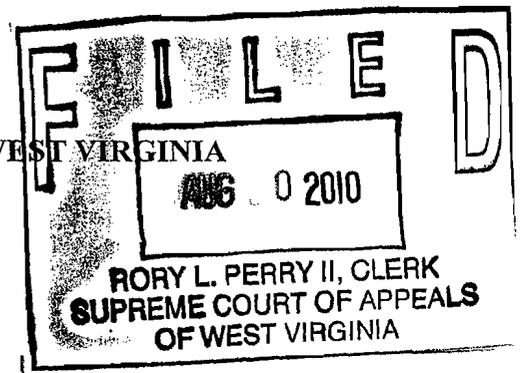


# ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35537



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

Petitioners,

v.

Upon Original Jurisdiction  
in Prohibition,  
No. 100191

THE HONORABLE RONALD E. WILSON, and  
CHARLENE A. SHORTS,

Respondents.

## REPLY TO RESPONSE TO RULE TO SHOW CAUSE

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Shorts devotes most of her Response to this Court’s Rule to Show Cause (“Resp.”) to attacking arbitration provisions that AT&T Mobility’s predecessors abandoned years ago. That is because she cannot show that the versions of ATTM’s arbitration provisions found applicable by the circuit court—which were introduced in late 2006 and early 2009, respectively—are unconscionable under West Virginia law, which analyzes whether a contract term “would prohibit or substantially limit a person from enforcing and vindicating rights and protections.” Syl. Pt. 2, *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 550, 567 S.E.2d 265, 266 (2002). To the contrary, those arbitration provisions ensure that any customer who has a claim easily can vindicate it in a traditional, one-on-one arbitration and hence fully comply with the standard enunciated in *Dunlap*.

Because she cannot plausibly contend that she is unable to vindicate her claims under ATTM’s 2006 and 2009 arbitration provisions, Shorts is forced to take the position that *Dunlap* effectively erects a *per se* rule that provisions that preclude customers from pursuing class-wide arbitration are unenforceable—without regard to whether customers realistically can vindicate their claims on an individual basis. That is a wholly untenable interpretation of *Dunlap*, as federal judges in this State repeatedly have recognized. See *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 683-85 (N.D. W. Va. 2010) (enforcing 2009 version of ATTM’s arbitration provision); *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 899-900 (S.D. W. Va. 2009) (enforcing 2006 version of ATTM’s arbitration provision).

Moreover, Shorts’s reading of *Dunlap* would render that decision inconsistent with West Virginia’s generally applicable unconscionability principles, which dictate that courts may refuse to enforce a contractual provision only if its terms are “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). Because ATTM's 2006 and 2009 provisions "essentially guarantee that the company will make any aggrieved customer whole who files a claim" (*Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009), *cert. granted sub nom. AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010)), they obviously are not "unreasonably favorable" to ATTM. Hence, it is only by deviating from the generally applicable standard that Shorts can contend that ATTM's arbitration provision is unconscionable. As the Supreme Court has made clear, however, States may invoke contract-law defenses to arbitration provisions only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the Federal Arbitration Act]." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis in original); *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration to special scrutiny."). In other words, the FAA requires courts to apply neutral principles of unconscionability law, and under those neutral principles there is no plausible argument that ATTM's arbitration provision is unconscionable.

Shorts's effort to focus the Court on the long-superseded arbitration provisions of its predecessor companies is no more compelling. In deciding ATTM's motion to compel arbitration, the circuit court rejected Shorts's argument, instead finding that ATTM's current arbitration provisions apply. And it was with ATTM's current arbitration provisions in mind that the circuit court urged this Court to accept review in this case. That makes sense: In assessing

whether Shorts can feasibly vindicate her claims under ATTM’s arbitration process, the focus properly belongs on the fairness of the arbitration procedures that are in place now—and that therefore would govern how Shorts’s arbitration would actually proceed.

