IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

NO. 011984

MARGARET TOPPINGS and
ROGER D. TOPPINGS,

Plaintiffs,

UPON CERTIFIED QUESTION FROM THE CIRCUIT COURT OF LINCOLN COUNTY
CIVIL ACTION NO. 00-C-146

v.

MERITECH MORTGAGE SERVICES, INC., a corporation, and division of SAXON MORTGAGE, INC., a corporation, PLATINUM CAPITAL GROUP, a corporation, CHASE MANHATTAN BANK, formerly CHASE BANK OF TEXAS, NA, and SALMONS AGENCY, INC., a West Virginia corporation,

Defendants.

I. INTRODUCTION

What should not be forgotten in the legal dispute presently before the Court is the monumental impact of the Court's decision in this case. What hangs in the balance is the ability for thousands of homeowners in this State to protect their family homes from predatory lenders. Most every subprime home mortgage or home equity loan from an out-of-state lender or finance company now includes a compulsory arbitration provision, which unbeknownst to the consumer waives all access to pursue remedy for valid claims or defenses against the loan – including any effort to save the home from unjustifiable foreclosure. These out-of-state lenders have identified arbitration a means to insulate themselves from enforcement of state and federal consumer protection laws, and if they can pick their own forum, the result is predetermined. Indeed, in this case, the subprime

lenders are the only party to the dispute that favors arbitration before the National Arbitration Forum ("NAF"); the defendant, Salmons Agency, Inc., has joined with the plaintiffs to oppose arbitration before the lender-designated decisionmaker. Guidance from this Court is necessary to ensure that the out-of-lenders do not abuse the federal policy in favor of arbitration, and effectively eliminate consumers' right to pursue their statutory and other legal and constitutional rights in a neutral, unbiased forum. To that end, this Court must strike down as unconscionable, as a matter of state law, any contract that compels disputes before a decisionmaker tainted by the inherent bias suggested by a system that sees the decisionmaker paid on a fee-per-case basis and where the decisionmaker is selected by one side to the dispute.

The response of defendants, Meritech Mortgage Services, Inc., a division of Saxon Mortgage, Inc., and Chase Manhattan Bank (hereinafter "the subprime lender Defendants"),[1] and the brief by their *amici*, the American Financial Services Association ("the finance companies:)[2] disrespect the century old principles upheld by this Court and the West Virginia court system itself in an attempt to avoid the State's judicial system in favor of their own forum – a system of resolving disputes where justice is for hire.

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[1] These defendants are all related to one another through a process call asset securitization. Subprime lenders, such as the defendants, Meritech Mortgage Services, Inc., Saxon Mortgage, Inc., and Chase Manhattan Bank, pool, securitize, and sell home equity loans to a trust, usually one of a few banks nationwide, which serves as the nominal holder of the loan. Meanwhile, an entity retains the right to service the loan. In this case, Meritech Mortgage Services, Inc., a division of Saxon Mortgage, Inc., services the loan, and Chase Manhattan holds the loan and the security interest in the plaintiffs' home.

[2] As described in *Amici's* motion, the American Financial Services Association is the national trade association for finance companies. Signatory counsel for the *Amici* also represents Beneficial Finance Company in several suits pending against the subprime lender in West Virginia courts involving issues implicated by the pending Certified Question, the majority of which involve whether the low income homeowners will be able to retain their homes.

