

35537

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,  
Docket No. 100191

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

Respondents.

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FROM THE CIRCUIT COURT OF BROOKE COUNTY  
Civil Action No. 06-C-127

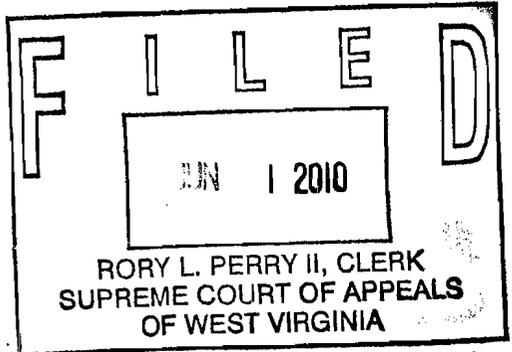
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RESPONSE TO RULE TO SHOW CAUSE

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## INTRODUCTION

AT&T Mobility's ("AT&T's") Petition for a writ of prohibition in this case seeks a wholesale change in West Virginia law. AT&T asks this court to overrule the holding in State ex rel. Dunlap v. Berger, 211 W. Va. 549, 567 S.E.2d 265 (2002), which the circuit court expressly relied on in reaching its conclusion. AT&T makes this request even though Dunlap is clearly good law and has been repeatedly adopted by courts around the country.

In Dunlap, this Court held that unconscionable provisions, such as class-action bans, contained in consumer contracts of adhesion are unenforceable even when they are drafted into arbitration provisions. The Court explained that neither the Federal Arbitration Act, nor the federal policy favoring arbitration, can rescue unconscionable provisions tucked away into arbitration clauses. This remains the law in West Virginia and in numerous jurisdictions around the country.

Dunlap controls the outcome here. In this State, as in many others, arbitration provisions in contracts of adhesion are unenforceable when they ban consumer class actions, ban punitive damages, or establish one-sided access to the courts. The arbitration provision in the agreement between Shorts and AT&T does precisely that.

AT&T does not argue otherwise. Instead, it attempts to moot the provisions in the applicable arbitration agreement by unilaterally establishing a brand new arbitration procedure—one that it offered to Shorts for the first time in 2009, well after this litigation began and to which Shorts has never agreed. This re-writing of the contract during the litigation is impermissible

under basic contract law, Dunlap and the most recent pronouncement of the United States Supreme Court on the Federal Arbitration Act.<sup>1</sup>

Dunlap explicitly forbids the very ploy that AT&T utilizes here: “[W]e think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.” 567 S.E. 2d at 284. Thus, AT&T’s arbitration agreement must stand or fall based on whether it was unconscionable “at the time of the making of the contract.” Id. at 272; W. Va. Code § 46A-2-121 (whether contract is unconscionable determined “at the time it was made”). Additionally, the Supreme Court of the United States recently held that neither a court, nor an arbitrator, nor a party to an arbitration agreement, could vary the agreement after the fact and that only the arbitration agreement the parties actually agreed to was relevant in an FAA analysis.<sup>2</sup> AT&T’s efforts to change, year by year, what its arbitration provisions say fail as a matter of federal and state law.

Even if AT&T could unilaterally swap out its old, unconscionable arbitration provision for the new tailored-for-litigation version, the new version is likewise unconscionable and unenforceable. As the circuit court correctly held, even AT&T’s 2009 arbitration provision is unconscionable because of its class-action ban and its consequent limitation on consumer remedies.

The Federal Arbitration Act does not preempt this result. The FAA cannot and does not require West Virginia courts to enforce unconscionable contract terms merely because those

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<sup>1</sup> See e.g. Stolt Nielsen S.A. v. Animal Feeds International Corp., \_\_\_ U.S. \_\_\_, No. 08-1198, 2010 WL 1655826 (Apr. 27, 2010) (holding that arbitration under the FAA is strictly limited to what both parties consented to and rejecting the rights of courts, arbitrators or parties to add or modify the procedures of arbitration without an agreement by the parties to be charged).

<sup>2</sup> See id.

terms are embedded in an arbitration provision. This Court resolved that issue in Dunlap as well. 567 S.E.2d at 272.

Because the circuit court followed Dunlap, no writ should be awarded. AT&T's argument that Dunlap is bad law is not a supportable ground for extraordinary relief, and it is belied by the many courts around the country that have relied on Dunlap.

#### SUMMARY OF RELEVANT FACTS

More than seven years ago, in February 2003, Shorts purchased a cellular phone and wireless phone service from an AT&T predecessor, AT&T Wireless Services, Inc. (Ex. 1)<sup>3</sup> Shorts's phone service with AT&T Wireless is governed by the terms and conditions contained in a standardized AT&T Wireless instruction booklet. (Ex. 2)<sup>4</sup> It is undisputed that the terms and conditions in the instruction booklet were non-negotiable and were offered on a take it or leave it basis.

IF YOU DO NOT AGREE WITH THESE TERMS AND  
CONDITIONS . . . . DO NOT USE THE SERVICE OR DEVICE  
AND NOTIFY US IMMEDIATELY TO CANCEL SERVICE . . .

Id. at 21.

The AT&T Wireless terms and conditions contain an arbitration provision requiring arbitration of most disputes and directing that any arbitration be administered by the American Arbitration Association ("AAA"). The provision modifies the AAA Rules, however, to provide that "an arbitrator may not award relief in excess of or contrary to what this Agreement provides," and that "each party will bear the expense of its own counsel, experts, witnesses and preparation and presentation of evidence at the arbitration." Id. at 30-31.

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<sup>3</sup> Ex. 1 – Civil Complaint of Palisades Collection, LLC. All Exhibits referenced herein were filed on March 17, 2010 – Shorts' Appendix Of Exhibits.

<sup>4</sup> Ex. 2 – 2003 AT&T Wireless Terms and Conditions

Section 4 of the AT&T Wireless contract entitled “LIMITATIONS” explains that punitive damages are unavailable in arbitration because such relief would be “contrary to what this Agreement provides”:

WE AND ANY UNDERLYING CARRIER ARE NOT LIABLE FOR ANY INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES SUCH AS LOST PROFITS. YOU AND WE BOTH WAIVE TO THE FULLEST EXTENT ALLOWED BY LAW, ANY CLAIMS TO RECOVER INCIDENTAL, PUNITIVE AND CONSEQUENTIAL DAMAGES.

Id. at 29. The AT&T Wireless contract also bans class actions, stating that arbitration must “be conducted on an individual basis and not on a consolidated, class-wide or representative basis.”

Id.