Moreover, this Court does not generally issue rules to show cause to resolve narrow, case-specific questions that are unlikely to have any future impact. Instead, it generally exercises this discretionary authority to provide guidance on questions of exceptional importance to citizens of this State and businesses operating here. And the question that matters to West Virginians is whether ATTM’s *current* arbitration provisions are enforceable. Indeed, even in this very litigation, it would not advance the ball to address only whether the abandoned arbitration clauses of ATTM’s predecessors are unconscionable: Even if Shorts were entitled to avoid arbitration of her own claim by attacking the superseded arbitration provisions, she purports to represent *every* ATTM subscriber in this State from 2002 up to and including the present. If—as the *Wince* and *Strawn* courts have held—ATTM’s 2006 and 2009 arbitration provisions are enforceable under West Virginia law, then Shorts could not pursue a class action on behalf of any ATTM subscribers who are bound by one of those two provisions. Because the viability of her putative class-action lawsuit will turn (at least in part) on whether those clauses are enforceable, there is nothing to be gained from focusing on the superseded clauses as Shorts urges.<sup>1</sup>

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<sup>1</sup> In its order of August 2, 2010, this Court stated that it had narrowed the issue for review to “[w]hether the absence of class-wide arbitration in a consumer arbitration agreement, under West Virginia law, renders the arbitration agreement to be unconscionable.” We construe that to mean that the Court does not intend to reach the question whether the FAA would preempt any holding by this Court that ATTM’s 2006 and 2009 provisions are unenforceable under West Virginia law. Accordingly, without waiving our right to raise that issue if necessary in future proceedings, we do not further brief it here.

## ARGUMENT<sup>2</sup>

### **I. ATTM's 2006 And 2009 Arbitration Provisions Are Fully Enforceable Under West Virginia Law.**

As we have noted, Shorts's substantive arguments are largely directed at attacking earlier arbitration provisions that are no longer in effect. *See* Resp. at 16-20, 22-24. Her challenges to the earlier clauses are irrelevant, however, for the reasons noted above (at 2-3) and discussed more fully in Part II, *infra*.

By contrast, Shorts dedicates scant attention to ATTM's 2006 and 2009 arbitration provisions. That is unsurprising, because these arbitration provisions are extraordinarily favorable to consumers. As one veteran federal judge in California has remarked, "ATTM's [2006] arbitration agreement contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at \*3 (C.D. Cal. June 18, 2009). Under that provision and the slightly modified 2009 version, customers are

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<sup>2</sup> At the conclusion of her "Summary of Relevant Facts," Shorts repeats (without in any way supporting) the assertion in her Opposition to the Petition for Writ of Prohibition that the American Arbitration Association ("AAA") would not administer her claims against ATTM (Resp. at 6) because it has announced a moratorium on certain types of consumer arbitrations. In issuing the rule to show cause, this Court presumably already considered and rejected this assertion. And for good reason: It is manifestly false. The AAA clearly states on its web site that the moratorium is limited to debt-collection arbitrations initiated by a business against a consumer. *See* <http://www.adr.org/sp.asp?id=36432>. Moreover, as we pointed out in a notice of supplemental authority, the U.S. District Court for the Northern District of Illinois has rejected the very argument that Shorts makes here. *Jackson v. Payday Loan Store*, 2010 WL 1031590, at \*1 (N.D. Ill. Mar. 17, 2010). In *Jackson*, the plaintiffs had "assert[ed] that the AAA's moratorium on accepting new arbitrations where 'the company is the filing party' will prevent the AAA from accepting this dispute, because the arbitration here is demanded by Payday Loans, and not by the individual consumers." *Id.* at \*2. The court concluded that "[t]his is a misreading of the clear language of the moratorium. If the Court rules that the Agreement is enforceable and that arbitration is therefore mandated, such arbitration will not occur automatically at Payday Loan's behest, but will only begin if Plaintiffs file a claim in arbitration." *Id.* More recently, another federal court, this time in the Central District of Illinois, reached precisely the same conclusion. *See Estep v. World Fin. Corp.*, 2010 WL 3239456, at \*5 (C.D. Ill. Aug. 16, 2010) (holding that AAA moratorium applies only to debt-collection actions initiated by the company against the consumer, not claims brought by the consumer against the company).

entitled to arbitrate any non-frivolous claim of \$75,000 or less for free in the county of their billing address, and arbitrators may award any form of individual relief (such as statutory damages, treble damages, punitive damages, injunctions, and attorneys' fees) that a court could award. In addition, customers who receive an arbitral award that exceeds ATTM's last settlement offer are entitled to a minimum recovery of \$5,000 plus double attorneys' fees under the 2006 provision, or \$10,000 plus double attorneys' fees under the 2009 provision. See Memorandum in Support of Petition for Writ of Prohibition ("Mem.") at 5-6. These unique features of ATTM's 2006 and 2009 arbitration provisions ensure that customers like Shorts and their attorneys have adequate incentives to pursue arbitration on an individual basis. Indeed, as the Ninth Circuit has recognized, they "essentially guarantee that the company will make any aggrieved customer whole who files a claim." *Laster*, 584 F.3d at 856 n.9. In view of these pro-consumer features, ATTM's 2006 and 2009 arbitration provisions cannot be characterized as containing "terms unreasonably favorable to the stronger party" (*Saylor*, 216 W. Va. at 774, 613 S.E.2d at 922)—the test for determining whether a contract provision is unconscionable under West Virginia's generally applicable unconscionability doctrine. As noted above, no different standard may be applied to arbitration provisions.