The subprime lenders and the *Amici* urge this Court to answer the Certified Question on remarkably broad grounds. If this Court were to follow their proposed approach, it would effectively prevent consumers from ever challenging arbitration systems structured with inherent, unfair bias against the consumers. For example, they argue federal law preempts this Court's entrenched commitment to neutral decisionmaking process to resolve disputes and prohibits this Court from declaring unconscionable an arbitration clause that establishes a system where the arbitrators have strong incentives to favor one party. What the finance companies argue, in essence, is that they have a federal right to compel consumers before biased arbitration systems that violate West Virginia law. This however is a contorted construction of The Federal Arbitration Act ("FAA"), which only bars states from enforcing laws that are specifically aimed at defeating arbitration generally. The principles of fairness and unbiased decisionmakers grow out of a hundred years of West Virginia jurisprudence that has nothing at all to do with arbitration. See State ex rel. Shrewsbury v. Poteet, 157 W. Va. 540, 545-47, 202 S.E.2d 628, 631-32 (1974); Williams v. Bramen, 116 W. Va. 1, 4, 178 S.E. 67, 68-69 (1935); Findley v. Smith, 42 W. Va. 299, 305, 26 S.E. 370, 372 (1896). To be sure, the principles derive from universal concepts of fairness, justice, and equity – concepts that are not exclusive to arbitration.[3] The subprime lender defendants and the finance companies argue federal law prohibits states from ensuring that arbitration systems are conducted fairly. The FAA does no such thing.

Moreover, when predatory lenders compel consumers to a biased arbitration system, they effectively deny the consumers any meaningful remedy for wrongdoing by the finance companies.

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[3] The American Law Reports sets forth Shrewsbury as the seminal case nationally on pecuniary interest and decisionmaker neutrality. See 72 A.L.R. 3d 368 (1974).

In doing so, the lenders not only violate the federal policy in favor of arbitration by preventing the consumers from effectively vindicating their rights, they also violate West Virginia law on grounds applicable to all consumer contracts: this State's proscription of waivers of the right to enforce claims generally. See W. VA. CODE § 46A-1-107; U.S. Life Credit Corp. v. Wilson, 171 W. Va. 538, 540-41, 301 S.E.2d 164, 171-72 (1982).

Similarly, the finance companies contend this Court may not declare an arbitration clause unconscionable on the grounds of arbitrator bias until after the arbitration is complete. Under this futile approach, a consumer would be compelled to endure arbitration and to incur the expense and delays attendant to doing so no matter how apparently unfair the process. This Court has not endorsed this approach. See Arnold v. United Cos. Lending Corp., 204 W. Va. 229, 236-37, 511 S.E.2d 854, 861-62 (1998). The finance companies would prefer this approach because consumers subjected to the biased arbitration are then limited to the exceptionally narrow judicial review accorded to completed arbitration decisions. See, e.g., Lattimer-Stevens Co. v. United Steelworkers of Am., Dist. 27, Sub. Dist. 5, 913 F.2d 1166, 1169 (6th Cir.1990) ("When courts are called on to review an arbitrator's decision, the review is very narrow; one of the narrowest standards of judicial review in all of American jurisprudence."). This approach ignores the multitude of decisions that have struck down unfair arbitration and refused to compel arbitration on unconscionability grounds under § 2 of the FAA when the systems were structured in such a way as to render them likely to be biased. See 9 U.S.C. § 2; see also, e.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999); Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1195 (7th Cir. 1984); Graham v. Scissor-Tail, 623 P.2d 165, 177 (Cal. 1990); Cheng-Canindan v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 874-77 (Cal. Dist. Ct. App. 1996); Ditto v. Re/Max Preferred

Properties, Inc., 861 P.2d 1000, 1004 (Okla. Ct. App. 1993); Cross & Brown Co. v. Nelson (In re Cross & Brown Co., 167 N.Y.S.2d 573, 575 (N.Y. App. Div. 1957).

