IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1649

CHARLENE A. SHORTS,

Petitioner,

v. On Petition for Appeal

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

Respondents.

BRIEF FOR RESPONDENTS AT&T MOBILITY LLC AND AT&T MOBILITY CORPORATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules and Regulations

Miscellaneous

Petitioner Charlene Shorts doesn't know when to give up. She already has lost once in this Court, unsuccessfully sought rehearing, lost on remand in the circuit court, again unsuccessfully sought reconsideration, and now is back in this Court recycling the same arguments that this Court and the circuit court have consistently rejected—all in an effort to avoid enforcement of an arbitration provision that the U.S. Supreme Court has said would leave her better off than she would be in a class action. It is time to put an end to this lawyer-driven litigation once and for all. The Court should affirm the circuit court's order without further ado.

STATEMENT OF THE CASE

A. The Circuit Court's 2009 Decision

In June 2006, Palisades Collection LLC brought an action against Shorts to recover on a debt that Shorts had owed to AT&T Wireless ("AWS"), a predecessor to respondent AT&T Mobility LLC ("ATTM"). In June 2007, Shorts was granted leave to file counterclaims against both Palisades and, as a third-party defendant, ATTM. A-17. The counterclaims sought relief on behalf of a putative class of similarly situated consumers. ATTM moved to compel Shorts to arbitrate her claims on an individual basis, explaining that in 2005 Shorts had entered into an agreement with ATTM predecessor Cingular Wireless LLC obligating her to do so.[1] ATTM also explained that in late 2006—before Shorts filed her counterclaims—ATTM had revised its arbitration provision to provide its customers with pathbreaking, consumer-friendly arbitration procedures and had made the features of the revised provision available to all current and former customers, including Shorts.[2] This very arbitration provision was subsequently lauded by the

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[1] Shorts' original agreement with AWS also required her to arbitrate her claims on an individual basis, but, as the circuit court found, the 2005 agreement with Cingular supersedes the 2003 agreement with AWS. A-139.

[2] Shorts misleadingly states that the amendments were drafted during "the litigation." Pet. Br. 2, 3, 12, 13. As indicated in text, although Palisades initiated the litigation against Shorts in

U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The key features of the 2006 provision—as slightly modified in 2009—include:

- **Cost-free arbitration**: For consumer claims of $75,000 or less, "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration, and arbitrator fees" unless the arbitrator determines that the claim is "frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";
- **$10,000 minimum award if arbitral award exceeds ATTM's last settlement offer**: If the arbitrator awards a customer more than ATTM's "last written settlement offer," ATTM must pay the customer $10,000 in lieu of any smaller arbitral award;[3]
- **Double attorneys' fees available**: If the arbitrator awards the customer more than ATTM's last written settlement offer, "[ATTM] will . . . pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert fees and costs) that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";
- **ATTM disclaims right to seek attorneys' fees**: "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in arbitration, [ATTM] agrees that it will not seek such an award [from the customer]";

June 2006, Shorts did not bring ATTM into the case until June 2007 (A-17)—well after ATTM had introduced its 2006 revised arbitration provision.

[3] In the 2006 version, the amount of the minimum award varied from state to state, because it was based on the jurisdictional maximum for the state's small claims court. In West Virginia, the original amount of the minimum award was $5,000.

- **Small claims court option**: Either party may bring a claim in small claims court;
- **No confidentiality requirement**: The customer and his or her attorney need not keep the arbitration demand or the arbitrator's decision confidential;
- **Full remedies available**: The arbitrator may award the consumer any form of individual relief (including punitive damages, statutory damages, attorneys' fees, and individualized injunctions) that a court could award;
- **Flexible consumer procedures**: Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Conveniently located hearing**: Arbitration will take place "in the county . . . of [the customer's] billing address";
- **Choice of in-person, telephonic, or no hearing**: For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator"; and
- **Right to a written decision**: "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."[4]

[4] The right to a written decision was not contained in the 2006 version. This and the change in the amount of the minimum payment noted above are the only material differences between the 2006 and 2009 versions of the arbitration provision.

In opposing ATTM's motion to compel arbitration, Shorts argued that, although ATTM may have made the 2006 and 2009 versions of its arbitration provision available to all current and former customers, her original arbitration agreement with AWS (and the 2005 agreement with Cingular) were unconscionable under West Virginia law.

The circuit court held that the 2006 and 2009 provisions—which outline the procedures under which Shorts' arbitration would actually be conducted—were the relevant ones for purposes of assessing Shorts' unconscionability challenge. A-139. The court then concluded, however, that based on its reading of *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), arbitration agreements that preclude class actions are per se unenforceable under West Virginia law. A-144.

B. This Court's 2010 Decision

ATTM sought a writ of prohibition from this Court, and—after full briefing and oral argument—this Court granted a moulded writ. In particular, this Court held:

- Under West Virginia law, arbitration agreements are not per se unenforceable merely because they require that arbitration proceed on an individual basis. *State ex rel. AT&T Mobility LLC v. Wilson*, 226 W. Va. 572, 580, 703 S.E.2d 543, 551 (2010) (per curiam) ("*Shorts I*").
- Shorts had failed to raise an objection to "the trial court's ruling that the 2005 agreement, along with the 2006 and 2009 modifications, are the controlling provisions with regard to arbitration." *Id.* at 576 n.9, 703 S.E.2d at 547 n.9.
- "Ms. Shorts' relief is not limited by the arbitration forum as she is entitled, under the provisions the trial court found to govern, to an award that provides for all

statutory and punitive relief that is available in a court." *Id.* at 580, 703 S.E.2d at 551.