Shorts attempts to portray this Court's decision in *Dunlap* as erecting a *per se* rule barring agreements to arbitrate on an individual rather than class-wide basis. See Resp. at 15, 18, 21-22. Yet this Court did no such thing in *Dunlap*—or any other case. Instead, this Court has adhered to the long-standing principle that unconscionability "must \* \* \* be determined on a case-by-case basis." *Dunlap*, 211 W. Va. at 560 n.5, 567 S.E.2d at 276 n.5. That inquiry focuses on whether an arbitration provision is fair to the individual plaintiff before the court. Thus, as this Court explained in *Dunlap*, only those provisions "that 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 \* \* \* are unconscionable.” *Id.* at 559-60, 567 S.E.2d at 275-76.

ATTM’s 2006 and 2009 arbitration provisions neither prohibit nor in the slightest manner limit customers from seeking and obtaining statutory or common-law remedies. *See Wince*, 681 F. Supp. 2d at 683-85 & n.4 (enforcing 2006 and 2009 ATTM arbitration provisions); *Strawn*, 593 F. Supp. 2d at 899-900 (enforcing 2006 ATTM arbitration provision). As Judge Bailey held in *Wince*, “the ATTM arbitration clause, as a whole, comports with the heart of the *Dunlap* decision.” 681 F. Supp. 2d at 685. That is because, under ATTM’s arbitration provisions, “each putative class member has incentive to bring his or her claim, regardless of whether classified as ‘high’ or ‘small’ dollar. This incentive is provided by several provisions of the ATTM arbitration clause. \* \* \* [I]n light of these \* \* \* incentives, the class action restriction cannot be deemed unfair.” *Id.* Thus, while Shorts asserts that ATTM’s arbitration provisions are “illusory” (Resp. at 15), that “argument misses the point of the premium,” which “is best described as the outer limit of a potential windfall that further protects the customer from malfeasance by the superiorly positioned party.” *Strawn*, 593 F. Supp. 2d at 900 n.6.

Shorts does not mention *Wince* at all, and ignores *Strawn*’s analysis of West Virginia law. She similarly fails to acknowledge that several other courts around the country have upheld ATTM’s 2006 provision. For example, federal judges in the Eastern District of Michigan have twice upheld that provision, concluding that “AT&T’s arbitration process is fair” (*Francis v. AT&T Mobility LLC*, 2009 WL 416063, at \*5 (E.D. Mich. Feb. 18, 2009)) and that, because of the premiums available under ATTM’s provision, a consumer’s “potential recovery” in arbitration “exceeds the value in time and energy required to arbitrate her claims” on an

individual basis (*Moffat v. Cingular Ameritech Mobile Commc'ns Inc.*, 2010 WL 451033, at \*2 (E.D. Mich. Feb. 5, 2010)). *See also Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690, at \*3-\*4 (M.D. Fla. Sept. 15, 2008) (upholding ATTM's 2006 arbitration provision), *appeal pending*, No. 08-16080-CC (11th Cir.); *Davidson v. Cingular Wireless LLC*, 2007 WL 896349, at \*8 (E.D. Ark. Mar. 23, 2007) (same).

Shorts instead bases her rather perfunctory assertion that the 2006 and 2009 arbitration provisions are unenforceable on four out-of-state cases. *See Resp.* at 8, 15.<sup>3</sup> But in these cases, the courts construed the relevant state's law to effect an across-the-board prohibition of agreements to arbitrate consumer disputes on an individual basis. For example, in *Laster* the Ninth Circuit held that although ATTM's 2006 "essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim," that provision nonetheless is unenforceable under California law because "the problem \* \* \*—as we read that law—is that not every aggrieved customer will file a claim." 584 F.3d at 856 n.9.<sup>4</sup> This holding is tantamount to a blanket ban on agreements to arbitrate on an individual basis, for it can never be proven that *every* potentially aggrieved customer will invoke an arbitration provision. Indeed, Judge Bea—the author of the opinion in *Laster*—explained as much during oral argument, stating that he understood California law to include "a bizarre component to it saying that no matter how conscionable to the individual [an arbitration agreement is], the public policy of California is to

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<sup>3</sup> Shorts also cites *Paetzold v. Palisades Collections, LLC*, No. 07-C-272 (W. Va. Cir. Ct., Ohio Cty. Dec. 26, 2007) (*see Resp.* at 14-15), but in that case the court did not consider the 2006 and 2009 provisions.