As one final illustration, the finance companies argue the bias of the arbitration service provider – who, among other things, selects the individuals to be included on the panel of potential arbitrators in a given case – is irrelevant, unless the consumer can prove that each individual arbitrator is biased. This contention flies in the face of Shrewsbury, where this Court found unconstitutional the entire Justice of the Peace structure that created incentives for a justice-for-sale system. Similarly, this Court should declare substantively unconscionable the entire abusive approach that twists the ideal of neutral arbitration into a one-sided justice-for-sale system that operates by and for the benefit of the finance companies and subprime lenders. The intended purpose of these and their other arguments is that the subprime lender defendants and their *Amici* would like to make it effectively impossible for a consumer to challenge a biased arbitration system.[4] This is not required by the FAA or the law of West Virginia, however. This Court should reject the self-serving legal theories of the finance companies and subprime lenders in favor of preserving a

[4] Petitioners would be remiss if we failed to point out that the brief of the *Amici* finance companies supports the facts that NAF has close ties to lenders, and that lenders have a powerful interest in seeing NAF, in particular, replace the civil justice system. The brief was authored by the law firm of Wilmer, Cutler & Pickering, one of whose partners is identified in NAF's solicitations to finance companies as an "Information Resource." (See Pls.' Resp. to Defs.' Mot. to Reconsid. at Ex. 7 (identifying Christopher Lipsett, of Wilmer, Cutler & Pickering).) NAF has a history of inappropriately entering into litigation as an *amicus* on behalf of lenders and against consumers. While NAF has not done so directly in this case, not so coincidently, the *Amici* have made a series of the same arguments (sometimes in similar language) to those found in NAF *amicus* briefs in other cases. See e.g., Brief of National Arbitration Forum as *Amicus Curiae*, Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000); Brief of *Amicus Curiae* National Arbitration Forum, Baron v. Best Buy Co., Inc., No-14028-E (11th Cir. Dec. 15, 1999); Brief of *Amicus Curiae* National Arbitration Forum, Marsh v. First USA Bank, N.A., No. 00-10648 (5th Cir Dec. 12, 2000). At the very least, the similarity in interests and positions of NAF and its friends and clients, the finance companies, is telling.

system for resolving disputes that is fair and provides homeowners with a neutral forum in which to protect their homes from predatory lenders.

II. DISCUSSION

A. This Court Has the Authority to Determine What Types of Contracts Are Substantively Unconscionable.

As previously stated, finance companies have inserted compulsory arbitration in most every subprime home loan agreement, and they have a financial interest in preserving the system they have so carefully crafted. In a number of them, the finance companies have chose *their* decisionmaker. To that end, the *Amici* argue unconscionability determinations must be reserved for a case-by-case analysis. Their argument suggests this Court has no authority to issue a rule of law that the holding of Shrewsbury – that structurally biased systems are improper in general – may not be applied to the law of unconscionability. (See Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 3-6.) The suggested approach by the finance companies that this Court must continually revisit anew in each case the question of whether a structurally flawed arbitration system with a built-in incentive for bias is legal, ignores the authority of this Court, properly exercised, in Shrewsbury.[5] In Shrewsbury, this Court eschewed the methodology suggested by the *Amici* and declared it is generally unconstitutional to have a justice-for-sale system. There is no reason that this Court cannot make the same sort of ruling with respect to the issue of substantive unconscionability.

In addition to discounting the authority of this Court to issue generally applicable rules of law, the finance companies also blur two aspects of West Virginia's law of unconscionability, using

[5] Remarkably, the subprime lender defendants fail to cite to Shrewsbury even once in their entire brief, and only mention the Arnold case once. Their premise seems to be that West Virginia contract law is dictated not by the rulings of this Court, but by largely unpublished foreign federal district court decisions involving drastically different factual settings.

the issue of procedural unconscionability (which is properly a case specific analysis) to argue that no broader principles of substantive unconscionability may be established. This blurring is improper.

The West Virginia Consumer Credit and Protection Act provides as follows regarding unconscionable agreements:

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
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> > (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or
> > (b) Any term of part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part as to avoid any unconscionable result.

W. VA. CODE § 46A-2-121. The above quoted provision provides that procedurally unconscionable agreements may be unenforceable under section (1)(a), and substantively unconscionable provisions may be unenforceable under section (1)(b). It is true the subsection (1)(a) question of whether the agreement was induced by unconscionable conduct, or whether the agreement was unconscionable in the making is inherently a case-specific inquiry. If Bill Gates were the plaintiff here, and he had negotiated out the terms of this arbitration clause with the defendant lenders, after receiving the advice of a team of lawyers, there is little doubt the clause would not be procedurally unconscionable.

