under West Virginia law, and explaining that "[plaintiff's] inability to bring a class action * * * cannot by itself suffice to defeat the strong congressional preference for an arbitral forum").

In sum, if an arbitration agreement does not "prohibit or substantially limit" the ability of an individual to vindicate his or her rights, the agreement is enforceable under West Virginia law. Syl. Pt. 2, *Dunlap*, 211 W. Va. at 550, 567 S.E.2d at 266; *see also Wince*, 2010 WL 392975, at *4 (question under *Dunlap* is "whether a particular arbitration provision represented the type of 'exculpatory provision * * * that if applied would prohibit or substantially limit a person from enforcing and vindicating [his] rights'"); *Schultz*, 376 F. Supp. 2d at 690 (the

appropriate inquiry under West Virginia law is whether the arbitration agreement operates to "preclude[] the plaintiff from effectively asserting his claims or * * * extinguish[] a right provided by statute"); *Miller*, 2006 WL 2571634, at *17 (holding an agreement to arbitrate on an individual basis enforceable because "the waiver of the right to pursue a class action claim does not have an exculpatory effect insofar as plaintiffs can effectively vindicate their rights without the use of the class action vehicle"). The circuit court's contrary conclusion was erroneous.

2. Under the correct interpretation of *Dunlap*, ATTM's arbitration agreement is plainly enforceable because it provides consumers with a full opportunity—and substantial incentives—to pursue their disputes against ATTM. This agreement is a world apart from the agreement rejected by the *Dunlap* Court: Under the ATTM provision, Shorts may arbitrate her claim for free; she may obtain any remedy that a court could award—including punitive damages, statutory damages, cancellation of her debt, and attorneys' fees; and the arbitration agreement mutually obligates both ATTM and the customer to pursue their disputes in arbitration.[10]

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[10] As noted above (at 10), the circuit court held that ATTM's arbitration provisions "prohibit punitive damages (at a trial to a jury)." Circuit Op. 9. The court was simply mistaken: Nothing in the relevant arbitration provisions precludes an arbitrator from awarding punitive damages to the full extent permitted by law. *See* page 5, *supra*. To the contrary, ATTM's arbitration provision expressly states that "[a]rbitrators can award the same damages and relief that a court can award." *See* 2009 ATTM Arbitration Agreement at 1 (attached as exhibit to Letter to Judge Wilson). Insofar as the circuit court was concerned that the arbitration agreement precluded "a jury" from awarding punitive damages, "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (internal quotation marks omitted); *see also R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 164 (4th Cir. 2004) ("A party may, of course, waive the jury trial right by signing an agreement to arbitrate * * *."). Accordingly, the FAA preempts any holding that arbitration agreements are unenforceable because they preclude ***jury***-awarded punitive damages. In any event, Shorts's counterclaim against ATTM does not seek punitive damages. *See* Def.'s First Am. Counterclaim at 6. Thus, even if the arbitration provision did preclude punitive damages, that would be no basis for refusing to require arbitration ***in this case***.

Moreover, the ATTM agreement has several features that make arbitration ***better*** for consumers than court would be.

a. ***Cost-free arbitration.*** ATTM has agreed to pay all costs associated with arbitration for virtually all consumer claims. *See* Circuit Op. 6; *see also* page 5, *supra*; *Wince*, 2010 WL 392975, at *4 ("[W]ith limited exceptions, ATTM has committed to pay all costs of arbitration whether a customer wins or loses."). Thus, it is cheaper for customers to pursue arbitration than to file a lawsuit in the circuit court. *See* W. Va. Code § 59-1-11(a)(1) (filing fee of $145). Indeed, ATTM's arbitration provision is more favorable to customers on this score than other provisions that have been upheld by federal courts in West Virginia. *See Miller*, 2006 WL 2571634, at *5 (upholding arbitration provision even though defendant was obligated to "***advance*** the first $150" of arbitration fees and "[t]he arbitrator [would] decide which party will ultimately be responsible for paying [the] fees") (emphasis added); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 616 (S.D. W. Va. 2004) ("Although the initial filing fee for an arbitration claim is higher than the initial filing fee in West Virginia state court, * * * the costs associated with arbitration are not unreasonably burdensome as they do not effectively prevent a plaintiff from enforcing or vindicating his or her rights."). By making arbitration free, ATTM has gone beyond merely placing no impediments in the customer's path; it has created an affirmative incentive to pursue arbitration on an individual basis.