In May 2003, AT&T Wireless deemed Shorts in default, terminated her service, and charged her a \$175.00 early termination fee. (Ex. 1) More than three years later, on June 23, 2006, AT&T Wireless’s assignee, Palisades Collections, filed a debt-collection action against Shorts in the Magistrate Court of Brooke County, seeking to recover Shorts’s alleged debt to AT&T Wireless. Id. The consumer debt collection action against Shorts was brought under the account number for Shorts’s 2003 AT&T Wireless contract. Although Shorts purchased cellular phone service with another AT&T predecessor, Cingular Wireless, in May 2005, that purchase was not the subject of Palisades’ 2006 suit. (Ex. 3)<sup>5</sup> Notably, Palisades filed this case as a debt collection claim in court, not in arbitration.

As a defense and as a compulsory counterclaim to the collection action, Shorts alleged that a \$175 “early termination fee” charged to her in 2003, and the subsequent attempts to collect

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<sup>5</sup> Ex. 3 – 2005 Cingular Wireless Terms and Conditions

it, violate multiple sections of the West Virginia Consumer Credit & Protection Act. (Ex. 4)<sup>6</sup> After a series of corporate transactions that merged AT&T Wireless with Cingular, Shorts amended her counterclaim to add the surviving entity, AT&T Mobility (“ATTM” or “AT&T”). And ultimately, Shorts sought to assert her claims on behalf of a class of ATTM customers with West Virginia billing addresses. (Ex. 5)<sup>7</sup>

After a prolonged and unsuccessful attempt to remove this case to federal court, AT&T moved to compel arbitration. (Ex. 6)<sup>8</sup> AT&T initially sought to compel arbitration under Shorts’s 2005 Cingular Wireless contract (which was not the subject of Palisades suit) and a 2006 arbitration provision (which Shorts never agreed to and which did not exist until after Palisades sued Shorts). *Id.*; (Ex. 7)<sup>9</sup> Strikingly, AT&T then re-wrote its arbitration provisions in 2009 and filed a renewed motion based on those provisions before the ink was dry. Even though the 2009 provision did not exist until six years after AT&T terminated Shorts’s wireless contract, three years after Palisades sued Shorts in magistrate court, and more than a year after AT&T filed its original motion to compel arbitration, AT&T claims that this new, sanitized provision is somehow applicable to this dispute regarding Shorts’s 2003 wireless contract. (Ex. 8)<sup>10</sup>

Because forcing Shorts to individually arbitrate her counterclaims would countermand Dunlap’s clear directive, and effectively deny to Shorts and similarly-situated West Virginia consumers important civil remedies, the circuit court correctly denied AT&T’s motion to compel

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<sup>6</sup> Ex. 4 – Shorts’s original Answer and Counterclaim (citing W.Va. Code §§ 46A-1-101, et al.)

<sup>7</sup> Ex. 5 – Shorts’s Amended Answer and Counterclaim.

<sup>8</sup> Ex. 6 – AT&T’s Motion to Compel Arbitration, filed April 14, 2008.

<sup>9</sup> Ex. 7 – AT&T Mobility 2006 Arbitration Provision.

<sup>10</sup> Ex. 8 – AT&T Mobility 2009 Arbitration Provision.

arbitration, concluding that AT&T's arbitration provisions are unconscionable and unenforceable under West Virginia law. See Mem. Order (Ex. 9)<sup>11</sup> AT&T's Petition for a writ of prohibition followed.

Notably, after the briefing below but before the submission of proposed findings and conclusions, the AAA announced a moratorium on conducting the very type of arbitrations at issue here. (Ex. 10)<sup>12</sup> Thus, an additional basis for denying AT&T's Petition is that the relief sought appears to be unavailable, although the fact record has not been fully developed or resolved, in the first instance, by the circuit court.

#### ISSUES RAISED BY THE PETITION

1. Rather than determining the enforceability of an arbitration clause by examining the actual agreement between the parties, should a court permit a corporate party to unilaterally modify arbitration clauses in contracts of adhesion after litigation begins and even after a motion to compel arbitration is filed?
2. Are exculpatory provisions in an arbitration clause unconscionable, as stated in Dunlap, if they are designed to prohibit or substantially limit a person from vindicating rights and obtaining remedies that are afforded by the laws of this State for the benefit and protection of the public?

#### STANDARD OF REVIEW

A writ of prohibition against a circuit court is a drastic and extraordinary remedy, afforded by this Court only in "really extraordinary causes." State ex rel. United States Fid. & Guar. Co. v. Canady, 194 W. Va. 431, 436, 460 S.E.2d 677 (1995) (internal citations omitted). See also State ex rel. Thrasher Eng'g, Inc. v. Fox, 218 W. Va. 134, 138, 624 S.E.2d 481 (2005)

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<sup>11</sup> **Ex. 9** – Memorandum Order Denying AT&T's Motion to Compel Arbitration, dated Dec. 1, 2009 entered in Palisades v. Shorts, Brooke County Civil Action No. 06-C-127.

<sup>12</sup> **Ex. 10** – American Arbitration Association Moratorium on Consumer Debt Collection Actions (announcing moratorium on administration of consumer debt-collection actions involving telecom bills "effective immediately"); <http://www.adr.org/sp.asp?id=36427>.

(“writs of prohibition . . . provide a drastic remedy to be invoked only in extraordinary situations”). The standard for obtaining relief from a circuit court order by means of a writ of prohibition is well-established. In syllabus point one of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979), this Court held that it will use prohibition only to correct “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate.” In McGraw v. Am. Tobacco Co., 216 W.Va. 766, 681 S.E.2d 96, 107 (2009), this Court specifically applied this heightened standard to petitions challenging a ruling on a motion to compel arbitration: “this Court will preclude enforcement of a circuit court’s order compelling arbitration only after a de novo review of the circuit court’s legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.” As the petitioner, AT&T bears this heavy burden to demonstrate—by substantial, clear cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate—its right to the relief it requests. See State ex rel. Rose L. v. Pancake, 209 W. Va. 188, 191, 544 S.E.2d 403 (2001). This AT&T cannot do.

## ARGUMENT

### **I. A Writ Of Prohibition Is Inappropriate Because The Circuit Court Followed The Well-Reasoned Mandate of *Dunlap***

AT&T cannot demonstrate a clear-cut error of law. The circuit court strictly adhered to the legal mandate of Dunlap and well-established West Virginia law on unconscionability, and on that basis alone denied AT&T’s motion. See Mem. Order at 8. (“[T]he Court cannot rule in favor of arbitration without contravening the law set forth in Dunlap.”). Although AT&T apparently has convinced a federal court in this State that “Dunlap is preempted by the [Federal

Arbitration Act],” see e.g., Schultz v. AT&T Wireless Servs., 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005), this Court and Judge Wilson are not bound by federal trial court decisions. Also, numerous federal courts assessing the enforceability of the arbitration provisions in AT&T’s contracts have concluded that these provisions are unconscionable for the same reasons this Court reached that conclusion in Dunlap.