But procedural unconscionability is not the issue in the question certified. The subprime lender defendants and the finance companies do not seriously dispute the record here demonstrates the arbitration agreement is procedurally unconscionable. Nor could they. There exists in the record

undisputed evidence that (a) the clause was drafted by the subprime lender defendants, who are large national corporations; (b) it was imposed on the plaintiffs on a take-it-or-leave-it basis; (c) the plaintiffs were far less economically sophisticated than the subprime lender defendants; (d) the plaintiffs, who are not sophisticated and do not read well, were rushed through the closing; and (e) the plaintiffs did not understand and were not told what they were signing. These facts, which are not in dispute, are more than adequate for this Court to find procedural unconscionability in this case.

But procedural unconscionability is not the question certified to this Court. Certain types of unfair terms should never be allowed in a procedurally unconscionable contract, and this Court has the authority to lay down such a rule of law. For example, in Arnold v. United Cos. Lending Corp., this Court, *inter alia*, imposed the general rule of law that the defendant's one-way arbitration clause was substantively unconscionable. See 204 W. Va. at 236-37, 511 S.E.2d at 861-62. Likewise, in U.S. Life Credit Corp, this Court struck down an exculpatory clause, on substantive unconscionability grounds, concluding the purported waiver was unfair and contrary to the public policy of the State. See 171 W. Va. at 540-41, 301 S.E.2d at 171-72 (concluding a provision waiving rights to pursue certain remedies "unconscionable when it was entered into and its inclusion in the contract was a patent violation" of the West Virginia Consumer Credit and Protection Act). The high courts of many other states have also set out generally applicable laws with respect to categories of arbitration contracts that are substantively unconscionable. See, e.g., Ex Parte Thicklin, ___ So. 2d ___, *available in* 2002 WL 27925, * 8 (Ala. 2001) ("[I]n violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum."); Armendariz v.

Foundation Health Psychare Servs., Inc., 6 P.3d 669, ___, 25 Cal. 4th 83, 86 (Cal. 2000) ("[The arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."). The *Amici* implicitly suggest that this Court did not have the authority to issue the ruling in Arnold. They make this suggestion, however, by focusing on issues of procedural unconscionability. There is no reason this Court should abandon its practice of deciding the question of substantive unconscionability on the basis of generally applicable legal principles. See, e.g., Arnold, 204 W. Va. at 236-37, 511 S.E.2d at 861-62; U.S. Life Credit Corp., 171 W. Va. at 540-41, 301 S.E.2d at 171-72.

B. The Record Supports the Finding that the Principle of Shrewsbury – Decisionmakers with a Pecuniary Interest in a Dispute are Inherently Biased and Unfair – Applies to Substantive Unconscionability.

In Shrewsbury, this Court established a general rule of law that a system where decisionmakers, specifically Justices of the Peace, depended for their income upon selections made by creditors gave rise to an unconstitutional justice-for-sale system. Likewise, the plaintiffs and the defendants, Salmons Agency, Inc., urge this Court to rule this same principle applies to the law of contracts, and that any contract establishing such an inherently biased system is unconscionable. The Certified Question in this case does not raise a narrow issue relating to a particular arbitrator or arbitration service provider, but rather addresses a system that this Court has already found in another context to be inherently problematic and unfair.[6] Accordingly, the central issue in this case

[6] The finance companies claim that Anderson v. Nichols, 178 W. Va. 284, 289-93, 359 S.E.2d 117, 122-24 (1987), supports the notion that individual arbitrators may be biased. (See Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 7 n.3.) In Anderson, the parties to a commercial contract agreed to a standard tripartite selection process in which an arbitration panel is comprised (continued...)

does not turn on the individual facts relating to each and every arbitrator and arbitration service provider, but instead depends upon the broader legal issue of what legal significance the law of contract in West Virginia will give to a system that is inherently structurally unfair. The fact that the arbitration provider in this case has demonstrated bias is anecdotal and solidifies the plaintiffs' and defendant Salmons Agency Inc.'s claims that the system is inherently unfair.