b. ***No limitations on remedies.*** As noted above, ATTM's arbitration provision authorizes arbitrators to award the same remedies to a customer that are available in court—including statutory damages and attorneys' fees, punitive damages, and the like. *See* page 5, *supra*; *see also Wince*, 2010 WL 392975, at *1 ("[I]f a customer prevails in arbitration, he or she may obtain the same remedies—including compensatory, punitive, and statutory damages;

injunctive and declaratory relief; and attorneys' fees—that are available in court."). Accordingly, Shorts has particularly strong incentives to pursue arbitration because the relief she seeks—including statutory damages and attorneys' fees—is significant in value. First, Shorts seeks the maximum statutory damages available for an alleged violation of a provision of the WVCCPA. *See* Def.'s First Am. Counterclaim ¶ 24 (citing W. Va. Code. § 46A-5-101). Under that provision, Shorts would be entitled to a statutory award of between $428 and $4,275.[11] Second, Shorts also seeks cancellation of her debt—which, she has alleged, is worth $1,037.39. *See* page 8, *supra*. Thus, the total amount at stake for Shorts is between $1,465.39 and $5,312.39.

Moreover, ATTM's provision guarantees that Shorts can recover attorneys' fees to the same extent as in court. *See* page 5, *supra*. Here, Shorts has asserted claims under the WVCCPA, which provides for attorneys' fees (*see* W. Va. Code § 46A-5-104). The promise of statutory attorneys' fees provides attorneys with significant incentives to represent a customer in individual arbitration with ATTM. For precisely that reason, the Fourth Circuit has rejected the argument that "without the class action vehicle, [a consumer] will be unable to maintain her legal representation given the small amount of her individual damages," explaining that such concerns are wholly "***unfounded*** in light of" the broad availability of statutory attorneys' fees in arbitration. *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (emphasis added) (holding that an agreement to arbitrate on an individual basis was not

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[11] The statute authorizes the court to award damages of between $100 and $1000 adjusted for inflation from September 1, 1974 to the present. W. Va. Code. § 46A-5-106; *see also Strawn*, 593 F. Supp. 2d at 899 (discussing inflation adjustment available under WVCCPA). Thus, the statute currently permits an award in the range of approximately $428 to $4,275. *See* U.S. Dep't of Lab., Bur. of Lab. Stats., Consumer Price Index 1913 to Present, *at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (November 2009 CPI/September 1974 CPI ($100 and $1000, respectively)).

unconscionable under Maryland law because the arbitrator was permitted to award fees available under applicable statutes); *accord Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878-79 (11th Cir. 2005) ("[W]hen the opportunity to recover attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration."); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374-75 (3d Cir. 2000).

In contrast with *Dunlap*, in which the arbitration clause barred punitive damages and the claim for compensatory damages was quite small, the unfettered potential for statutory attorneys' fees, combined with the substantial amount of actual and statutory damages at issue, gives Shorts more than adequate incentive to arbitrate her disputes on an individual basis.

c. ***Substantial affirmative monetary incentives for customers and their counsel.*** If ATTM's arbitration provision had done nothing more than ensure that the cost of arbitrating is low and that remedies are not limited, it would be enforceable under Dunlap. But ATTM in fact has gone even further, including in its arbitration provision affirmative—and indeed, unprecedented—incentives for its customers to pursue arbitration on an individual basis. Specifically, the agreement provides a minimum recovery of $10,000 if an arbitrator awards a customer more than ATTM's last settlement offer. Circuit Op. 7; *see also Wince*, 2010 WL 392975, at *4. As Judge Copenhaver put it in *Strawn*, this provision "is best described as the outer limit of a potential windfall that further protects the customer from malfeasance by the superiorly positioned party." 593 F. Supp. 2d at 900 n.6. And as Judge Bailey explained in *Wince*, in view of the minimum payment under ATTM's provision, "each putative class member has incentive to bring his or her claim, regardless of whether classified as 'high' or 'small' dollar." *Wince*, 2010 WL 392975, at *4. For that reason, he concluded, "the ATTM arbitration clause, as a whole, comports with the heart of the *Dunlap* decision." *Id.*