<sup>4</sup> Shorts actually cites the district court's opinion in *Laster*, rather than the Ninth Circuit's decision affirming the district court. As this Court is aware, the Supreme Court has granted certiorari in *Laster*. *See AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010).

use class actions.” Tr. of Oral Arg. at 7:55, *Laster*, 584 F.3d 849.<sup>5</sup> By contrast, *Dunlap* makes clear that West Virginia law does not erect a *per se* prohibition on agreements to arbitrate on an individual basis. See pp. 5-6, *supra*.

Shorts’s discussion of cases not involving ATTM’s arbitration provision is even less helpful to her cause. Despite her conclusory assertion (*see* Resp. at 20), it is not true that most jurisdictions prohibit all agreements to arbitrate on an individual basis. In fact, courts in many of the states that Shorts identifies—including, at minimum, Alabama, Florida, Michigan, Missouri, New Jersey, Ohio, and Pennsylvania—have enforced arbitration provisions that do not authorize class arbitration.<sup>6</sup> Shorts is simply mistaken that there is a national trend to prohibit *every*

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<sup>5</sup> Two of the other cases cited by Shorts also treated California law as creating a *de facto per se* rule. See *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592, 603 (D.N.J. 2009) (“[T]he Court does not quarrel with ATTM’s assertion that the present arbitration provision is among the more consumer-friendly provisions in the country. \* \* \* That may or may not be true, but in any event it does not matter. Under California law, it simply is not enough.”); *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, 1029-30 (N.D. Cal. 2008) (holding that under California law, a defendant must show that its “Arbitration Agreement functions as well as a class action would” by “proving that hundreds of thousands, if not millions, of \* \* \* consumers across the country have the time, resources, or inclination to individually” pursue their disputes in arbitration). And in the final case cited by Shorts, the court paid lip service to the notion that Washington law does not impose a “*per se* ban” on agreements to arbitrate on an individual basis, but nonetheless declared that “class action lawsuits are necessary” as a matter of Washington public policy. *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1256, 1259-60 (W.D. Wash. 2009), *appeal pending*, No. 09-35563 (9th Cir.).

<sup>6</sup> **Alabama:** See, e.g., *Milligan v. Comcast Corp.*, 2007 WL 4885492, at \*2 (N.D. Ala. Jan. 22, 2007); *Battels v. Sears Nat’l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Taylor v. First N. Am. Nat’l Bank*, 325 F. Supp. 2d 1304, 1319–22 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1276–77 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263–64 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345 (M.D. Ala. 2003); *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003). **Florida:** See, e.g., *La Torre v. BFS Retail & Commercial Operations, LLC*, 2008 WL 5156301, at \*5 (S.D. Fla. Dec. 8, 2008); *Sanders v. Comcast Cable Holdings, LLC*, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008); *Rivera v. AT&T Corp.*, 420 F. Supp. 2d 1312, 1322 (S.D. Fla. 2006); *Hughes v. Alltel Corp.*, 2004 U.S. Dist. LEXIS 20705, at \*9-\*16 (N.D. Fla. Mar. 31, 2004). **Michigan:** See, e.g., *Moffat*, 2010 WL 451033, at \*2; *Francis*, 2009 WL 416063, at \*5; *Adler v. Dell, Inc.*, 2008 WL 5351042, at \*9 (E.D. Mich. Dec. 18, 2008); *Copeland v. Katz*, 2005

agreement to arbitrate on an individual basis. Instead, the trend is for states to enforce those arbitration agreements that afford individual customers a realistic opportunity to vindicate their own claims in arbitration (*see* Mem. at 22 & n.15)—precisely the test that this Court announced in *Dunlap* and that Judges Bailey and Copenhaver applied in *Wince* and *Strawn*.