For example in Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 U.S. Dist. LEXIS 103712, \*31-34 (S.D. Cal. Aug. 11, 2008), the court concluded that AT&T’s 2006 arbitration provision does not adequately substitute for the deterrent effect of the class action mechanism, because it would allow AT&T to avoid the potential liability accruing from the thousands of customers who are unaware of any alleged wrongdoing. Id. at \*38-43. Similarly, in Hall v. AT&T Mobility LLC, 608 F. Supp. 2d 592 (D. N.J. 2009), the District of New Jersey addressed the same ETF charges at issue in this case, rejected AT&T’s arguments regarding its self-characterized “consumer-friendly” Premium and Attorney Premium, and found AT&T’s class-action ban unconscionable and unenforceable. Again, in Coneff v. AT&T Corp., 620 F.Supp.2d 1248, 1258 (W.D. Wash. 2009), the Western District of Washington carefully examined AT&T’s allegedly unique and “pro-consumer” provisions and found that AT&T’s class-action ban was substantively unconscionable and unenforceable.

Indeed, AT&T’s early termination fee, which is the crux of Shorts’s claim here, was until recently the subject of a nationwide class action in federal court in New Jersey. Hall v. AT&T Mobility, LLC, Civil Action No. 2:07-cv-5325 (JLL), 608 F. Supp. 2d 592 (D. N.J. 2009). The court in that case denied AT&T’s motion to compel arbitration and certified the class. Id. at 604;

(Ex. 11)<sup>13</sup> While the motion at issue here was pending, AT&T settled with the nationwide class and carved out from its release the claims pending here under the West Virginia Consumer Credit Protection Act. (Ex. 12)<sup>14</sup>

It is not just AT&T's arbitration provisions that have been widely struck down. Since this Court's decision in Dunlap, the law across the country has trended in that direction. The Dunlap decision was a path-breaking decision, among the first of many to reject class-action bans and other exculpatory provisions disguised as arbitration provisions in consumer contracts. Indeed, since Dunlap, class-action bans embedded in arbitration provisions have been repeatedly struck down by courts in states across the country, including Alabama,<sup>15</sup> Arizona,<sup>16</sup> California,<sup>17</sup>

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<sup>13</sup> Ex. 11 - Order Certifying Proposed Settlement Class, Docket Entry No. 437 (Jan. 15, 2010) and Preliminary Approval of Settlement, Docket Entry No. 421 (Nov. 5, 2009) in Civil Action No. 2:07-CV-5325 (JLL) (D. N.J.).

<sup>14</sup> Ex. 12 - Stipulation and Settlement Agreement, Docket Entry No. 355-3 (Sept. 15, 2009) in Civil Action No. 2:07-cv-5325 (JLL) (D. N.J.).

<sup>15</sup> See Leonard v. Terminix Int'l Co., 854 So.2d 529, 539 (Ala. 2002) (class-action ban unconscionable under Alabama law where it forecloses plaintiffs from seeking practical redress through a class action and "restrict[s] them to a disproportionately expensive individual arbitration").

<sup>16</sup> See Cooper v. QC Financial Services, Inc., 503 F. Supp. 2d 1266 (D. Ariz. 2007) (class-action ban unconscionable under Arizona law even with the availability of attorneys' fees and the possibility of administrative enforcement).

<sup>17</sup> AT&T Mobility II v. Pestano, No. C 07-05463 WHA, 2008 U.S. Dist. LEXIS 23135 (N.D. Cal. Mar. 7, 2008); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1165 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003).

Florida,<sup>18</sup> Georgia,<sup>19</sup> Massachusetts,<sup>20</sup> Michigan,<sup>21</sup> Missouri,<sup>22</sup> New Mexico,<sup>23</sup> North Carolina,<sup>24</sup> New Jersey,<sup>25</sup> Ohio,<sup>26</sup> Oregon,<sup>27</sup> Pennsylvania,<sup>28</sup> Washington,<sup>29</sup> and Wisconsin.<sup>30</sup> Furthermore,

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<sup>18</sup> See Rollins, Inc. v. Garrett, 176 Fed. Appx. 968 (11th Cir. Fla. 2006) (per curiam) (recognizing that exculpatory class-action bans are invalid under Florida law); S.D.S. Autos, Inc. v. Chrzanowski, et al., 976 So.2d 600, at \*3 (Fla. Ct. App. 2007) (class-action ban unconscionable because it “deprive[s] the plaintiff of the ability to obtain meaningful relief for alleged statutory violations”); Powertel v. Bexley, 743 So.2d 570, 576 (Fla. Ct. App. 1999) (defendant’s class-action ban “precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone”).

<sup>19</sup> See Dale v. Comcast Corp., 498 F.3d 1216 (11th Cir. Ga. 2007) (finding under Georgia law that “class action waiver is unconscionable to the extent it prohibits the subscribers from bringing a class action alleging state law claims based on a violation of the Cable Act’s franchise fee provisions”).

<sup>20</sup> See Skirchak v. Dynamics Research Corp., 432 F. Supp. 2d 175, 181 (D. Mass.), aff’d, 2007 WL 4098832 (1st Cir. Nov. 19, 2007) (class-action ban unconscionable under Massachusetts law “because it may effectively prevent[] employees from seeking redress of [statutory] violations” and “removes any incentive for [the employer] to avoid the type of conduct that might lead to class litigation in the first instance”); Kristian v. Comcast Corp., 446 F.3d 25, 64-65 (1st Cir. Mass. 2006).

<sup>21</sup> See Wong v. T-Mobile U.S.A., No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (class-action ban unenforceable under Michigan law because “the right to a class action. . . is certainly necessary for the effective vindication of statutory rights, at least under the facts of this case. Defendant makes much of the fact that it contributes toward plaintiffs’ arbitration costs, but in order for arbitration to be feasible, the amount at issue must also exceed the value in time and energy required to arbitrate a claim.”); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (class-action ban unenforceable where it impermissibly waived remedies normally available under consumer protection statutes).

<sup>22</sup> See Doerhoff v. General Growth Properties, Inc., No. 06-04099-cv-C-SOW, 2006 WL 3210502 (W.D. Mo. Nov. 6, 2006) (class-action ban unconscionable under Missouri law); Whitney v. Alltel Communs., Inc., 173 S.W.3d 300, 313-14 (Mo. Ct. App. 2005) (wireless company’s class-action ban substantively unconscionable because it would effectively strip consumers with small claims of remedies and insulate the corporation from liability).

<sup>23</sup> Fiser v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008) (finding “a prohibition on class actions has nothing to do with a valid agreement to arbitrate” under New Mexico law)

<sup>24</sup> See Tillman v. Commer. Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008) (citing Dunlap and finding arbitration clause with class-action ban “simply does not allow for meaningful redress of grievances and therefore . . . must be held unenforceable” under North Carolina law).