The $10,000 minimum payment available under the 2009 provision materially exceeds the maximum statutory damage awards of $200 and $4,275 that West Virginia has determined to be sufficient incentives for plaintiffs to pursue claims under the West Virginia Consumer Credit and Protection Act. *See* W. Va. Code §§ 46A-5-101 & 46A-6-106(a). The minimum payment also greatly exceeds the typical incentive payments awarded to class representatives as part of court-approved class settlement agreements.[12] Moreover, the $10,000 minimum recovery is twice the jurisdictional limit of the West Virginia Magistrate Court. *See* W. Va. Code. § 50-2-1. West Virginia residents routinely avail themselves of the Magistrate Court notwithstanding the $5,000 recovery limit; in 2007, plaintiffs brought 49,365 civil complaints before the state's 158 magistrate judges. *See* Magistrate Courts—2007 Annual Report, *available at* http://...// /Magistrate2007.pdf (last visited Feb. 7, 2010).[13]

In addition, ATTM's arbitration agreement provides an incentive—beyond statutory attorneys' fees—for attorneys to represent customers like Shorts in individual arbitration. If the arbitrator awards the customer more than ATTM's last settlement offer, ATTM is obligated to pay the customer's attorneys ***twice*** the amount of the fees they incurred prosecuting the customer's claims—regardless of whether attorneys' fees would have been available under applicable law. *See* page 6, *supra*. This potential for double attorneys' fees supplies further assurance that customers can vindicate any claims they may have through individual arbitration.

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[12] *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 & tbl.5 (2006) (median incentive award for class representatives in consumer and consumer credit cases are $2,089 and $1,045, respectively).

[13] If—despite all of these consumer-friendly provisions that ATTM has built into its arbitration agreement—Shorts still does not wish to arbitrate her claim, the arbitration provision specifies that she may pursue an action against ATTM in the West Virginia Magistrate Court. Courts have recognized that this is a hallmark of a fair arbitration provision. *See Jenkins*, 400 F.3d at 878-79.

In short, ATTM's arbitration provision provides substantial financial incentives for customers and their counsel to pursue their claims through individual arbitration. An agreement that affirmatively creates such incentives cannot be deemed "unfair" and hence substantively unconscionable.

Indeed, because most claims a customer may have are inherently individualized and hence unsuitable for class-wide treatment, this "unusually customer-centered" arbitration provision is affirmatively beneficial to customers. As the Supreme Court has recognized, in enacting the FAA, "Congress * * * had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). Because it "allow[s] parties to avoid the costs of litigation," arbitration benefits individuals with "smaller" claims. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce*, 513 U.S. at 281. Under ATTM's exceptionally consumer-friendly arbitration clause, not only are there no costs for arbitrating small claims, but ATTM has a massive incentive to make whole (and then some) any consumer with a non-frivolous claim. *See* page 4-6, *supra*.

3. The circuit court's refusal to enforce ATTM's arbitration agreement also is at odds with the decisions of many other courts outside of West Virginia that have upheld either ATTM's arbitration agreement or less pro-consumer clauses used by ATTM's predecessors.[14]

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[14] *See, e.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (enforcing a prior version of Cingular's arbitration provision and noting that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims") (internal citation

More generally, courts applying the laws of at least 25 States, plus the District of Columbia, have held that agreements that require arbitration to be conducted on an individual basis are fully enforceable—at least so long as they do not impose undue costs on the consumer or limit the remedies that the consumer can obtain.[15] The rule is otherwise in at most only a few States,[16] with the issue being open in several others.[17]

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and quotation marks omitted); *Moffat v. Comms. Inc.*, 2010 WL 451033 (E.D. Mich. Feb. 5, 2010) (enforcing ATTM's 2006 provision); *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009) (same); *Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008) (same), *appeal pending* No. 08-16080-CC (11th Cir. argued Nov. 17, 2009); *Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752 (S.D. Ill. July 18, 2008) (enforcing AWS arbitration clause); *Weinstein v. AT&T Mobility Corp.*, 2008 WL 1914754 (E.D. Pa. Apr. 30, 2008) (same); *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007) (enforcing ATTM's 2006 provision); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005) (enforcing AWS arbitration provision); *Blitz v. AT&T Wireless Servs., Inc.*, 2005 WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005) (upholding Cingular's arbitration provision under Missouri law and distinguishing *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005), on the ground that "Alltel's [arbitration] provision contained several features, apart from its class-action prohibition, that made it difficult for individuals to obtain relief for small claims," while "Cingular's provision presents no such barriers").