Moreover, even if ATTM’s arbitration provisions did not contain the path-breaking premiums designed to encourage consumers to pursue arbitration of relatively small claims, this case is manifestly not one in which minuscule claims are at issue. As Shorts concedes, her claims for statutory damages under this State’s consumer protection law are worth “up to \$4,183.” Resp. at 21. Courts repeatedly have held that claims of this magnitude are not the type of “small dollar” disputes that created the concerns expressed in *Dunlap*. *See Strawn*, 593 F. Supp. 2d at 899 (*Dunlap* “is distinguishable” because plaintiffs “contend that they can each recover a minimum amount of \$200 in damages under the WVCCPA, along with a further \$1,000 penalty under that statute,” plus “an adjustment \* \* \* for inflation as permitted by the WVCCPA”); *Wince*, 681 F. Supp. 2d at 684-85 (“this case could possibly be distinguished from *Dunlap* purely on a quantitative basis” because “defendants estimate that each putative class

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WL 3163296, at \*4 (E.D. Mich. Nov. 28, 2005). **Missouri:** *See, e.g., Cicle v. Chase Bank USA*, 583 F.3d 549, 556-57 (8th Cir. 2009); *Pleasants v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008); *Kates v. Chad Franklin Nat’l Auto Sales N., LLC*, 2008 WL 5145942, at \*4-\*5 (W.D. Mo. Dec. 1, 2008); *Gutierrez v. State Line Nissan, Inc.*, 2008 WL 3155896, at \*3-\*4 (W.D. Mo. Aug. 4, 2008); *Bass v. Carmax Auto Superstores, Inc.*, 2008 WL 2705506, at \*2-\*3 (W.D. Mo. July 9, 2008). **New Jersey:** *See, e.g., Jones v. Chubb Inst.*, 2007 WL 2892683, at \*4-\*5 (D.N.J. Sept. 28, 2007); *Davis v. Dell, Inc.*, 2007 WL 4623030, at \*6-\*8 (D.N.J. Dec. 28, 2007). **Ohio:** *See, e.g., Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 770-72 (N.D. Ohio 2009); *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770, at \*3-\*4 (Ohio Ct. App. Sept. 17, 2009); *Hawkins v. O’Brien*, 2009 WL 50616, at \*6 (Ohio Ct. App. Jan. 9, 2009); *Price v. Taylor*, 575 F. Supp. 2d 845, 854-55 (N.D. Ohio 2008); *Howard v. Wells Fargo Minn., N.A.*, 2007 WL 2778664, at \*4-\*5 (N.D. Ohio Sept. 21, 2007). **Pennsylvania:** *See, e.g., Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 624-25 (3d Cir. 2009); *Cronin v. CitiFinancial Servs., Inc.*, 352 F. App’x 630, 635-36 (3d Cir. 2009) (*per curiam*); *Clerk v. First Bank of Del.*, 2010 WL 1253578, at \*14 (E.D. Pa. Mar. 23, 2010).

member seeks at least \$400.00” in statutory damages, “which adjusted for inflation would exceed \$1,700.00”).

Shorts argues that *Dunlap* is indistinguishable because a similar amount of potential statutory damages was at issue in that case. *See* Resp. at 21. But she ignores that in *Dunlap*, the arbitration clause “provide[d] that ‘[n]o arbitrator may make an award of punitive damages,” and that this Court interpreted that language to preclude the award of statutory penalty damages. *Dunlap*, 211 W. Va. at 561, 567 S.E.2d at 277 (internal quotation marks omitted). Accordingly, the plaintiff’s claim in *Dunlap* was limited to a “total of \$8.46 in insurance charges.” *Id.* at 562, 567 S.E.2d at 278; *see also Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 690 (N.D. W. Va. 2005) (“the plaintiff in *Dunlap* asserted \* \* \* a claim worth \$8.46”). Shorts’s claim for damages is far greater here—*nearly 500 times* greater than in *Dunlap*—because ATTM’s provision does not prohibit an arbitrator from awarding penalty damages under the WVCCPA.

## **II. The Question That Warrants This Court’s Attention Is Whether ATTM’s *Current Arbitration Provision Is Enforceable Under West Virginia Law.***

No doubt recognizing the difficulty of persuading this Court that ATTM’s uniquely consumer-friendly 2006 and 2009 provisions are unconscionable under generally applicable West Virginia unconscionability doctrine, Shorts seeks to evade the issue by contending that the circuit court erred in deeming those provisions to be the applicable ones. This Court should reject her effort to limit the inquiry to the long-superseded provisions of ATTM’s predecessors.

### **A. ATTM’s Current Arbitration Provision Controls Shorts’s Dispute With ATTM.**

The circuit court expressly determined that Shorts’s “argument that only the 2003 arbitration agreement \* \* \* from AWS is relevant to the issue before the court is \* \* \* without merit. It 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.” Op. at 5. Shorts’s arguments for overturning this finding are misguided.