The Court remanded the case to the circuit court for the limited purpose of "mak[ing] specific findings on the issue of unconscionability that comport with the tests for unconscionability established in *Art's Flower Shop*[, *Inc. v. Chesapeake & Potomac Telephone Co.*, 186 W. Va. 613, 413 S.E.2d 670 (1991)] and in *Dunlap*." *Shorts I*, 226 W. Va. at 580, 703 S.E.2d at 551.

Shorts sought reconsideration of the Court's determination that she had failed to properly preserve an objection to the circuit court's holding that the 2006 and 2009 revisions to ATTM's arbitration provision were controlling. *See* Resp. Pet. for Reh'g on Limited Issue of Counsel's Representation at Oral Arg. (Nov. 8, 2010). That request was denied. *See* Nov. 29, 2010 Order.

C. Proceedings On Remand

On remand, Shorts filed a "Motion to Reconsider Applicable Arbitration Provisions." The circuit court denied that motion, citing its previous holding that "[i]t is the 2005 arbitration agreement, with its consumer oriented revisions in December 2006 and March 2009, that the court finds to be the agreement that is the focus of the legal issue before the Court." A-3. The circuit court then held that ATTM's arbitration provision must be enforced. Following this Court's mandate, the court applied the *Art's Flower Shop* factors and held that ATTM's arbitration provision is enforceable as a matter of West Virginia law. It also recognized that in *Concepcion* the U.S. Supreme Court had held that the very version of ATTM's arbitration agreement involved here is enforceable as a matter of federal law. In short, the court concluded that ATTM's arbitration agreement did "not prevent Ms. Shorts from addressing her claims in arbitration and enforcing her rights." A-7. It therefore granted AT&T's motion to compel arbitration. *Id.*

Undeterred by this latest defeat, Shorts filed yet another "Motion to Clarify and Reconsider Order Compelling Arbitration," asking—among other things—that the circuit court abandon its prior determinations that the unconscionability challenge must focus on the 2006 and 2009 arbitration provisions. A-402. The court denied that motion as well. A-9.

Unwilling to accept reality, Shorts now appeals to this Court.

SUMMARY OF ARGUMENT

The arbitration provisions that the Circuit Court determined to be controlling are unquestionably enforceable. First, this Court previously recognized—in this very case—that the 2006 and 2009 provisions do not limit Shorts' available remedies. Second, in *Concepcion* the U.S. Supreme Court examined the 2006 provision and—in addition to recognizing that consumers are essentially guaranteed to be made whole under its terms—declared that states may not refuse to enforce that (or any other) arbitration provision on the ground that it requires that arbitration be conducted on an individual basis.

No doubt recognizing that any challenge to the 2006 and 2009 provisions would be futile under *Shorts I* and *Concepcion*, Shorts expends most of her energy trying to convince this Court—despite its prior determination—that she should be allowed to attack the arbitration provisions that have long been superseded. Her efforts fail for two reasons. First, this Court already has determined that Shorts failed to preserve her objection to the circuit court's ruling that the 2006 and 2009 arbitration provisions are "controlling." The doctrine of law of the case precludes Shorts from attempting to reopen this settled question. Second, the circuit court's decision on this issue was correct as a matter of federal and West Virginia law. Under this Court's precedents—including the prior decision in this case—the question is whether the procedures that will govern the arbitration between Shorts and ATTM will prevent Shorts from

pursuing her claims in arbitration. That question cannot be separated from an assessment of how arbitration actually would proceed if Shorts were to file a demand.

Moreover, even if Shorts' earlier arbitration agreements were relevant to the inquiry, after *Concepcion* it is clear that those agreements are fully enforceable. Shorts' arguments to the contrary depend on distorting those agreements and ignoring relevant case law.

Shorts' remaining contentions are easily dispatched. The AAA has not issued a moratorium on hearing claims that are brought by consumers, such as her claims under the West Virginia Consumer Credit and Protection Act. Rather, the moratorium applies only to company-initiated debt-collection actions. And because the law is clear that the 2006 and 2009 provisions are fully enforceable, Shorts' request to conduct discovery would be a pointless and costly waste of time.

STATEMENT REGARDING ORAL ARGUMENT

Because the outcome of this case is controlled by clear precedent—the U.S. Supreme Court's decision in *Concepcion* and this Court's decision in *Shorts I*—no oral argument is necessary. *See* W. Va. R. App. P. 18(a)(3). Indeed, given these precedents, Shorts' appeal is frivolous. *See* W. Va. R. App. P. 18(a)(2). Moreover, because this Court is familiar with this case from the previous round of briefing and argument, another oral argument would not significantly assist the decisional process. *See* W. Va. R. App. P. 18(a)(4).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOCUSED ON THE TERMS OF ARBITRATION THAT WILL ACTUALLY GOVERN SHORTS' DISPUTE.