<sup>25</sup> Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88 (N.J. 2006) (class arbitration ban unenforceable under New Jersey law).

the holdings of Dunlap that AT&T seeks to question—that enforceability under state contract law is a threshold question of law for the court and that Dunlap is not preempted by the FAA—were reaffirmed just last Fall in State ex rel. Clites v. Clawges, 224 W.Va. 299, 685 S.E.2d 693, 699 (2009) (“the issue of whether an arbitration agreement is a valid contract is a matter of state contract law and capable of state judicial review . . . state court rules of appellate jurisdiction and procedure are not preempted by the Federal Arbitration Act.”).

AT&T seeks to paint a different picture. AT&T portrayed the Dunlap decision to the circuit court as an outlier whose outcome turned on its particular facts. Shepardizing the case, however, debunks this characterization. Dunlap has been cited in 59 opinions from 31 jurisdictions, yet it has been criticized only twice. It has been cited favorably by the First Circuit, by federal district courts in Arizona, California, Washington, and Florida, and by the supreme courts of California, Illinois, New Mexico, Washington, and Wisconsin.

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<sup>26</sup> See Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at \*5 (Ohio Ct. App. June 29, 2006) (class-action ban unconscionable under Ohio law because “[b]y prohibiting its customers from filing suit as a class, Alltel prevents the cost effective use of class action litigation that can end abusive practices by large corporations in those instances in which individual claims are ineffective”).

<sup>27</sup> See Beneficial v. Vasquez-Lopez, 152 P.3d 940, 951 (Or. Ct. App. 2007) (class-action ban unconscionable because it gave the defendant “a virtual license to commit, with impunity, millions of dollars’ worth of small-scale fraud”).

<sup>28</sup> See Thibodeau v. Comcast Corp., 912 A.2d 874, 886 (Pa. Super. Ct. 2006) (class-action ban unconscionable under Pennsylvania law, because, if enforced, the defendant would be “immunized from the challenges brought by [the plaintiff], brought by any class member, or effectively from any minor consumer claims”).

<sup>29</sup> Luna v. Household Finance Corporation III, 236 F. Supp. 2d 1166 (W.D. Wash. 2002) (finding under Washington law “the prohibition on class actions allows the Arbitration Rider to be ‘used as a sword to strike down access to justice instead of a shield against prohibitive costs.’”) (quoting Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594 (Wash. App. 2002)).

<sup>30</sup> See Coady v. Cross Country Bank, 729 N.W.2d 732, 748 (Wis. 2007) (class-action ban unconscionable under Wisconsin law because it “unduly restricted] [the plaintiffs’] remedies and [was] unreasonably favorable to [the defendant]”).

In Feeney v. Dell Inc., 908 N.E.2d 753 (Mass. 2009), the Supreme Judicial Court of Massachusetts recently issued a decision embracing Dunlap in virtually all of its particulars, holding that class action bans in consumer contracts violated a fundamental public policy of the Commonwealth, and that the FAA did not preempt the conclusion that a class-action ban violated public policy and so were unenforceable. (citing Dunlap at 202, 763). Moreover, as recently as this month, federal courts have considered whether anything in the federal FAA jurisprudence would prevent upholding the now-commonplace decisions that AT&T's arbitration provisions are unconscionable under state law and found that nothing does.<sup>31</sup>

In short, there is nothing approaching a clear-cut legal error here. Judge Wilson followed the law of Dunlap that has been embraced by this Court and courts around the country including multiple courts of last resort. Neither AT&T's argument nor the current judicial landscape gives the Court any reason to second-guess itself.

## **II. The Court Should Disregard AT&T's Post Hoc Revisions To Its Arbitration Clause**

The inquiry in this matter should be limited to a review of the contract that Shorts agreed to. It would be fundamentally unfair to allow any party to unilaterally re-write a contract of any type for the purposes of litigation.<sup>32</sup> And there is no merit to AT&T's argument that Shorts has agreed or must agree to any such modification that AT&T proposes. Whether a contract is

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<sup>31</sup> McArdle v. AT&T Mobility LLC, No. C 09-1117 CW, 2010 WL 1875812, (N.D. Cal. May 10, 2010) (expressly rejecting the contention that the Supreme Court's decision in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., \_\_\_ U.S. \_\_\_, No. 08-1198, 2010 WL 1655826 (Apr. 27, 2010) undermines precedent voiding AT&T unconscionable arbitration provisions); see also Carlsen v. Freedom Debt Relief, LLC, No. CV-09-55-LRS, 2010 WL 1286616, (E.D. Wa. Mar. 26, 2010) (holding class action bans unconscionable under the state law of contracts).

<sup>32</sup> See e.g. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., \_\_\_ U.S. \_\_\_, No. 08-1198, 2010 WL 1655826 (Apr. 27, 2010) (holding that arbitration under the FAA is strictly limited to what both parties consented to and rejecting the rights of courts, arbitrators or parties to add or modify the procedures of arbitration without an agreement by the parties to be charged).

unconscionable is determined “at the time it was made.” W. Va. Code § 46A-2-121; Arnold v. United Cos. Lending Corp., 204 W. Va. 229, 511 S.E.2d 854, 859-60 (1998). In no way, shape, or form does this test leave wiggle room for AT&T to resuscitate its unconscionable arbitration clause with after-the-fact revisions.

The alternative rule that AT&T proposes—that it can unilaterally alter contracts to suit its interests in ongoing litigation—would leave the law of contracts as a whole in ruins. Such a rule is contrary to the WVCCPA, to contract law in general and to black letter West Virginia law regarding the time at which unconscionability is determined. Most importantly, as the United States Supreme Court held this year, “arbitration is a matter of consent, not coercion.”<sup>33</sup> The U.S. Supreme Court in Stolt-Nielsen made it perfectly clear that any attempt by a party, by an arbitrator or by a court to take the scope of an arbitration beyond what the parties actually agreed to is void as a matter of law: “it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”<sup>34</sup> Since there is not even a colorable argument that Shorts agreed to AT&T’s revised (and then revised again) arbitration provisions, Stolt-Nielsen compels rejection of AT&T’s ever-changing positions in this proceeding.

Further, AT&T’s claimed power of unilateral revision would lead unfalteringly to absurd results. If AT&T can rely on the 2009 version of its arbitration procedures merely because it offered them to Shorts in 2009 (after filing its first motion to compel arbitration), what is to stop AT&T from modifying its provisions again after this Court rules and then subsequently moving to compel arbitration again under its 2010 or 2011 procedures? This Court rejected this type of

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<sup>33</sup> Stolt-Nielsen, *supra* at \*11.

<sup>34</sup> Id. at \*13 (emphasis in original).

maneuvering in Dunlap: “We think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.” 567 S.E.2d at 283-84.