1. Shorts argues that ATTM’s revised arbitration provisions cannot be considered under the U.S. Supreme Court’s recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). She is mistaken. In *Stolt-Nielsen*, the parties had entered into an arbitration agreement that did not specify whether arbitrators were authorized to conduct class-wide arbitration. The Supreme Court held that, in such circumstances, the Federal Arbitration Act imposes a default rule that class arbitration is not permissible, because “the differences between bilateral [*i.e.*, one-on-one] and class-action arbitration are too great for arbitrators to presume \* \* \* that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” *Id.* at 1776. At the same time, however, the Court recognized that “[i]n certain contexts, it is appropriate to presume that parties \* \* \* implicitly authorize \* \* \* adopt[ing] such procedures as are necessary to give effect to the parties’ agreement.” *Id.* at 1775. Here, adopting the procedures that are available under ATTM’s current arbitration provision would not fundamentally alter the nature of the parties’ underlying agreement to arbitrate their disputes on an individual basis. To the contrary, it “gives effect” to the parties’ core agreement by ensuring that arbitration is even more fair and accessible for Shorts.

More to the point is *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), in which the U.S. Supreme Court enforced an arbitration agreement under the FAA. In that case, the Court denigrated as not “serious” the contention that the plaintiffs could avoid arbitration because they had “agreed to arbitrate future disputes \* \* \* in reliance on [an earlier case] holding that such agreements would be held unenforceable by the courts.” *Id.* at 485.

Shorts' argument here fails under *Rodriguez de Quijas*: It is no more plausible—or consistent with the FAA—for Shorts to assert a right to attack what she considers to be a vulnerable arbitration provision after she has been afforded the opportunity to arbitrate under the more consumer-friendly rules of the current provisions. The Supreme Court has made clear 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 requires consideration of the incentives provided in the 2006 and 2009 arbitration provisions in order to enforce the agreement to arbitrate that Shorts made when she first signed up for service with AWS in 2003 and that she renewed when she signed up for service with Cingular in 2005.

2. Shorts also contends that *Dunlap* establishes the irrelevance of ATTM's 2006 and 2009 arbitration provisions. Resp. at 2, 13-14. Again, she is mistaken. *Dunlap* involved a defendant's effort to avoid a finding of unconscionability by making a one-time, *ad hoc* offer not to enforce the problematic aspects of its arbitration clause. 211 W. Va. at 568, 567 S.E.2d at 284. Here, by contrast, ATTM has made its current arbitration provisions available to *all* customers. It is not true—as Shorts suggests—that the revisions to ATTM's arbitration provision were “tailored” (Resp. at 2) for this litigation. Instead, the 2006 and 2009 revisions were made to the contracts of all of ATTM's customers; moreover, when ATTM publicly announced its policy of making its most recent—and most consumer-friendly—arbitration provisions available to all of its current and former customers, it did so contemporaneously with its promulgation of those provisions, not for purposes of this (or any other) litigation. Mem. at 4; *see also* Affidavit of Neal S. Berinhout (“Berinhout Aff.”), Ex. 3, at 1 (“Former AT&T customers as well as former customers of AT&T's predecessors ([including] Cingular

Wireless [and] the former AT&T Wireless, \* \* \*) are entitled to have any dispute resolved under AT&T's current arbitration provision.”). Unlike in *Dunlap*, ATTM's current arbitration provision (the 2009 provision)—along with information about the procedures for invoking the company's dispute resolution process—is clearly disclosed on ATTM's website, at <http://www.att.com/disputeresolution>. Mem. at 4; *see also* Berinhout Aff., Ex. 3.

Therefore, unlike in *Dunlap*, ATTM's policy is not a ticket good for one ride (or one case) only. For the same reason, the out-of-state authorities that Shorts cites are inapposite. A number of them, like *Dunlap*, involved situations in which a defendant sought to modify an arbitration agreement only in the context of the single litigation at issue.<sup>7</sup> In these cases, courts have expressed the concern that when a defendant offers to alter a set of contract terms on a one-off basis in a particular case, the offer may simply be a litigation tactic because the allegedly questionable provisions would still apply in all other contexts. That is not the case here: *Every* ATTM customer (past and present) has been extended the benefit of the revised arbitration provisions.