This Court previously recognized—and refused to disturb—the circuit court's ruling that "the 2005 agreement, along with the 2006 and 2009 modifications, are the controlling provisions with regard to arbitration." *Shorts I*, 226 W. Va. at 576 n.9, 703 S.E.2d at 547 n.9. In light of

the U.S. Supreme Court's decision in *Concepcion*—and many other cases rejecting attacks on the 2006 and 2009 provisions—there can be little dispute that those provisions are fully enforceable.[5] Although Shorts now contends otherwise, her argument to that effect has been waived, and in any event fails on the merits.[6]

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[5] *See Coneff v. AT&T Mobility LLC*, ___ F.3d ___, 2012 WL 887598 (9th Cir. Mar. 16, 2012); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011); *Kaltwasser v. AT & T Mobility LLC*, 812 F. Supp. 2d 1042 (N.D. Cal. 2011); *Blau v. AT&T Mobility LLC*, 2012 WL 566565 (N.D. Cal. Feb. 21, 2012); *Blau v. AT&T Mobility*, 2012 WL 10546 (N.D. Cal. Jan. 3, 2012); *In re Apple & AT&TM Antitrust Litig.*, __ F. Supp. 2d __ , 2011 WL 6018401, at *4 (N.D. Cal. Dec. 1, 2011); *Hendricks v. AT&T Mobility, LLC*, 2011 WL 5104421 (N.D. Cal. Oct. 26, 2011); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153 (N.D. Cal. Aug. 18, 2011); *Boyer v. AT&T Mobility Servs., LLC*, 2011 WL 3047666 (S.D. Cal. July 25, 2011); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407 (N.D. Cal. July 19, 2011); *Johnson v. AT & T Mobility, LLC*, 2010 WL 5342825 (S.D. Tex. Dec. 21, 2010); *Fay v. New Cingular, Wireless, PCS, LLC*, 2010 WL 4905698 (E.D. Mo. Nov. 24, 2010); *Powell v. AT & T Mobility, LLC*, 742 F. Supp. 2d 1285 (N.D. Ala. 2010); *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679 (N.D. W. Va. 2010); *Francis v. AT & T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009); *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007); *see also Sherman v. AT&T Inc.*, 2012 WL 1021823 (N.D. Ill. Mar. 26, 2012) (enforcing similar arbitration provision in terms for AT&T high-speed internet service).

[6] This Court already has concluded that, under ATTM's 2006 and 2009 arbitration provisions, "Shorts' relief is not limited by the arbitration forum." *Shorts I*, 226 W. Va. at 580, 703 S.E.2d at 551. Shorts contends that the 2006 and 2009 provisions nonetheless are unconscionable because customers who refuse settlement offers are not guaranteed to receive the $10,000 minimum payment provided for under the 2009 provision if they are not awarded more than ATTM's last written settlement offer. *See* Pet. Br. 23-25. But because she did not raise this argument below (*see* Shorts' Motion to Stay (Feb. 18, 2011), at 2 ("[T]he unavailability of a class action remedy ***is the sole basis*** for Shorts' claim that the 2009 provision is unconscionable . . . ." (emphasis added)), the argument is waived. *See Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 550, 687 S.E.2d 123, 129 (2009) (per curiam) ("Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument has been waived."). Moreover, the U.S. Supreme Court has already addressed and rejected this argument. *See Concepcion*, 131 S. Ct. at 1753 (concluding that "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole" under ATTM's arbitration provision and that plaintiffs are "*better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action") (emphasis and first alteration in original). Furthermore, the two district court cases on which she depends (*see* Pet. Br. 23-25 (citing *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016 (N.D. Cal. 2008), and *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592 (D.N.J. 2009)), both relied upon *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)—the California case that *Concepcion* declared preempted by the FAA.

Recognizing that *Concepcion* and this Court's ruling in *Shorts I* doom any challenge to the 2006 and 2009 provisions, Shorts focuses most of her attention on attempting to overturn the circuit court's conclusion that ATTM's 2006 and 2009 provisions are "controlling" for purposes of her unconscionability attack. As we explain, however, her contentions are barred by the law-of-the-case doctrine. Even if Shorts could beat this dead horse again, her arguments fail as a matter of law.

A. Shorts Is Procedurally Barred From Again Raising The Issue Of Which Arbitration Provisions Should Be The Focus Of Her Enforceability Challenge.

As this Court previously stated, "Shorts' counsel represented during oral argument that he did not object to the trial court's ruling that the 2005 agreement, along with the 2006 and 2009 modifications, are the controlling provisions with regard to arbitration." *Shorts I*, 226 W. Va. at 576 n.9, 703 S.E.2d at 547 n.9. In her petition for rehearing, Shorts asserted that this Court's statement was "inconsistent with the argument presented by her counsel and unfairly implies that she could and should have sought relief from a ruling in her favor." Pet. for Rehearing 3. But this Court denied that petition for rehearing. Shorts now makes the same arguments as she did then—citing the same statements in her prior briefing and same quotations from a (partial) transcript of the hearing.

This Court should reject this renewed attempt at seeking reconsideration of its 2010 decision on this point. Indeed, the law-of-the-case doctrine is designed to prevent exactly this sort of litigation tactic. When, as here, "a question has been definitively determined by [this Court,] its decision is conclusive on parties, privies, and courts . . . and it is regarded as the law of the case." *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003) (internal quotation marks omitted). Moreover, this Court's mandate in *Shorts I* was clear: The "trial court" was instructed to "evaluate the ***provisions of the arbitration clause***

it has found to control" and "make specific findings on the issue of unconscionability that comport with the tests . . . we established in *Art's Flower Shop* and in *Dunlap*." *Shorts I*, 226 W. Va. at 580, 703 S.E.2d at 551 (emphasis added). In view of those instructions, Shorts' contention that the trial court erred in refusing to reopen the question of the applicable arbitration terms cannot withstand scrutiny. As this Court recently stated in another case, "[t]he circuit court was correct in limiting its actions to the directions this Court included in the mandate." *Powell v. Paine*, 226 W.Va. 125, 129, 697 S.E.2d 161, 165 (2010) (per curiam) (affirming circuit court's refusal to consider a motion requesting relief outside the scope of the mandate).