[15] *See, e.g.*, *Cicle v. Chase Bank USA*, 583 F.3d 549, 555-56 (8th Cir. 2009) (Missouri law); *Gay v. CreditInform*, 511 F.3d 369, 393-95 (3d Cir. 2007) (Virginia law); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law); *Jenkins*, 400 F.3d at 877-78 (Georgia law); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003) (holding that a class waiver does not conflict with the Truth In Lending Act ("TILA")); *Adkins*, 303 F.3d at 502 (West Virginia law); *Snowden*, 290 F.3d at 638 (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App'x 82, 84 (3d Cir. 2002) (Delaware law); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (holding that a class waiver does not conflict with the TILA); *Johnson*, 225 F.3d at 374 (same); *Pomposi v. GameStop, Inc.*, 2010 WL 147196 (D. Conn. Jan. 11, 2010) (requirement that arbitration be conducted on an individual basis is neither inconsistent with the FLSA nor unconscionable under Connecticut law); *Anglin v. Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523, 528-30 (S.D. Miss. 2009) (Mississippi law); *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 772 (N.D. Ohio 2009) (Ohio law); *Easter v. Compucredit Corp.*, 2009 WL 499384, at *5-*6 (W.D. Ark. Feb. 27, 2009) (Arkansas law); *Credit Acceptance Corp. v. Davisson*, 644 F. Supp. 2d 948, 958-59 (N.D. Ohio 2009) (Ohio law); *Coffey v. Kellogg Brown & Root*, 2009 WL 2515649, at *10-*13 (N.D. Ga. Aug. 13, 2009) (Georgia law); *Morgan v. Advance Am.*, 2008 WL 4191754, at *16 (D.S.C. Sept. 5, 2008) (South Carolina law); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1285-90 (N.D. Ga. 2008) (Georgia law); *Stephens v. Wachovia Corp.*, 2008 WL 686214, at *6-*7 (W.D.N.C. Mar. 7, 2008) (Alabama law); *Harris v. DirecTV Group, Inc.*, 2008 WL 342973, at *5 (N.D. Ill. Feb. 5, 2008) (Illinois law); *Eaves-Leonos v. Assurant, Inc.*, 2008 WL 80173, at *8-*9 (W.D. Ky. Jan. 8, 2008) (South Dakota law);

Davis v. Dell, Inc., 2007 WL 4623030, at *4 (D.N.J. Dec. 28, 2007) (Texas and New Jersey law); *Szymkowicz v. DirecTV, Inc.*, 2007 WL 1424652, at *2 (D.D.C. May 9, 2007) (District of Columbia law); *Ornelas v. Sonic-Denver T, Inc.*, 2007 WL 274738, at *5-*7 (D. Col. Jan. 29, 2007) (Colorado law); *Steed v. Sanderson Farms, Inc.*, 2006 WL 2844546, at *10 (S.D. Miss. Sept. 29, 2006) (Mississippi law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-06 (C.D. Cal. 2006) (Texas law); *Copeland v. Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421, at *1 (C.D. Cal. July 11, 2005) (Nevada law); *Battels v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005) (Alabama law); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004) (Alabama law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) (Delaware law); *Freedman v. Comcast Corp.*, 2010 WL 311002 (Md. Ct. Spec. App. Jan. 28, 2010) (Maryland law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 120 (Ill. App. Ct. 2005) (Texas law); *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1193 (Ill. App. Ct. 2005) (New York law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. May 27, 2005) (per curiam) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Doyle v. Fin. Am., LLC*, 918 A.2d 1266, 1271 n.6 (Md. Ct. Sp. App. 2007) ("Although a minority of jurisdictions take the position that 'no-class-action' provisions are unenforceable, Maryland stands firm in the majority."); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 715 (Tenn. Ct. App. 2006) (stating that "the overwhelming majority view" is that class waivers are enforceable and that the contrary view is a "fringe position"); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law).