The subprime lender defendants and their *Amici*, the finance companies, ignore this reality and maintain, quite astonishingly, that the evidentiary record in this case is inadequate. According to the subprime lender defendants, "Plaintiffs attack the NAF with generalized allegations" based upon "mere speculation" and "no evidence." (Br. of Defs. Meritech Mtg. Servs., Inc and The Chase Manhattan Bank at 1.) These assertions are palpably untrue. There is an extraordinary factual record here including documents from NAF's own files, a deposition of NAF's Executive Director, a deposition of the lender's in-house counsel, sworn discovery documents from other cases involving NAF, and correspondence between NAF and the subprime lender defendants, that establishes NAF has engaged in entirely inappropriate conduct and has exhibited a clear pattern and practice of favoring lenders over consumers. The evidentiary record here demonstrates the following:[7]

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[6](...continued)
after each party selects one arbitrator favoring their interests and the two then jointly select a third. See id. 178 W. Va. at 289, 359 S.E.2d at 122. This selection process is neutral and fair in that it gives both sides an equal input into the selection of the decisionmaker. This scenario presents an obvious contrast to this case, in which an economically advantaged party gets to chose and impose its will on all other parties to a dispute.

[7] The contentions that there is an "inadequate record" or that the record is "selective," belie the fact that the evidence in the record is substantial and *undisputed*. Indeed, the evidence comes from the defendants and NAF itself, including NAF's own solicitations and correspondence, (continued...)

- In a series of advertisements and solicitations aimed at lenders, NAF has repeatedly inappropriately promised results favorable to lenders by promising improvement to lenders' bottom lines and to give them better results than the judicial system.[8] (See Pls.' Resp. to Defs.' Mot. to Reconsid. at Exs. 2-13, 18.)

- In its advertisements and solicitations, NAF has inappropriately promised to favor lenders' interests over those of consumers by sharply limiting discovery, barring class actions, limiting awards to plaintiffs so that newly discovered evidence is disregarded if it would lead to a higher award, and adopting a "loser pays" rule that requires any consumer who does not win his case to pay the finance company's attorney's fees. (See id. at Ex. 18; ADR – Organizations; Do An LRA: Implement Your Own Civil Justice Reform Program NOW, THE METROPOLITAN CORPORATE COUNSEL (Aug. 2001) ("The rules of the National Arbitration Forum allow the arbitrator to award the prevailing party the cost of the arbitration, including attorneys' fees. . . . There is no such thing as a 'no risk' arbitration for either side.").) In one letter, an NAF executive promises a lawyer who specializes in defending finance companies that these rules will ensure that his clients will not need to worry about the plaintiffs' "class action bar" in Y2K lawsuits. (See Pls. Resp. to Defs.' Mot. to Reconsid. at Ex. 11.) In short, NAF's solicitations reveal that it sees itself as a means for finance companies and subprime lenders to defend against

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[7](...continued)
testimony of the Director of NAF, and testimony from in-house counsel for the defendants, Saxon Mortgage, Inc. and Meritech Mortgage Services, Inc. The parties had ample opportunity to controvert any evidence in the record. A potion of what the defendants did introduce was falsified. See Plfs.' Resp. to Defs.' Mot. to Reconsid. at Exs. 14-16.)