To be sure, this Court is free to reconsider its prior rulings. But Shorts has offered no new reason justifying reconsideration here. "'[A]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.'" *State ex rel. W. Va. Dep't of Transp., Div. of Highways v. Reed*, __ S.E.2d __, 2012 WL 453616, at *3 (W. Va. Feb. 10, 2012) (quoting Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974)). On this question, nothing has changed since this Court denied Shorts' November 2010 petition for rehearing.

B. The Circuit Court Properly Determined That Shorts' Unconscionability Attack Must Be Limited To The Arbitration Provisions That Will Govern How An Arbitration Between Shorts And ATTM Actually Would Proceed.

Even if Shorts were not precluded from challenging the circuit court's determination that the 2006 and 2009 provisions control for purposes of evaluating Shorts' unconscionability arguments, that challenge would fail under both West Virginia and federal law.

To begin with, West Virginia law calls for examining the process under which arbitration will actually be conducted. Two of the critical inquiries in "assessing the fairness of the

contractual terms" are "(1) whether the contract prevents a claimant from vindicating his or her rights; and (2) whether the costs of arbitration are unreasonably burdensome." *Shorts I*, 226 W. Va. at 579, 703 S.E.2d at 550.

This Court's analysis in *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693 (2009) (per curiam)—a case that Shorts utterly ignores—supports the circuit court's "focus" on the "consumer oriented revisions" to ATTM's arbitration agreement "in December 2006 and March 2009." *Shorts I*, 226 W. Va. at 576, 703 S.E.2d at 547 (internal quotation marks omitted). In *Clites*, the Court examined the enforceability of an arbitration clause contained in an employment agreement. During the course of the litigation, the employer submitted an affidavit agreeing "that it would pay for all costs incurred in the Arbitration that were in excess of what the Petitioner would otherwise have been obligated to pay to the circuit court as a cost in the circuit court case." *Clites*, 224 W. Va. at 303, 685 S.E.2d at 697. This Court expressly relied on that affidavit in evaluating whether the arbitration clause at issue was unfair, and concluded—on the basis of that affidavit—that "there is no proof in the record before us that the Petitioner is exposed to exorbitant costs." *Id.* at 307, 685 S.E.2d at 701.[7]

Federal law also requires a court confronted with a plaintiff's effort to avoid arbitration on unconscionability grounds to focus on how arbitration actually would unfold. As the U.S. Supreme Court has made clear, under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, courts may not refuse to enforce arbitration agreements based on speculation. *Green Tree Fin. Corp. v.*

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[7] Outside of West Virginia, numerous other courts have reached the conclusion that a company's willingness to make arbitration available at lower costs or under more favorable procedures should be taken into account in assessing the fairness of the arbitration process. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 n.3 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *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); *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 763 & n.7 (Wash. 2004) (en banc).

Randolph, 531 U.S. 79 (2000). In *Randolph*, the Court rejected a plaintiff's effort to avoid arbitration based on speculation that the arbitration forum would impose unreasonable costs on her. *Id.* at 92. Shorts' argument here is even weaker than the one rejected by the Supreme Court in *Randolph*, because it is undisputed that, "under the provisions the trial court found to govern," "Ms. Shorts bears no costs with regard to an arbitration proceeding," and that her "relief is not limited by the arbitration forum as she is entitled . . . to an award that provides for all statutory and punitive relief that is available in a court." *Shorts I*, 226 W. Va. at 580, 703 S.E.2d at 551.

In fact, Shorts' argument is much like the one advanced (and rejected) in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). There, the plaintiffs argued that they should not be held to their arbitration agreement 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. The U.S. Supreme Court labeled this argument not "serious." *Id.* Like Rodriguez de Quijas, Shorts argues that she should be allowed to ignore the availability of terms that make it even cheaper and easier to vindicate her claims on an individual basis in arbitration so that she can argue counterfactually that vindication of her claims is ***not possible*** if she is required to arbitrate. That argument is contrary to the policies underlying the FAA, which "was designed to promote arbitration" (*Concepcion*, 131 S. Ct. at 1749), and should fare no better here than it did in *Rodriguez de Quijas*.

Shorts contends that this Court's decision in *Brown v. Genesis Healthcare Corp.*, __ S.E.2d __, 2011 WL 2611327 (W. Va. June 29, 2011), *rev'd on other grounds sub nom. Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam), supports her contention that the unconscionability analysis should focus on her original arbitration agreements, rather than the 2006 and 2009 revisions. But the portions of *Brown* that she quotes were merely part of

the Court's "comprehensive discussion of the doctrine of unconscionability" (*id.* at *4)—in particular, reviewing the law addressing the scope of arbitrable disputes. *See, e.g.*, *id.* at *17 & n.76 (quoting *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938, 944 (1995)). Here, there is no dispute regarding the scope of arbitrable claims. *Brown* accordingly has no bearing on whether the circuit court correctly concluded that ATTM's 2006 and 2009 arbitration provisions are "controlling."[8]

Next, Shorts argues that *Dunlap* and pre-*Dunlap* cases prohibit the courts of this State from considering any modifications to an arbitration agreement that would make arbitration more favorable for consumers or employees. Pet. Br. 8-9. This reading of *Dunlap* conflicts both with this Court's later ruling in *Clites* and with West Virginia Code § 46A-2-121(1)(b). As noted above, in *Clites* this Court endorsed the trial court's reliance on an attorney's affidavit waiving a potentially burdensome feature of the plaintiff's arbitration agreement in holding that the agreement was enforceable. Similarly, West Virginia Code § 46A-2-121(1)(b) allows courts to modify arbitration agreements to eliminate specific terms that would otherwise render them unconscionable.[9]

It was even more appropriate for the circuit court to give controlling weight to ATTM's across-the-board revisions to its arbitration provision than it was for the circuit court in *Clites* to rely on the defendant's one-time waiver of a burdensome provision. As the court below

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[8] *Brown* is relevant, however, as a cautionary tale. In *Marmet*, the Supreme Court reversed *Brown*, explaining that *Brown* was inconsistent with *Concepcion* and other Supreme Court cases. Here, Shorts invites this Court to risk reversal again by urging that controlling Supreme Court precedent be ignored.