[16] *See* N.M. Stat. §§ 44-7A-1, -5 (prohibiting agreements to arbitrate on an individual basis in non-negotiable form consumer contracts); *see also Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) (California law), *petition for cert. filed sub nom. AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. Jan. 25, 2010); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009) (Oregon law); *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009) (Washington law), *appeal pending*, No. 09-35563 (9th Cir.); *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009) (Massachusetts law); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (Pennsylvania law). The Third Circuit has held that Pennsylvania's rule against agreements to arbitrate on an individual basis is preempted by the FAA. *See Gay*, 511 F.3d at 393-95. None of the courts in these states—except those applying California or Washington law—has considered arbitration provisions that contain the types of affirmative incentives to

This Court should align itself with the overwhelming majority of the jurisdictions that have addressed the issue and hold that, because ATTM's arbitration provision makes it realistic to vindicate claims on an individual basis, it is not unconscionable.

B. Shorts Had Meaningful Alternatives To ATTM Service.

Even if Shorts could show that ATTM's arbitration provision unreasonably favors ATTM and is thus unfair to her—which she cannot—the circuit court still erred in declaring her arbitration agreement unconscionable because Shorts failed to establish the existence of a "gross inadequacy in bargaining power." *See Troy Mining Corp.*, 176 W. Va. at 604, 346 S.E.2d at 753. The only fact that could support such a finding is that the ATTM agreements are form contracts. But this Court already has recognized that "the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts." *Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273 (quotation omitted); *see also* John J.A. Burke, *Contract as a Commodity: A Nonfiction*

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pursue arbitration that are included in ATTM's arbitration agreement.

[17] The issue is open under Idaho, Indiana, Iowa, Minnesota, Montana, Nebraska, New Hampshire, Rhode Island, and Wyoming law, and is pending before the Florida and Kentucky Supreme Courts. *See Shnuerle v. Insight Commc'ns Co.*, 2008 WL 4367840 (Ky. Ct. App. Sept. 26, 2008) (unpublished) (upholding class waiver under Kentucky law), *discretionary review granted*, No. 2008-SC-000789 (Ky. June 17, 2009) (pending); *Pendergast v. Sprint Nextel Corp.*, 2010 WL 6745 (11th Cir. Jan. 4, 2010) (certifying issue to Florida Supreme Court). In addition, courts applying Arizona law have split on the issue. *Compare In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 259 & n.11 (enforcing arbitration clause under Arizona law); *Vigil*, 205 F. Supp. 2d at 572-73 (same); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (same) *with Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007) (invalidating clause). Moreover, although a Wisconsin court has invalidated an agreement to arbitrate on an individual basis that completely barred recovery under Wisconsin's consumer-protection act (*Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 745-46 (Wis. Ct. App. 2007)), Wisconsin courts have not considered the enforceability of an agreement that preserves individual remedies in arbitration. Finally, courts in New Jersey and North Carolina have announced that they will review such agreements on a case-by-case basis, and have suggested that it is the combination of high arbitration costs, limited remedies, and the lack of class relief that may make such an agreement unconscionable. *See Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 91-93 (N.J. 2006); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 371-74 (N.C. 2008); *see also Homa*, 558 F.3d at 233-34 (Weis, J., concurring) (describing factors relevant to New Jersey's standard).

Approach, 24 Seton Hall Legis. J. 285, 290 (2000) (explaining that 99% of all contracts in this country are form agreements). For this reason, West Virginia does not deem all form contracts unconscionable. *See Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273; *Clites*, 224 W. Va. 299, 685 S.E.2d at 700 ("[T]he fact that the Agreement is a contract of adhesion does not necessarily mean that it is also invalid."); *accord Adkins*, 303 F.3d at 501 ("A ruling of unconscionability based on [a gross disparity in bargaining power and a take-it-or-leave-it contract] alone could potentially apply to every contract of employment in our contemporary economy.").

Instead, to demonstrate the existence of the necessary "gross inadequacy in bargaining power," Shorts was required to show that she lacked "meaningful alternatives" to cellular service with ATTM. *Saylor*, 216 W. Va. at 774, 613 S.E.2d at 922 (quoting Syl. Pt. 4, *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co.*, 186 W. Va. 613, 617-18, 413 S.E.2d 670, 674-75 (1991)). Shorts did not (and could not) carry that burden. ATTM affirmatively established in the circuit court that, at the time Shorts became a Cingular customer in 2005, she could have obtained wireless service from three other carriers that did not require arbitration as a condition of receiving service. Aff. of Ihuoma N. Onyeali ¶¶ 2-7 & Exs. 1-6 (attached as Exhibit G). As several courts have recognized, that fact is fatal to a claim of procedural unconscionability. *See, e.g.*, *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 705 (S.D. Ill. 2005) ("[E]ven though Chandler could not negotiate the terms of the contract, she was free to make other choices, such as choosing a cellular service other than AWS."); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1027 (Fla. Dist. Ct. App. 2005) ("If Fonte was unsatisfied with the terms, she did not have to sign the contract. * * * Fonte was free to choose any wireless service provider without limitation."). Yet the circuit court failed to consider—or even mention—this

essential element of West Virginia's law of unconscionability. That error alone justifies this Court's review and reversal of the order below.