Other courts agree. In a similar action in the Circuit Court of Ohio County, AT&T presented the trial court with the same argument—namely, that it should consider unilaterally-revised arbitration procedures that AT&T had made available to the plaintiff. Citing Dunlap, the court disagreed: “AT&T’s position that its current arbitration provision will be made available to all current and former customers, such as the plaintiff, does not impact this ruling as the Court believes the arbitration provision within the four corners of the service agreements in effect is controlling.” Paetzold v. Palisades Collections, LLC and AT&T Mobility, LLC, Ohio County Civil Action No. 07-C-272 (W. Va. Cir. Ct., Dec. 26, 2007) (Recht, J.) (**Ex. 12**)<sup>35</sup> AT&T also lost this argument before the Illinois Supreme Court in Kinkel v. Cingular Wireless, LLC, 857 N.E.2d 250 (Ill. 2006). There, the court ruled that “a defendant’s after-the-fact offer to pay the costs of arbitration should not be allowed to preclude consideration of whether the original arbitration clause is unconscionable.” Id. at 259.

Similarly, in Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 676 (6th Cir. 2003), the court held that “reviewing courts should not consider after-the-fact offers by employers to pay the plaintiff’s share of the arbitration costs where the agreement itself provides that the plaintiff is liable, at least potentially, for arbitration fees and costs.” And in Murray v. United Food & Commercial Workers Int’l Union, 289 F.3d 297, 304 (4th Cir. 2002), the court concluded, “[t]he arbitration agreement is unenforceable as written and [the defendant] may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that

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<sup>35</sup> **Ex. 13** – Memorandum Order dated December 26, 2007 entered in Paetzold, Ohio County Civil Action No. 07-C-272

it is an acceptable one.” See also Tillman v. Commer. Credit Loans, Inc., 655 S.E.2d 362, 372 (N.C. 2008) (“[I]t is inappropriate to rewrite an illegal or unconscionable contract . . . [B]ecause the underlying concern is whether individuals, upon reading an arbitration agreement, will be deterred from bringing a claim, courts must consider the agreement as drafted.”).

Even if the Court were to consider AT&T’s revised arbitration provisions, they are unconscionable too. The circuit court stated that this conclusion is irresistible. See Mem. Order at 8 (Ex. 9). Many courts agree. See Paetzold v. Palisades Collections, (Ex. 12); Steiner v. Apple Computer, Inc., 556 F. Supp. 2d 1016 (N.D. Cal. 2008) (allegedly consumer-friendly arbitration provision is illusory, unconscionable); Laster v. T-Mobile USA, Inc., 2008 U.S. Dist. LEXIS 103712, \*31-34, \*38-43 (S.D. Cal. Aug. 11, 2008) (class-action ban unconscionable because it would allow AT&T to avoid the potential liability accruing from the thousands of customers who are unaware of any alleged wrongdoing); Hall v. AT&T Mobility LLC, 608 F. Supp. 2d 592, 603-04 (D.N.J. 2009) (“At the end of the day, as conceivably consumer-friendly as the provisions may be, it does not induce individuals to bring suit and it still operates to immunize ATTM from claims that would be suitable for class action resolution.”); Coneff v. AT&T Corp., 620 F.Supp.2d 1248, 1258-59 (W.D. Wash. 2009) (finding “tangible evidence which reveals that [AT&T’s] ‘pro-consumer’ provisions are not having their intended effect. . . . [F]ewer than 200 consumer arbitrations involving Defendants have been conducted nationwide . . . . To place this in perspective, it is worthwhile to reiterate that Defendants’ client base is currently over 70 million customers. Therefore the actual percentage of customers utilizing Defendants’ allegedly ‘pro-consumer’ provisions represents an infinitesimal amount. . . . Defendants are utilizing the provisions . . . to effectively exculpate themselves from any potential liability . . . .”).

### **III. The Arbitration Clause In Shorts's Contract With AT&T Is Unconscionable**

As to the contracts to which Shorts agreed—both the 2003 AT&T Wireless contract and the 2005 Cingular Wireless contract—the arbitration clause in each is unconscionable.<sup>36</sup> The Supreme Court of Appeals, in the second syllabus point in Dunlap, provides the rule that disposes of AT&T's position:

Exculpatory provisions in a contract of adhesion that if applied 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 are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

567 S.E.2d 265. Further, as Dunlap instructs, “exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved.” Id. at 274. The exculpatory provisions in AT&T's arbitration clause cannot withstand such scrutiny. This clearly applicable syllabus point of Dunlap does not single out arbitration agreements, but is rather a contract-law point of general application in West Virginia.

#### **A. AT&T Concedes That Its Agreement With Shorts Is A Contract Of Adhesion**

AT&T does not contest the first prong of the analysis under Dunlap. Under West Virginia law, form contracts and standardized contracts offered on a take-it-or-leave-it basis are adhesion contracts by definition. Dunlap, 567 S.E.2d at 273-274; Saylor v. Wilkes, 216 W.Va. 766, 613 S.E.2d 914, 921 (2002). The contract at issue here is, by its very nature, an adhesion

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<sup>36</sup> As to the 2003 AT&T Wireless contract, AT&T hasn't even attempted to defend its terms either here or before the circuit court. Thus, the 2005 Cingular Wireless contract will be the focus of this section. Shorts maintains that her 2005 contract with Cingular did not contemplate or replace her 2003 contract with AT&T Wireless, but the difference between the arbitration provisions of those contracts are not significant with respect to the issues briefed here.

contract. It is a standardized, pre-printed form contract. There are no individualized terms relating to Shorts or any other individual consumers. AT&T did not offer Shorts an opportunity to negotiate the terms of the agreements. It simply presents its customers with a non-negotiable, take-it-or-leave-it standardized contract, which AT&T alone drafted, forcing customers who do not accept the terms to cancel service. **Ex. 2** at 21.

Despite the fact that AT&T's agreements have all the hallmarks of classic contracts of adhesion, AT&T argues that Shorts failed to establish the existence of a "gross inadequacy in bargaining power." This argument misses the mark. As Dunlap explains, there is no bargaining power when it comes to contracts of adhesion, because "[o]ne of the purposes of standardization is to eliminate bargaining over details of individual transactions." 567 S.E. 2d at 558 (emphasis added).

Moreover, Defendant AT&T Mobility is an arm of "the largest communications holding company in the world," which has over 85 million customers nationwide and revenue in 2009 of \$123 billion.<sup>37</sup> Shorts is an individual who couldn't pay her cell phone bill. The disparity in bargaining power is evident.