[9] Shorts implies that in *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998), this Court "determin[ed] unconscionability 'under the circumstances existing at the time the conduct occurs or . . . at the time of the making of the contract.'" Pet. Br. 13. In fact, however, *Arnold* did not involve any modifications to an agreement or the question whether the court may ignore the terms under which arbitration will actually be conducted.

expressly found, ATTM made its revised arbitration provisions available to ***all*** current and former customers, A-139, while the defendant in *Clites* limited its waiver to the plaintiff in that case. The across-the-board nature of ATTM's revisions also distinguishes this case from *Dunlap*, where this Court rejected the defendant's request to rewrite an unconscionable contract solely for the single plaintiff before the Court. *See Dunlap*, 211 W. Va. at 567, 567 S.E.2d at 283 (rejecting request to "remand the case to the circuit court with instructions to compel Mr. Dunlap to go to arbitration on his claims against Friedman's *et al.* under altered terms and conditions").

As noted above, the Court need not reach the merits of Shorts' argument on this score, because Shorts failed to raise this issue when the parties were previously before this Court and therefore should be precluded from raising it now. *See* Section I.A, *supra*. But if the Court does choose to address the question, both *Clites* and the FAA's "'emphatic federal policy in favor of arbitral dispute resolution'" (*Marmet*, 132 S. Ct. at 1203 (quoting *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam))) dictate upholding the circuit court's determination that the 2006 and 2009 provisions are "controlling" for purposes of Shorts' effort to avoid arbitration on unconscionability grounds.

II. THE ORIGINAL ARBITRATION AGREEMENTS INTO WHICH SHORTS ENTERED ARE FULLY ENFORCEABLE.

Even if it were permissible for Shorts to attack features of her original arbitration provisions that would not apply to her in an actual arbitration, those original arbitration provisions are every bit as enforceable as the 2006 and 2009 provisions that were evaluated by the circuit court in accordance with this Court's instructions. Since the U.S. Supreme Court's decision in *Concepcion*, courts around the country have routinely applied the FAA to enforce arbitration agreements that are no more (and in many cases considerably less) consumer-friendly

than the agreements Shorts entered into in 2003 and 2005.[10] Shorts ignores this extensive post-*Concepcion* authority—likely because it makes clear that her challenges to the original

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[10] *See also, e.g.*, *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, __ F.3d __, 2012 WL 833742 (3d Cir. Mar. 14, 2012); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011); *Valentine v. Wideopen W. Fin., LLC*, 2012 WL 1021809 (N.D. Ill. Mar. 26, 2012); *Captain Bounce, Inc. v. Bus. Fin. Servs., Inc.*, 2012 WL 928412 (S.D. Cal. Mar. 19, 2012); *Vernon v. Qwest Commc'ns Int'l, Inc.*, 2012 WL 768125 (D. Colo. Mar. 8, 2012); *Rosendahl v. Bridgepoint Educ., Inc.*, 2012 WL 667049 (S.D. Cal. Feb. 28, 2012); *Coiro v. Wachovia Bank, N.A.*, 2012 WL 628514 (D.N.J. Feb. 27, 2012); *Wilson v. Cash Am. Int'l, Inc.*, 2012 WL 310936 (N.D. Tex. Feb. 1, 2012); *Aneke v. Am. Express Travel Related Servs., Inc.*, __ F. Supp. 2d __, 2012 WL 266878 (D.D.C. Jan. 31, 2012); *Estrella v. Freedom Fin. Network, LLC*, 2012 WL 214856 (N.D. Cal. Jan. 24, 2012); *Sanders v. Swift Transp. Co. of Arizona, LLC*, __ F. Supp. 2d __, 2012 WL 523527 (N.D. Cal. Jan. 17, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Chassen v. Fid. Nat'l Fin., Inc.*, 2012 WL 71744 (D.N.J. Jan. 10, 2012); *Khanna v. Am. Express Co.*, 2011 WL 6382603 (S.D.N.Y. Dec. 14, 2011); *Sanders v. Forex Capital Mkts., LLC*, 2011 WL 5980202 (S.D.N.Y. Nov. 29, 2011); *Somerset Consulting, LLC v. United Capital Lenders, LLC*, __ F. Supp. 2d __, 2011 WL 5555622 (E.D. Pa. Nov. 15, 2011); *Brown v. TrueBlue, Inc.*, 2011 WL 5869773 (M.D. Pa. Nov. 22, 2011); *Khan v. Orkin Exterminating Co.*, 2011 WL 4853365 (N.D. Cal. Oct. 13, 2011); *Dauod v. Ameriprise Fin. Servs., Inc.*, 2011 WL 6961589 (C.D. Cal. Oct. 12, 2011); *Chavez v. Bank of Am.*, 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011); *Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161 (N.D. Cal. 2011); *Giles v. GE Money Bank*, 2011 WL 4501099 (D. Nev. Sept. 27, 2011); *Tory v. First Premier Bank*, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); *Meyer v. T-Mobile USA Inc.*, __ F. Supp. 2d __, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011); *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159 (S.D. Cal. 2011); *Sakalowski v. Metron Servs., Inc.*, 2011 WL 4007982 (E.D. Mo. Sept. 8, 2011); *King v. Advance Am., Cash Advance, Ctrs., Inc.*, 2011 WL 3861898 (E.D. Pa. Aug. 31, 2011); *Clerk v. Cash Am. Net of Nev., LLC*, 2011 WL 3740579 (E.D. Pa. Aug. 25, 2011); *Clerk v. Cash Cent. of Utah, LLC*, 2011 WL 3739549 (E.D. Pa. Aug. 25, 2011); *Black v. JP Morgan Chase & Co.*, 2011 WL 3940236 (W.D. Pa. Aug. 25, 2011); *Alfeche v. Cash Am. Int'l, Inc.*, 2011 WL 3565078 (E.D. Pa. Aug. 12, 2011); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal. 2011); *Murphy v. DirectTV, Inc.*, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011); *Carrell v. L & S Plumbing P'ship, Ltd.*, 2011 WL 3300067 (S.D. Tex. Aug. 1, 2011); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862 (C.D. Cal. July 21, 2011); *Estrella v. Freedom Fin.*, 2011 WL 2633643 (N.D. Cal. July 5, 2011); *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339 (N.D. Ga. 2011); *In re Cal. Title Ins. Antitrust Litig.*, 2011 WL 2559633 (N.D. Cal. June 27, 2011); *Villegas v. US Bancorp*, 2011 WL 2679610 (N.D. Cal. June 20, 2011); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011); *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308 (D. Conn. 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. May 16, 2011); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228 (C.D. Cal. May 9, 2011); *Day v. Persels & Assocs.*, 2011 WL 1770300 (M.D. Fla. May 9, 2011); *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323 (S.D. Cal. May 4, 2011); *Cottonwood Fin., Ltd. v. Estes*, __ N.W.2d __, 2012 WL 265716 (Wis. Ct. App. Jan. 31, 2012); *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011).