II. AN ACROSS-THE-BOARD RULE PROHIBITING AGREEMENTS THAT REQUIRE ARBITRATION ON AN INDIVIDUAL BASIS WOULD BE PREEMPTED BY THE FEDERAL ARBITRATION ACT.

For the reasons we have discussed, the circuit court's interpretation of *Dunlap* was mistaken, and the arbitration agreement between Shorts and ATTM is fully enforceable under a correct reading of *Dunlap*. But in addition to being erroneous as a matter of state law, the circuit court's overbroad interpretation of *Dunlap* runs afoul of the FAA. For that independent reason, this Court should reject the circuit court's interpretation and endorse the federal courts' reading of *Dunlap*—namely, that agreements to arbitrate on an individual basis are enforceable when, as here, they contain features that make it fully realistic to vindicate a customer's claims.

On a number of occasions, federal courts in West Virginia have noted that a broad interpretation of *Dunlap*—like that adopted by the circuit court—would run afoul of the FAA.[18] As Judge Stamp has recognized, if *Dunlap* were interpreted to bar all agreements that require that arbitration be conducted on an individual basis, then *Dunlap* would be "preempted by the FAA." *Schultz*, 376 F. Supp. 2d at 689. The Fourth Circuit has similarly explained that "[t]o the extent that *Dunlap* intends to fashion a broad prohibition against the arbitrability of state-law claims, such a ruling, whether dicta or otherwise, cannot contravene the FAA." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 90 (4th Cir. 2005); *cf. Coe*, 313 F. Supp. 2d at 615-16 (holding that, to the extent *Dunlap* erects "heightened requirements" for waiving the right to trial

[18] As this Court explained in *Clites*, neutral state-law principles of contract enforcement, including unconscionability, may be applied to arbitration agreements consistent with the FAA. 224 W. Va. 299, 685 S.E.2d at 698-99. *Clites* did not consider, however, the expansion of *Dunlap* adopted by the circuit court, which—even if facially neutral—has the effect of singling out arbitration agreements for disfavored treatment under state law.

by jury, those requirements would be preempted by the FAA); *Cochran v. Coffman*, No. 2:09-cv-00204, Mem. Op. at 8 n.4 (S.D. W. Va. Jan. 28, 2010) (following *Wood* and *Coe* in concluding that to the extent West Virginia law "would impose heightened requirements on the enforcement of arbitration agreements," the "FAA preempts West Virginia law").

Even more recently, Judge Bailey has held that if *Dunlap* were interpreted to deem ATTM's 2009 arbitration clause unconscionable, it would be preempted by the FAA: "[E]ven if a broader reading of *Dunlap* was applicable in this case, this Court finds that the FAA preempts *Dunlap* to the extent it would invalidate plaintiffs' waiver of the right to pursue class action relief." *Wince*, 2010 WL 392975, at *4. Accordingly, the circuit court's interpretation of *Dunlap* as creating an across-the-board ban on agreements to arbitrate disputes on an individual basis runs afoul of the FAA in three separate ways.

1. To begin with, the circuit court's interpretation of *Dunlap* singles out a feature of ATTM's arbitration agreement that is a core element of virtually all consumer arbitration provisions—namely, the requirement that arbitration be conducted on an individual basis.[19]

In so doing, the decision below conflicts with the "primary purpose" of the FAA, which—as the U.S. Supreme Court has stated repeatedly—is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see also First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995).