**B. AT&T Concedes That Its Agreement With Shorts Contains Exculpatory Provisions**

As with the arbitration clause at issue in Dunlap, AT&T's arbitration clause here contains the kinds of exculpatory provisions that prohibit or substantially limit the plaintiff's ability to vindicate her rights and obtain the remedies she is entitled to under state law. In fact, the exculpatory provisions here are largely the same provisions that the Court deemed

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<sup>37</sup> See <http://www.att.com/gen/investor-relations?pid=5711> at "Key Facts" tab. "AT&T currently ranks 8th among the 2009 Fortune 500 and 29th among the 2008 Global Fortune 500." Id. at "Overview" tab.

unconscionable there: a class-action ban, a restriction on attorneys' fees, and a restriction on punitive damages. Each is addressed here in turn.

1. **The Ban On Class Actions Renders The Arbitration Clause Unconscionable**

Adhesion contracts that ban consumer class actions via an arbitration clause are unconscionable. The Supreme Court of Appeals in Dunlap said so expressly. 567 S.E.2d at 278-80. The Court explained:

Class action relief—including the remedies of damages, rescission, restitution, penalties, and injunction—is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases. In McFoy v. Amerigas, Inc., 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982), this Court stated that: “[i]n general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers....”

Id. at 278.

Class-action relief is often necessary to permit the adequate vindication of consumer rights. Frequently, individual consumer claims are so small that consumers will have no realistic remedy—no economically viable option of pursuing their rights—unless it is possible for them to proceed on a class-action basis. Such were the circumstances in Dunlap, and so they are here. Moreover, as the Dunlap court pointed out, permitting enterprises to immunize themselves from consumer class actions with contracts of adhesion “would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable.” Id. at 278-79.

In CitiFinancial v. Lightner, Marshall County Civil Action No. 02-C-273 (W.Va. Cir. Ct., Oct. 27, 2006)<sup>38</sup>, Judge Madden applied Dunlap and denied a similar motion to compel arbitration, explaining: “[w]hen an arbitration provision bars a class action, it is unconscionable and therefore unenforceable in this contract, that this Court finds to be one of adhesion.” Id. at 3.

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<sup>38</sup> **Ex. 14** – Memorandum Order dated October 27, 2006 entered in Lightner, Marshall County Civil Action No. 02-C-273, included within the Appendix

Similarly, in Cummins v. H&R Block, Inc., Kanawha County Civil Action No. 03-C-134, 2004 WL 5362608, \*6 (June 15 2004), Judge Bloom struck down an arbitration provision, because “The fact that the provisions preclude plaintiff’s ability to participate in a class action unless the defendants decide to not force arbitration results in a situation, similar to that in Dunlap, where consumers are not able to effectively pursue their state law rights.”

AT&T’s arbitration provision has not fared much better outside of West Virginia. In Shroyer v. New Cingular Wireless Serv. Inc., 498 F. 3d 976, 1025 (9th Cir. 2007), the Ninth Circuit Court of Appeals, cited the principles articulated in Dunlap and found that “AT&T’s class arbitration waiver is both procedurally and substantively unconscionable, and cannot be enforced.”

In Kinkel v. Cingular Wireless, L.L.C., 857 N.E.2d 250, 272-73 (Ill. 2006), the Supreme Court of Illinois similarly cited Dunlap in rejecting AT&T’s class-action ban, explaining that Cingular/AT&T

seeks to insulate itself from liability to a potential class of customers by enforcing a class action waiver in its standard service agreement. We find that under the circumstances of this case, the class action waiver is unconscionable and unenforceable. These circumstances include a contract of adhesion that requires the customer to arbitrate all claims, but does not reveal the cost of arbitration, and contains a liquidated damages clause that allegedly operates as an illegal penalty. These provisions operate together to create a situation where the cost of vindicating the claim is so high that the plaintiff’s only reasonable, cost-effective means of obtaining a complete remedy is as either the representative or a member of a class.

Id. at 274-75.

In Riensch v. Cingular Wireless LLC, No. C06-1325Z, 2006 U.S. Dist. LEXIS 93747 (W.D. Wash. Dec. 27, 2006), the Western District of Washington also struck down a near-identical predecessor to the class-action ban at issue here, commenting that

The class action waiver prohibition effectively prevents consumers from seeking redress whenever the monetary value of the claim is so small that it is not worth the time or money to pursue in small claims court or arbitration, while allowing Cingular to allegedly “cheat large numbers of consumers out of individually small sums of money.” Even though Cingular agrees to pay the fees and costs of arbitration, the class action prohibition “serves as a disincentive . . . to avoid the type of conduct that might lead to class action litigation.”

Id. at \*38-39. See also Scott v. Cingular Wireless, 161 P.3d 1000, 1008 (Wash. 2007) (holding arbitration clause unenforceable due to class-action ban as well as other unconscionable provisions, and noting that “[t]he FAA favors arbitration, not exculpation”).

Several other courts in Alabama, Arizona, California, Florida, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin have similarly refused to permit sophisticated corporate parties, such as AT&T, to immunize themselves from consumer class actions via class-action bans in arbitration provisions.<sup>39</sup>

AT&T attempts to distinguish Dunlap and this entire line of case law by arguing that Shorts is not asserting a low-dollar claim, as if it believes that the economics of West Virginia’s approximate \$4,000 statutory penalty is sufficient incentive for its customers and their lawyers to take on the largest communications company in the world. It is not, as empirical data demonstrates. See Coneff v. AT&T Corp., 620 F.Supp.2d 1248, 1258-59 (W.D. Wash. 2009) (“[S]ince 2003, fewer than 200 consumer arbitrations involving [AT&T] have been conducted nationwide . . . . [AT&T’s] client base is currently over 70 million customers.”).

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<sup>39</sup> See Footnotes 13-28, supra

This case is a textbook example of a small dollar class action claim. The fact that civil penalties of up to \$4,183 are available to Shorts changes nothing. Indeed, the same penalties were available in both Dunlap and Lightner.<sup>40</sup>

In reality, it is the class-action ban, not the forum, that is the focal point and perhaps the purpose of AT&T's arbitration provisions here. AT&T's agreement illustrates this by voiding the arbitration provisions entirely if a court concludes that the class-action ban is unenforceable.