arbitration provisions are unavailing. Instead, she distorts the terms and effects of those provisions. When her distortions are rectified, it should be manifest that her original arbitration agreements are not unconscionable under West Virginia law.

A. Shorts Cannot Attack The 2003 And 2005 Arbitration Provisions On The Ground That They Preclude Class Actions.

For much of this case, Shorts has focused her fire on the requirement that arbitration take place on an individual, rather than class-wide, basis. This Court presciently rejected that line of attack, holding that "the lack of class action relief does not render an arbitration agreement unenforceable on grounds of unconscionability." *Shorts I*, 226 W. Va. at 579, 703 S.E.2d at 550. That holding correctly anticipated the U.S. Supreme Court's holding that a contrary rule would be preempted by the FAA. *See Concepcion*, 131 S. Ct. at 1753. Thus, Shorts' assertion that "the class action ban weighs in favor of a finding of unconscionability" (Pet. Br. 22) is badly misguided. As a federal court recently explained in upholding an ATTM arbitration provision that is materially identical to Shorts' 2005 agreement, "*Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages." *Kaltwasser v. AT&T Mobility, LLC*, 812 F. Supp. 2d 1042, 1050, (N.D. Cal. 2011), *motion for reconsideration and interlocutory appeal denied*, 2011 WL 5417085 (N.D. Cal. Nov. 8, 2011), *petition for mandamus denied*, No. 11-73752 (9th Cir. Jan. 9, 2012); *see also In re Apple and AT & T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *3 (N.D. Cal. July 19, 2011) (after *Concepcion*, "the argument that ATTM's arbitration provision is unenforceable solely because it includes a class action waiver is no longer viable") (addressing current version of ATTM's provision). In short, "the holding of *Concepcion* [is] both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted

by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'" *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011) (quoting *Concepcion*, 131 S. Ct. at 1753), *cert. denied*, 132 S. Ct. 1046 (2012).

B. Shorts Cannot Attack The 2003 And 2005 Arbitration Provisions On The Ground That The Contracts Of Which They Are Part Prohibit Punitive Damages In Some Circumstances.

Shorts contends that the 2003 and 2005 agreements preclude an arbitrator from awarding her punitive damages and, for that reason, are unenforceable. Of course, Shorts is seeking only statutory damages, not punitive damages, so she lacks standing to challenge them on the ground that they might preclude someone else from recovering punitive damages. *See, e.g.*, *Captain Bounce, Inc. v. Bus. Fin. Servs., Inc.*, 2012 WL 928412, at *11 (S.D. Cal. Mar. 19, 2012) (rejecting attack on punitive-damages prohibition because agreement did not preclude full recovery on the claims actually brought by plaintiffs). But even if she were seeking punitive damages, her argument is wrong.

To begin with, the provision that Shorts attacks applies only to claims arising out of service interruptions. It specifies: "Cingular shall not be liable for . . . punitive . . . damages you or any third party may suffer by use of, or inability to use, service of Equipment provided by or through Cingular, including loss of business or goodwill, revenue or profits, or claims of personal injury." A-467. Because Shorts' claims have nothing to do with service interruptions, she cannot evade arbitration by contending that this unexceptional limitation of liability for service interruptions is unconscionable.