Moreover, even if this case did involve a mere offer not to apply certain problematic terms of an arbitration provision rather than a modification applicable to all customers, this Court has recently made clear that the policy favoring arbitration warrants acceptance of a business's proffer of more favorable arbitration procedures. *See State ex rel. Clites v. Clawges* 224 W. Va. 299, 685 S.E.2d 693 (2009) (per curiam). In *Clites*, the arbitration provision specified “that each ‘party shall bear its own fees and costs incurred in connection with the arbitration.’” *Id.* at 303,

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<sup>7</sup> *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676 (6th Cir. 2003) (discussing “after-the-fact offers”); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 304 (4th Cir. 2002) (discussing attempted amendments on a “case-by-case basis”); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) (rejecting party's offer in litigation to apply different arbitration rules).

685 S.E. at 697. The plaintiff argued that this requirement was unconscionable because it would preclude her from pursuing arbitration. *Id.* But the circuit court had accepted the defendant's "assert[ion] and stipulat[ion] through affidavit that \* \* \* [it] will pay for all costs of expenses that would not be incurred by the Plaintiff in court, including the fees of the arbitrator[,] the costs of the hearing room, and a stenographer." *Id.* Relying in part on the defendant's stipulation, this Court held that the agreement to arbitrate had to be enforced because "there is no proof in the record before us that the [plaintiff] is exposed to exorbitant costs as a result of the Agreement as [the defendant] is paying all costs associated with the Arbitration in excess of what the [plaintiff] would have been required to pay to maintain her civil action in the circuit court." *Id.* at 307, 685 S.E.2d at 701.

To be sure, *Clites*'s holding is in tension with this Court's earlier conclusion in *Dunlap* that the defendant's ad hoc offer in that case should be disregarded. The Court need not resolve that tension here because the revisions to ATTM's arbitration provision were not offers created for the purposes of this litigation, but instead are available to *all* of ATTM's current and former customers. But if the Court does conclude it needs to reach the issue, *Clites* announces the better rule, both as a matter of this State's law and in view of the Supreme Court's instruction that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24.

To begin with, West Virginia Code § 46A-2-121(1)(b) specifies that a "court \* \* \* may so limit the application of any unconscionable term or part as to avoid any unconscionable result." That is precisely what the circuit court did (and what this Court affirmed) in *Clites*; that also is similar to what the circuit court did here. As in *Clites*, the court below "noted" and "accept[ed]" an affidavit (*Clites*, 224 W. Va. at 303, 685 S.E.2d at 697) submitted by ATTM that

voluntarily limited the application of earlier arbitration provisions and identified its policy of making its current arbitration provisions available to all of its customers (current and former). True, ATTM's arbitration provisions are much more favorable to individual plaintiffs than the arbitration clause at issue in *Clites*, but the same reasoning that led this Court to honor the defendant's stipulation in *Clites* should apply with even more force to ATTM's across-the-board policy of making its most recent arbitration provisions available to all current and former customers.

Moreover, courts routinely and properly consider the procedures that will actually govern how arbitration takes place. The U.S. Supreme Court has held that when a party seeks to avoid enforcement of an arbitration agreement on the ground that it precludes the effective vindication of her rights, "that party bears the burden of showing the likelihood of" being burdened by the alleged obstacles to pursuing arbitration. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (holding that customer's challenge to arbitration provision failed because her allegation that costs of arbitration would be prohibitive was speculative). Consistent with *Randolph*, many courts have accepted offers to waive allegedly problematic features of arbitration provisions when determining whether a party will be unable to vindicate his or her rights. See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 n.3 (5th Cir. 2004) ("[W]hat is at issue here is whether these plaintiffs will be required to pay prohibitive arbitration fees and costs if they are forced to proceed to arbitration.") (emphasis omitted); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (holding that "the fact that [the defendant] agreed to pay all costs associated with arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process") (emphasis omitted); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1029 (11th Cir. 2003); *Blair v. Scott Specialty Gases*, 283 F.3d 595,

610 (3d Cir. 2002); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (“[Defendant’s] offer to pay the costs of arbitration and to hold the arbitration in the [plaintiffs’] home state of Rhode Island mooted the issue of arbitration costs.”); *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 763 & n.7 (Wash. 2004) (en banc) (“refus[ing] to ignore” defendant’s “offer[] to ‘defray the cost of arbitration’ by paying arbitration fees,” thus rendering “moot” the plaintiff’s argument that the fees were unconscionable).<sup>8</sup> Crediting such offers serves to further, rather than frustrate, the strong federal policy under the FAA favoring the enforcement of arbitration agreements. *See, e.g., Moses H. Cone*, 460 U.S. at 24 (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements”).