You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Ex. 3, at 4. But because Dunlap instructs that “[c]lass action relief [is] essential to the enforcement and effective vindication of public purposes and protections underlying the law,”

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<sup>40</sup> It likewise changes nothing that a few of the smaller cell phone services, do not require arbitration or ban class actions. Under Dunlap, the Court is not required to consider alternatives when it is confronted with a contract of adhesion involving consumer transactions. And consumers certainly cannot be expected to compare arbitration provisions when choosing a product. See Dunlap, 567 S.E.2d at n.2 (“the pre-printed parts of the document would probably be seen by the average person as legal gobbledygook. Our discussion infra regarding such contracts of adhesion shows that it makes little difference whether they are in fact comprehensible-because people simply don't read them.”). Even if the court were inclined to consider AT&T's meaningful alternative argument, AT&T does not cite to the contracts of its competitors Verizon, Sprint, T-Mobile and Alltel. Instead, it relies on a 2008 Virgin Mobile contract, a 2005 TracFone contract and a 2005 STi Mobile contract; all of which are at least two years after the date that Shorts's service was terminated and she was charged the early termination fee. And none of these providers have store fronts in the Ohio Valley and, perhaps, no sales presence at all. Furthermore, the meaningful alternative factor is tied to bargaining power: “Since Art's Flower Shop had no meaningful alternative to purchasing the advertisement from C & P, it obviously was in no position to bargain for the contract.” Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co., 186 W.Va. 613, 618, 413 S.E.2d 670 (1991). These alternatives, if they existed in the Ohio Valley in late 2002 or early 2003, fall woefully short of providing Shorts with any degree of bargaining power over AT&T.

AT&T's attempt to ban class actions is unconscionable as a matter of law. *Id.* at 279. By the terms of the contract, the unenforceability of the class-action ban voids the arbitration clause. As was the case in *Dunlap*, “[i]t is not just that [AT&T] wants to litigate in the forum of its choice—arbitration; it is that [AT&T] wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable.” *Id.* at 284-85.

This by itself compels rejection of AT&T's petition for writ of prohibition. But there are additional reasons to deny AT&T's petition.

2. **The Restriction On Attorneys Fees Renders The Arbitration Clause Unconscionable**

The *Dunlap* Court explicitly stated, “Provisions in a contract of adhesion that would operate to restrict the availability of an award of attorneys’ fees to less than that provided for in applicable law would, under our decision today, be presumptively unconscionable.” *Id.* at 283 n.15. That presumption arises here. West Virginia Code § 46A-5-104 provides for fee shifting when a consumer brings a successful claim under the Consumer Protection Act, stating that, in such a case, “[t]he court may award all or a portion of the cost of litigation, including reasonable attorney fees, court costs and fees, to the consumer.” W.Va. Code § 46A-5-104. In contrast, AT&T's arbitration provision provides that only “[i]f the arbitrator grants relief to you that is equal to or greater than the value of your Demand, Cingular shall reimburse you for your reasonable attorneys’ fees and expenses incurred in arbitration.” *Ex. 3*, at 4. The Consumer Protection Act has no such requirement for recovering attorneys’ fees. Under *Dunlap*, these restrictions on remedies are presumptively unconscionable, and AT&T has offered nothing with which to overcome the presumption.

3. **The Restriction On Punitive Damages Renders The Arbitration Clause Unconscionable**

Dunlap says that arbitration provisions in adhesion contracts that prohibit a consumer from seeking punitive or penalty damages are unconscionable and unenforceable. 567 S.E.2d at 278. The Court first recognized that:

It is axiomatic that when consumers, employees, etc. are the victims of illegal willfully and wantonly wrongful, and/or fraudulent misconduct, the social remedy of *punitive and penalty damages* may be a powerful tool—for the benefit of the plaintiff and for the benefit of society in general—to punish the wrongdoer and to deter the commission of similar offenses in the future.”

Id. (emphasis added) (quoting Burgess v. Porterfield, 196 W. Va. 178, 182, 469 S.E.2d 114-118 (1996)). The Dunlap Court went on to find that a “no punitive damages” limitation deprives the consumer of important rights:

In the instant case, the intended effect of the “no punitive damages” provision . . . is that every Friedman’s customer is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct—and that Friedman’s would be categorically shielded from any liability for such sanctions, regardless of Friedman’s level of wrongdoing.

Id.

Here, as in Dunlap, Shorts’s claims include a request for statutory penalty damages. W. Va. Code § 46A-5-101 authorizes statutory penalty damages of \$100 to \$1,000 for each violation of the Consumer Protection Act. Consumers are further allowed a cancellation of their debts under W. Va. Code § 46A-5-105, which applies only to “willful violations” of the statute. These penalty damages are a form of punitive damages that go above and beyond actual damages and, as recognized by Dunlap, are designed to “to punish the wrongdoer and to deter the commission of similar offenses in the future.” 567 S.E. 2d at 278.

AT&T's arbitration provision clearly violates the rule stated in Dunlap. It provides: "Cingular shall not be liable for any . . . punitive . . . damages." Ex. 3, at 3.<sup>41</sup> Although AT&T argues that Shorts is not seeking punitive damages, this is simply misdirection. Shorts is seeking statutory penalties, which are a form of punitive damages. Dunlap recognized this when it included statutory penalty damages within its "no punitive damages" analysis. AT&T's ban on punitive damages runs afoul of this court's holding in Dunlap.

**IV. The Federal Arbitration Act Does Not Preempt Dunlap Or The Circuit Court's Ruling**

Nothing in the Federal Arbitration Act preempts West Virginia law on unconscionability. See Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Act]."). Indeed, the Act itself says that arbitration agreements may be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

AT&T, nevertheless, argues that "a broad interpretation of Dunlap—like that adopted by the circuit court—would run afoul of the FAA." AT&T further contends at page 27 that "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." AT&T is wrong on both counts.

The West Virginia Supreme Court of Appeals in Dunlap expressly rejected the same preemption argument that AT&T now makes here. First, the Dunlap decision explains that the Federal Arbitration Act does not preempt scrutiny of exculpatory provisions in contracts of adhesion:

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<sup>41</sup> See "Service Limitations; Limitation of Liability"

The Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied 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 from considering whether the provisions are unconscionable—merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration.

Syl. Pt. 3, Dunlap, 567 S.E.2d 265 (emphasis added). In other words, a class action waiver is not permitted in a contract of adhesion regardless of whether it is included in an arbitration provision. See id. at 280.

Second, Dunlap makes clear that its refusal to enforce unconscionable exculpatory provisions is not specific to arbitration provisions but equally applies to contracts in general:

We emphasize that the attempted avoidance of legally-required accountability for wrongdoing under the laws of West Virginia that Friedman’s has attempted to accomplish with exculpatory arbitration-related provisions in a contract of adhesion in the instant case would be just as objectionable and unconscionable if that attempted avoidance arose from language that made no mention of arbitration.

Id. at 285 n.17.

With this thorough understanding of federal preemption law, the Dunlap court concluded that “the prohibitions on punitive damages and class action relief that would be the result of the application of the provisions of Friedman’s purchase and finance agreement are clearly unconscionable.” Id. at 280. Thus, the unconscionability analysis set forth in Dunlap—like that of the circuit court—implicates only a general contract defense, which is expressly allowed by the Federal Arbitration Act.

Notwithstanding the clarity of the holding in Dunlap, AT&T has convinced two federal courts in this State that “the FAA preempts the holding in Dunlap” because it purportedly “places arbitration agreements on a different footing than other contracts.” See, e.g., Schultz v.