Moreover, as Shorts acknowledges (Pet. Br. 19), the limitations on liability—which importantly are not part of the arbitration clause—apply only to the "extent allowed by law." A-456, A-467. Accordingly, those limitations are enforceable in arbitration only to the extent they would be enforceable in court.

In any event, the validity of these separate clauses is not for this (or any other) Court to determine. As the U.S. Supreme Court has explained, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *see also PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003) ("since we do not know how the arbitrator will construe the remedial limitations, . . . the proper course is to compel arbitration").

C. The 2003 And 2005 Arbitration Provisions Do Not Bar Arbitrators From Awarding Prevailing Plaintiffs Statutory Attorneys' Fees.

Shorts also contends that the 2003 and 2005 arbitration provisions would prohibit an arbitrator from awarding her statutory attorneys' fees. Pet. Br. 18-19. Again, this is incorrect. Neither provision expressly precludes arbitrators from awarding a plaintiff who prevails in an individual arbitration the full panoply of statutory remedies, including attorneys' fees. While the 2003 agreement restates the American Rule governing attorneys' fees—that "each party will bear the expense of its own counsel, experts, and witnesses"—that does not amount to a limitation on an arbitrator's ability to grant the remedies that a statute requires. And the 2005 agreement likewise does not limit statutory attorneys' fees. Rather, it supplements the American Rule by making attorneys' fees available under ***additional*** circumstances, specifying: "If 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." A-468. That is why a court confronted with a similar attack on these same arbitration provisions observed that they "do[] not restrict the award of attorneys' fees if such fees are available under applicable federal or state law." *Blitz v. AT&T Wireless Servs., Inc.*, 2005 WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005).

Moreover, the AAA's rules—which both provisions incorporate—provide that an arbitrator may make "an award of attorneys' fees if . . . it is authorized by law." American Arbitration Association, Commercial Arbitration Rules, R-43(d)(ii). And courts have held that, if an arbitration provision does not specify that an arbitrator is precluded from awarding statutory attorneys' fees, the default rule is that such fees ***are*** available in arbitration. *See, e.g.*, *Drucker v. Siebel Sys., Inc.*, 2010 WL 1758883, at *4 (N.D. Cal. Apr. 30, 2010) ("declin[ing] to find the arbitration provision unenforceable for allegedly barring attorneys' fees" because there was "ambiguity as to whether" attorneys' fees were "expressly bar[red]").

For all of these reasons, Shorts' assertion that an arbitrator would be barred by the 2003 and 2005 agreements from awarding attorneys' fees is misguided, and hence she cannot avoid her obligation to arbitrate on this ground.

D. The 2003 And 2005 Agreements Do Not Create One-Sided Access To The Courts.

Shorts contends that the 2003 and 2005 agreements afford ATTM "one-sided" access to the courts. Pet. Br. 22. But she either ignores or distorts the terms of those agreements. The 2005 agreement allows ***either*** party to bring claims in small claims court; the 2003 agreement expressly affords ***customers*** the right to bring small claims actions. A-457, A-467. And while the 2003 agreement contains an exception permitting claims in court related to the collection of debts, that exception applies equally to both parties. A-457.[11] This provision stands in stark contrast with the agreement at issue in *Arnold v. United Cos. Lending Corp.*, which preserved only "the Lender's right . . . to submit and to pursue in a court of law any actions related to the collection of the debt." 204 W. Va. 229, 233, 511 S.E.2d 854, 858 (1998).

[11] Of course, given the AAA's moratorium on company-initiated debt-collection cases, A-475, it cannot be unconscionable for an arbitration provision to specify that such cases may be brought in court, since the arbitration forum refuses to hear them.

E. The Other Aspects Of The 2003 And 2005 Arbitration Provisions Attacked By Shorts Do Not Render Those Provisions Unconscionable.

In kitchen-sink fashion, Shorts attacks an assortment of other features of the 2003 and 2005 provisions, none of which warrants refusing to require her to arbitrate her claims. For instance, she complains that the 2005 agreement requires the consumer to pay the AAA filing fee in advance. Pet. Br. 22. But for claims under $10,000, that fee is $125 (American Arbitration Association, Consumer-Related Disputes Supplementary Procedures, C-8), which is comparable to the fee a customer would have to pay to bring a case in court.[12] Moreover, unlike in court, the arbitration provision specifies that ATTM "will promptly reimburse you for your payment of the filing fee." A-467.

Shorts' attacks on provisions in the 2003 and 2005 agreements that relate to the timing of billing disputes are irrelevant to her claims and thus have no bearing on "(1) whether the contract prevents [Shorts] from vindicating . . . her rights; and (2) whether the costs of arbitration are unreasonably burdensome." *Shorts I*, 226 W. Va. at 579, 703 S.E.2d at 550. In addition, those provisions are not found within the arbitration clauses themselves; accordingly, even if this case were about a billing dispute, Shorts' complaints about these provisions would be for an arbitrator, not a court, to resolve. *See* pp. 17-18, *supra*.

Shorts also points to a provision in the 2003 agreement that allows either party to elect to arbitrate by telephone conference call, asserting that the potential lack of an in-person hearing "effectively deprive[s] . . . customers of any real opportunity for redress." Pet. Br. 22. But that is pure speculation—and likely mistaken, as some customers might find it easier and more convenient to proceed by telephone. Under *Randolph*, such speculation cannot be a ground for

[12] It bears mention in this regard that even the dissent in *Randolph* regarded the $125 AAA filing fee to be "fair." *See* 531 U.S. at 95 (Ginsburg, J., dissenting).

invalidating an arbitration agreement. In any event, the relevant AAA rules provide that a customer may elect an in-person hearing if he or she chooses. American Arbitration Association, Commercial Arbitration Rules, E-6.