Although Section 2 of the FAA authorizes courts to decline to enforce arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract,"

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[19] As noted above (at pages 9-10), the circuit court also mentioned that ATTM's arbitration provision "prohibit[s] punitive damages (at a trial to a jury)." Circuit Op. 9. For reasons we already have discussed (*see* note 7, *supra*), however that somewhat ambiguous statement is interpreted, it is a manifestly invalid basis for refusing to enforce ATTM's arbitration provision.

including such "generally applicable contract defenses" as "fraud, duress, or unconscionability" (*Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996)), that exception is necessarily a narrow one. The Supreme Court has never held or even hinted that a state policy favoring a particular procedural device could come within Section 2's savings clause. To the contrary, the Court has squarely held that, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract ***the rules under which that arbitration will be conducted***." *Volt*, 489 U.S. at 479 (citation omitted; emphasis added).

The Supreme Court has specifically identified "procedure" as one of the "features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404 (2008). Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, the Supreme Court has recently reiterated that "the recognition that arbitration procedures are more streamlined than federal litigation is ***not*** a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) (emphasis added). Precisely because the entire purpose of arbitration is to provide a less expensive, less time-consuming, and less adversarial alternative to litigation, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve" federal statutory claims. *Id.*

Rather, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," there is no basis for refusing to enforce his or her

arbitration agreement according to its terms. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quotation omitted; alterations in original). That is so even if "the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal quotation marks omitted).

The holding below—that Section 2's savings clause authorized the circuit court to interpret *Dunlap* (and thus West Virginia law) to condition enforcement of arbitration provisions on the availability of the class-action device ***even when a class action is not necessary to vindicate the plaintiff's claims***—is thus irreconcilable with the Supreme Court's precedents.

Indeed, the Court's recent decision in *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978 (2008), confirms that. At issue in *Preston* was whether California could validly impose, through the state's Talent Agents Act ("TAA"), a procedural requirement that disputes under that Act be submitted to California's Labor Commissioner in the first instance—*i.e.*, prior to either litigation or arbitration. Noting that "[t]he FAA's displacement of conflicting state law is 'now well-established,'" the Court held that "the FAA supersedes" the California statute. *Preston*, 128 S. Ct. at 983, 987 (quoting *Allied-Bruce*, 513 U.S. at 272). As the Court observed, "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 986 (quoting *Mitsubishi Motors*, 473 U.S. at 633). That objective "would be frustrated" by the TAA, the Court explained, because "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy." *Id.* Here, just as California had done in *Preston*, the circuit court has interpreted West Virginia law as requiring that arbitration include certain favored procedures (in this case, the class action mechanism). But as in *Preston*, a state policy that has nothing to do with whether the parties to the dispute can effectively resolve that dispute through arbitration is not a

valid basis for adding procedural layers to which the parties did not agree. Thus, as the federal district court held in *Wince*, "a broad reading of *Dunlap* that sweepingly invalidates arbitration provisions containing class waivers, no matter the remaining incentives to arbitrate, would 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress' in enacting the FAA and would be preempted under the doctrine of conflict preemption." *Wince*, 2010 WL 392975, at *5.

2. Moreover, as noted above, court may invalidate an arbitration agreement only on the basis of generally applicable principles of state law. The circuit court's decision runs afoul of this limitation.

It has long been established in West Virginia that a contractual provision is unconscionable only if a party can show ***both*** "gross inadequacy in bargaining power" ***and*** "terms unreasonably favorable to the stronger party." *Saylor*, 216 W. Va. at 774, 613 S.E.2d at 922 (quotation omitted); *see also Troy Mining Corp.*, 176 W. Va. at 604, 346 S.E.2d at 753. Here, the circuit court invalidated ATTM's arbitration provision based entirely on the second element of this test. It failed entirely to analyze the first element—much less make a finding that Shorts had met her burden of proving the existence of a "gross inadequacy" in bargaining power. By (silently) eliminating a critical element of the unconscionability inquiry under West Virginia law, the circuit court impermissibly distorted that law in violation of the FAA. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (FAA preempts even "general principle[s] of contract law, such as unconscionability" if "those general doctrines" are "employ[ed] * * * in ways that subject arbitration clauses to special scrutiny").

3. Finally, as the Supreme Court has recognized, the FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive ***or procedural***

policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). The rule adopted by the circuit court—interpreting *Dunlap* to require the availability of class-action procedures regardless of whether a consumer can vindicate his or her rights in individual arbitration—irreconcilably conflicts with both the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable" (9 U.S.C. § 2) and the broad federal policy favoring arbitration because businesses will give up on arbitration altogether rather than subject themselves to the risk of a class arbitration.