**B. Most Members Of The Class Shorts Purports To Represent Agreed To The 2006 Or 2009 Arbitration Provisions, And The Enforceability Of Those Provisions Is The Question Of Broad Importance To West Virginians.**

Practical considerations also counsel in favor of addressing the enforceability of ATTM’s 2006 and 2009 arbitration provisions. It is undisputed that putative class members who received service from ATTM or its predecessors between late 2006 and the present are bound by the 2006 or 2009 arbitration provisions. Thus, even if Shorts is able to avoid those provisions, the membership of the putative class she wishes to represent will turn in large part on whether the revised provisions are enforceable. If they are, then a substantial proportion of putative class members would be precluded from participating in this case. Accordingly, there are powerful prudential reasons for this Court to consider the enforceability of the 2006 and 2009 agreements now.

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<sup>8</sup> It is true that the Illinois Supreme Court has reached a different conclusion. *See Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 257-60 (Ill. 2006). We submit that the *Kinkel* court was mistaken. First, its reliance on *Morrison* and similar cases fails to appreciate that ATTM has made an across-the-board change for all customers. Second, *Kinkel*’s analysis of Illinois law cannot be squared with *Clites*, in which this Court endorsed the defendant’s offer to pay allegedly excessive arbitral costs.

For example, in deciding whether class certification is appropriate, Shorts must show that she is “typical” of other class members. W. Va. R. Civ. P. 23(a). Even if Shorts were correct that the current ATTM arbitration provisions are irrelevant as to her, she cannot deny that these provisions do apply to the majority of class members. If the 2006 and 2009 arbitration provisions are enforceable, then Shorts performance would not be “typical” of the majority of class members. Similarly, in analyzing class certification, the circuit court will be required to assess the strength of ATTM’s affirmative defenses, including whether putative class members who are subject to ATTM’s recent arbitration provisions are obligated to pursue their claims through arbitration on an individual basis. If they are so obligated, Shorts cannot represent these individuals in a class action. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 312 (S.D.N.Y. 2004) (holding that individuals subject to a valid arbitration agreement must be excluded from class).

In addition, we respectfully submit that this Court granted discretionary review in this case for a reason—*i.e.*, to adjudicate a question of current, state-wide importance. The significant issue that we presented in our petition for a writ of prohibition—and that the circuit court suggested was ripe for this Court’s review—is whether ATTM’s 2006 and 2009 arbitration provisions are enforceable under West Virginia law. In contending that those provisions are inapplicable, Shorts essentially repeats her previous arguments for why review should be denied. *See Opp. to Pet. for Writ of Prohibition* at 1-2, 4-5, 10-12. Yet in issuing the rule to show cause, this Court surely intended to reach the issue of whether ATTM’s current arbitration agreements—not long superseded ones—are enforceable.

Accordingly, this Court should adjudicate the enforceability of the 2006 and 2009 provisions now. If the Court does not do so, the exact same question will arise when the circuit

court reaches the question of class certification, and likely will arise in a number of other cases in West Virginia's state and federal courts.

**CONCLUSION**

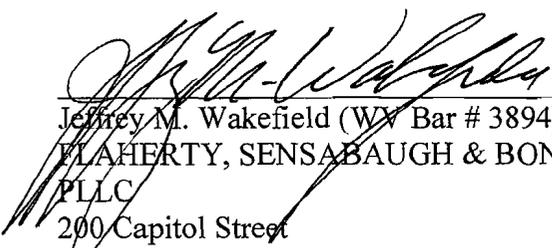
For the reasons set forth above and in the Memorandum in Support of Petition for Writ of Prohibition, the petitioners AT&T Mobility LLC and AT&T Mobility Corporation pray as follows:

- a. 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
- b. 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,**

DATED: August 30, 2010

  
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**CERTIFICATE OF SERVICE**

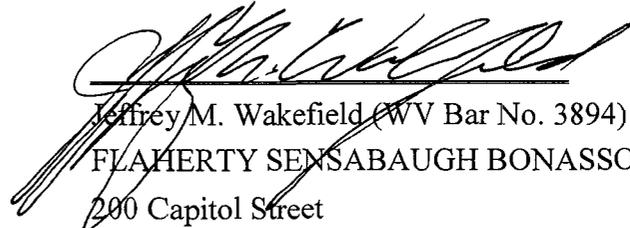
I hereby certify that I have on this the 30<sup>th</sup> day of August 2010, sent via First Class Mail and via e-mail the foregoing Petition for a Writ of Prohibition and Memorandum in Support of ATTM's Petition for a Writ of Prohibition upon all counsel of record in this cause, whose names and addresses are as follows:

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