* * *

In sum, though the 2006 and 2009 arbitration provisions—which the circuit court found to be "controlling" here—are the most pro-consumer arbitration provisions in existence, the 2003 and 2005 agreements nonetheless afford customers fair arbitration procedures and are fully enforceable under both the FAA and West Virginia law.

III. SHORTS' REMAINING ARGUMENTS ARE MERITLESS.

Shorts raises two final arguments that serve only to belie her utter desperation to avoid the day of reckoning in which she finally will have to arbitrate her claims.

A. The AAA Continues To Accept Consumer Protection Claims.

Shorts contends that the AAA "has ceased administering the very type of consumer debt-collection action that is at issue." Pet. Br. 26. This is an outright falsehood that Shorts has perpetuated throughout this case. As we explained in prior briefing before this Court, the AAA has made clear that it will decline to administer only arbitrations against debtors initiated by creditors. *See* Reply to Resp. to Rule to Show Cause 4 n.2, *Shorts I*; Notice of Supplemental Authority 1, *Shorts I* (Mar. 29, 2010); A-475. It remains available to administer arbitrations brought by consumers against businesses—even ones arising out of debts owed by the consumers. Accordingly, there is no question that the AAA would administer an arbitration brought by Shorts.[13]

[13] Whether it would entertain a counterclaim by Palisades against Shorts is unclear, but unimportant for present purposes, as the only thing that matters is that the AAA ***would*** entertain a claim by Shorts.

Indeed, courts around the country have repeatedly rejected the same argument that Shorts makes, recognizing that it "is a misreading of the clear language of the moratorium. If the Court rules that the Agreement is enforceable and the arbitration is therefore mandated, such arbitration will not occur automatically at [the company's] behest, but will only begin if Plaintiffs file a claim in arbitration." *Jackson v. Payday Loan Store*, 2010 WL 1031590, at *2 (N.D. Ill. Mar. 17, 2010); *see also Estep v. World Fin. Corp.*, 735 F. Supp. 2d 1028, 1033-34 (C.D. Ill. 2010); *Clerk v. ACE Cash Express, Inc.*, 2010 WL 364450, at *10 (E.D. Pa. Jan. 29, 2010) ("Here, however, as Defendant correctly points out, the instant dispute is not one in which the *company* is the filing party. Instead, it is *Plaintiff* who is the filing party, as she seeks to prosecute her claims against Defendant ACE. Plaintiff's argument simply fails to address this fact.").[14] As these cases make clear, Shorts can arbitrate before the AAA, just as other ATTM customers have done since the AAA announced its moratorium on company-initiated debt-collection arbitrations.

B. Shorts' Contention That The Circuit Court Erred In Not Granting Her Discovery Fails Because Her Agreement To Arbitrate Is Enforceable As A Matter Of Law.

In a final Hail Mary pass, Shorts argues that additional discovery is necessary to allow her to attack the arbitration provisions that the circuit court found to be controlling. But no amount of discovery would alter this Court's conclusion that "Ms. Shorts' relief is not limited by the arbitration forum" (*Shorts I*, 226 W. Va. at 580, 703 S.E.2d at 551) or the U.S. Supreme Court's observation that "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole" under ATTM's 2006 arbitration provision and that plaintiffs are "*better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action" (*Concepcion*, 131 S. Ct. at 1753).

[14] Although we have cited these cases repeatedly in prior briefs, Shorts continues to ignore them.

Indeed, in light of *Concepcion*, the discovery Shorts seeks would be a fruitless waste of time. At most, discovery on these topics "goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011). That is why the U.S. Court of Appeals for the Eleventh Circuit rejected the argument that "evidentiary proof regarding whether parties could vindicate their statutory rights in arbitration . . . escapes *Concepcion*'s preemptive effect." *Id.* at 1213. For similar reasons, the Ninth Circuit has explained that *Concepcion* "forecloses [the] argument" that "class-action waivers are unconscionable" based "on a case-by-case, evidence-specific finding of exculpation." *Coneff v. AT&T Corp.*, ___ F.3d ___, 2012 WL 887598, at *4 (9th Cir. Mar. 16, 2012).

Consistent with the view that plaintiffs may not seek to evade *Concepcion* by proving that class actions are necessary to vindicate their claims, courts consistently have refused to permit the type of discovery Shorts seeks—especially in cases involving ATTM's arbitration provisions. *See, e.g.*, *Kaplan v. AT&T Mobility, LLC*, 2011 WL 7409078, at *1 (C.D. Cal. Aug. 9, 2011) ("The Court finds that arbitration-related discovery is neither necessary nor proper and therefore denies plaintiff's request therefor."); *In re Apple & AT&T iPad*, 2011 WL 2886407, at *6 ("The argument that plaintiffs seek to support through arbitration related discovery has already been addressed and rejected by the [U.S.] Supreme Court in *Concepcion*."); *see also Laguna v. Coverall N. Am., Inc.*, 2011 WL 3176469, at *6-*8 (S.D. Cal. July 26, 2011); *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339 (N.D. Ga. 2011). In short, Shorts' final Hail Mary pass lands far short of the end zone.

CONCLUSION

For the foregoing reasons, the circuit court's orders should be affirmed.

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By Counsel,

DATED: April 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 12th day of April 2012, sent via First Class Mail the foregoing Brief For Respondents AT&T Mobility LLC and AT&T Mobility Corporation upon all counsel of record in this cause, whose names and addresses are as follows:

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