To begin with, class arbitration involves the same massive stakes as a judicial class action and is every bit as burdensome, expensive, and time-consuming—if not more so.[20] Indeed, class arbitration is the quintessential example of arbitration "mutat[ing] into a private judicial system that looks and costs like the litigation it's supposed to prevent." Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, Harv. Bus. Rev. 120, 120 (May 1994).

At the same time, class arbitration fails to provide many of the key protections offered to defendants litigating a class action in court. For one thing, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator's decision on such issues is "among the narrowest known to law." *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Consistent with the "national policy favoring arbitration," the FAA provides only "the limited review needed to maintain arbitration's essential virtue of resolving

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[20] Class arbitration may ***add*** procedural complexity. For example, the AAA's class arbitration procedures largely duplicate the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a "class determination award," the parties may move to vacate or confirm that interim award in the district court. *See generally* AAA, *Policy on Class Arbitrations*, *at* http://.adr.org/.

disputes straightaway." *Hall St. Assocs.*, 128 S. Ct. at 1405. Accordingly, an arbitrator's errors regarding class certification, the scope of any class, the admissibility of expert testimony or other important evidence, whether or not the claim was proven, and the amount of damages can rarely, if ever, be disturbed by a court. Moreover, even if the business wins a class-wide arbitration, it can have no assurance of finality because absent class members may contend that they were not afforded the due process protections necessary to make a class-wide award binding on them. Because arbitrators designated by contracts between private parties are not bound by the U.S. Constitution's due process clauses (*see* Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 187 n.5 (2006) (citing cases)), courts may well embrace such an argument. *See also* Edward K.M. Bilich, *Consumer Arbitration: A Class Action Panacea?*, 7 Class Action Litig. Rep. (BNA) 768, 771 (2006) (noting that because of the "deferential standard of review" of arbitrators' decisions there is "no assurance that the 'class' arbitration proceedings would be binding on absent class members").

Given the risks entailed in ***class*** arbitration and the absence of any offsetting benefits, no reasonable defendant would willingly subject itself to this worst-of-both-worlds scenario. Accordingly, the circuit court's interpretation of West Virginia law to condition the enforceability of arbitration provisions on the availability of class-wide arbitration is the functional equivalent of a ban on consumer arbitration agreements. As such, the circuit court's decision cannot be reconciled with the FAA's policy of promoting arbitration.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Prohibition, the petitioners AT&T Mobility LLC and AT&T Mobility Corporation pray as follows:

a. That the Petition for Writ of Prohibition be accepted for filing;

b. That this Court issue a rule directing the Respondents to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;

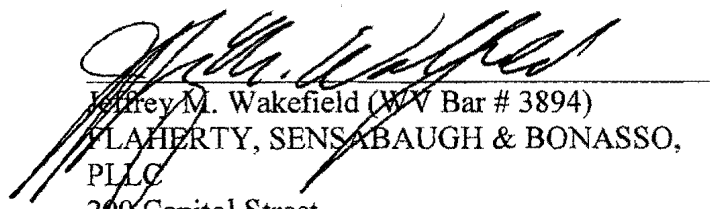
c. That the case be stayed until resolution of the issues raised in this Petition;

d. That the Court award a Writ of Prohibition against the Respondents, instructing the circuit court to compel Shorts to arbitrate her claims or pursue her claims in Magistrate Court; and

e. That the Court award such other and further relief as the Court may deem proper.

AT&T MOBILITY LLC, and
AT&T MOBILITY CORPORATION,

By Counsel,



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CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for AT&T Mobility LLC and AT&T Mobility Corporation, do hereby certify that the "**Memorandum in Support of Petition for Writ of Prohibition**" and "**Appendix in Support of Petition for Writ of Prohibition**" were served upon the following counsel of record via e-mail and by depositing true copies thereof in the United States Mail, first class, postage prepaid, this 18th day of February, 2010:

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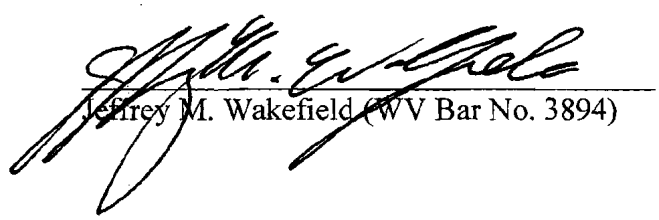

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