AT&T Wireless Servs., 376 F. Supp. 2d 685, 691 (N.D. W.Va. 2005) (“[T]his Court agrees with AT&T’s argument that Dunlap is preempted by the FAA.”); Strawn v. AT&T Mobility, Inc., 593 F. Supp. 2d 894 (S.D. W. Va. 2009) (“To the extent . . . 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.”).

But both of these federal decisions simply mis-analyze Dunlap, which based its reasoning on general contract law, not specific to arbitration provisions. Neither federal decision addressed the unconscionability analysis as this Court presented it in Dunlap—divorced from the arbitration clause altogether. In Dunlap, the Court concluded that class-action bans and restrictions on the award of attorney’s fees and punitive damages are unconscionable terms no matter where in a contract they may be located and regardless of the presence or absence of an arbitration clause. 526 S.E.2d at 279-80. This decision is precisely the kind of state law determination that 9 U.S.C. § 2 preserves, not the kind that it preempts.

Far more on point is the decision of the Supreme Court of Washington in McKee v. AT&T Corp., 191 P.3d 845 (Wash. 2008) which recently explained that unlawful exculpatory provisions cannot be immunized from scrutiny by burying them in an arbitration provision:

The [Federal Arbitration Act] requires that we place arbitration agreements on the same footing as other contracts. It does not require us to allow unconscionable restrictions on arbitration that are essentially exculpatory clauses in disguise. The [Federal Arbitration Act] does not require us to uphold a class action waiver merely because it is embedded in an arbitration agreement. Like any other contract, an arbitration agreement may be substantively unconscionable when it is used as a tool of oppression to prevent vindication of small but widespread claims.

Limiting consumers’ rights to open hearings, shortening statutes of limitations, limiting damages, and awarding attorney fees have absolutely nothing to do with resolving a dispute by arbitration. Courts will not be so easily deceived by the unilateral stripping away of protections and remedies merely because provisions

are disguised as arbitration clauses. The [Federal Arbitration Act] does not require enforcement of unconscionable contract provisions.

191 P.3d 845, 857 (Wash. 2008) (citations omitted); see also Shroyer v. New Cingular Wireless Services, 498 F.3d 976, 993 (9th Cir. 2007) (“We hold that applying California’s generally-applicable contract law to refuse enforcement of the unconscionable class action waiver in this case does not stand as an obstacle to the purposes or objectives of the Federal Arbitration Act, and is, therefore, not impliedly preempted.”); Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1260-61 (W.D. Wash. 2009) (finding that the Federal Arbitration Act “does not preempt Washington’s unconscionability law” as applied to class action waivers in wireless service agreements); Feeney v. Dell Inc., 908 N.E.2d 753 (Mass. 2009) (finding “a prohibition on class actions has nothing to do with a valid agreement to arbitrate”); Fiser v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008) (same).<sup>42</sup>

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<sup>42</sup> AT&T’s over-expansive interpretation of federal preemption is not only contrary to Dunlap, but is also contrary to President Obama’s directive to the heads of executive departments and agencies that there should be no preemption “without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” The President explained:

The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

**Ex. 15** - White House Memorandum the Heads of Executive Departments and Agencies, dated May 20, 2009 (Subject: Preemption).

At page 29 of its brief, AT&T attempts to make a last-ditch plea to escape from the umbrella of Dunlap by arguing that “to condition enforcement of arbitration provisions on the availability of the class-action device” is irreconcilable with a recent Supreme Court decision in Preston v. Ferrer, 552 U.S. 346 (2008). This strained interpretation of Preston has no merit. In Preston, the Supreme Court addressed the narrow issue of whether a state statute assigning primary jurisdiction to a state labor commission is superseded by the Federal Arbitration Act. Id. at 359. In holding that the statute was indeed preempted by the Act, the Court upheld the general principle in favor of arbitrating disputes. But Preston did not discuss or otherwise affect the more specific principle that “generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.” Doctor’s Assocs., 517 U.S. at 687. Preston has no application to this case.

Finally, at pages 31-32 of its brief, AT&T contends that applying Dunlap to require companies to permit class arbitration will mean that most companies will choose not to arbitrate at all. But AT&T was recently chastised in Shroyer v. New Cingular Wireless Servs., 498 F.3d 976 (9th Cir. 2007), for making this same argument:

As other courts have noted in rejecting [AT&T’s] conflict preemption argument, [AT&T] offers no authority or support for the main premise of its argument that the purposes and objectives of the Federal Arbitration Act encourage individual arbitration and disfavor class arbitration. . . . the FAA does not require state courts, when applying state law to a question of the enforceability of a particular contract, to necessarily reach an outcome that encourages individual arbitration.

Id. at 990.<sup>43</sup> The truth is that AT&T favors exculpation and immunity. Neither of these, however, is among the goals of the Federal Arbitration Act.

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<sup>43</sup> The Shroyer court also rejected AT&T’s argument that class proceedings will reduce the efficiency and expeditiousness of arbitration in general:

## CONCLUSION

The arbitration provisions that AT&T seeks to enforce are unconscionable and unenforceable. Dunlap itself supplies the best summation of the nature of the question now before the Court:

This lawsuit is not about arbitration . . . . [Under the guise of requiring arbitration, the company] was actually rewriting substantially the legal landscape on which its customers must contend . . . . [The company] sought to shield itself from liability . . . by imposing Legal Remedies Provisions that eliminate class actions, sharply curtail damages in cases of misrepresentation, fraud, and other intentional torts, cloak the arbitration process with secrecy and place significant financial hurdles in the path of a potential litigant. It is not just that [the company] wants to litigate in the forum of its choice—arbitration; it is that [the company] wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable[.]

Dunlap, 567 S.E.2d at 284-85 (quoting Ting v. AT&T, 182 F. Supp. 2d 902, 938-939 (N.D. Cal. 2002)) (alterations in original). Shorts asks the court to deny AT&T's Petition for writ of prohibition.

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If anything, when millions of consumers (or hundreds of thousands, or even lesser numbers) seek compensation based on the same legal theories and factual allegations, a class arbitration proceeding is simpler, cheaper, and faster for both the consumers and the defendant company, particularly when one considers the enormous administrative costs and attorneys' fees that a company faces in defending an extremely large number of individual claims. Similarly, because the use of class proceedings will enable far greater numbers of individuals to take part in and benefit from arbitration, we conclude that class arbitrations further the FAA's purpose of encouraging alternative dispute resolution.

Shroyer, 498 F.3d at 990-91.

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**CERTIFICATE OF SERVICE**

Service of the foregoing **RESPONSE TO MOTION TO SHOW CAUSE** on the plaintiffs/petitioners was made via e-mail and/or by U.S. Mail this 1<sup>st</sup> day of June, 2010, as follows:

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