Moreover, in light of specific evidence relating to NAF's credibility (the false filing with the trial court, and Mr. Anderson's denial that NAF had made statements to creditors that plainly appear on numerous documents from NAF's own files), this Court should place little weight upon the subprime lender defendants' and their *Amici*'s repeated efforts to cite to NAF self-serving statements or rules to contradict the trial court's finding that this arbitration clause was unconscionable. For example, the finance companies argue that biased arbitrators will be disqualified by NAF, citing to an NAF rule. (See Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 8 n.4, 20), and cite a periodical asserting NAF arbitrators rule for consumers more often than courts. (See id. at 10.) They claim that arbitrators are likely to avoid bias because of NAF's Rule 23. (See id. at 16.) The subprime lender defendants make similar claims, (see, e.g., Br. of Defs. Meritech Mtg. Servs., Inc. and The Chase Manhattan Bank at 21, 27.) The plaintiffs urge this Court to look at the evidence in the record of actual behavior by NAF, rather than its unsworn protestations of fair practices.

[8] Despite the presence of numerous documents establishing this fact from NAF's own files, NAF's designated witness falsely denied under oath in his testimony in this case that NAF had ever promised to improve lenders' "bottom lines." (Compare Pls.' Resp. to Defs.' Mot to Reconsid., Dep. of Ed Anderson at 69 with Ex. 9.)

consumer lawsuits, not as a neutral arbiter of such claims.

- NAF boasts of its close relationships with financial industry in its advertisements and solicitations aimed at the financial industry, and uses the defendant, Saxon Mortgage, Inc., as an endorser in its efforts to land further business from other lenders. (See id. at Ex. 7)[9] These boasts are not empty – NAF in fact has a close and ongoing relationship with the financial industry, including Saxon Mortgage, Inc. (see id. at Dep. of Matthew Grey at 49-40; Exs. 2-4) , and NAF's Executive Director, Mr. Anderson, came to NAF directly from a career as an in-house counsel for a lender beset with lawsuits for deceptive conduct.

- NAF ruled for one lender 99.6% of the time in nearly 20,000 arbitration cases before it. (See id. at 17.)

- NAF regularly enters into litigation in court between lenders and consumers, filing *amicus* briefs exclusively in support of the positions taken by and the interests of the lenders, and always against the positions and interests of the consumers. See e.g., Brief of National Arbitration Forum as *Amicus Curiae*, Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000); Brief of *Amicus Curiae* National Arbitration Forum, Baron v. Best Buy Co., Inc., No-14028-E (11th Cir. Dec. 15, 1999); Brief of *Amicus Curiae* National Arbitration Forum, Marsh v. First USA Bank, N.A., No. 00-10648 (5th Cir. Dec. 12, 2000).

- In this case, NAF misrepresented to the trial court that several distinguished members of the State Bar served as NAF arbitrators in an effort to help the subprime lender defendants compel arbitration. However, of the individuals identified as West Virginia arbitrators by NAF who were contacted, none had agreed to serve as arbitrators at that time. Included in this false list was former Justice for the Supreme Court of Appeals of West Virginia, Thomas McHugh, West Virginia University Professor of Law Charles DiSalvo, and Charleston lawyer, Martin Glasser. (See Pls.' Resp. to Defs.' Mot. to Reconsid. at Exs.14-16.)

The record contains ample, undisputed evidence that suggests NAF has a bias in favor of the finance companies and the subprime lender defendants in this case. This record more than adequately supports the plaintiffs' contention that the fee-per-case system employed by NAF leads to inherent bias.

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[9] Counsel for the *Amici*, Wlimer, Cutler, & Pickering is also listed as a reference for NAF arbitration. (See id. at Ex. 7.)

The subprime lender defendants claim Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), and Bank One v. Coates, 125 F. Supp. 2d 819 (2001), prohibit pre-arbitration bias attacks, like those leveled against the arbitration clause in this case. However, neither case supports the lender defendants' contention. Here, the plaintiffs have not come to this Court armed solely with "presumptions," "speculation," and "premises" about arbitration generally. Rather, they have submitted a robust evidentiary record consisting of series of profoundly inappropriate and damning documents from NAF's own files, sworn deposition testimony (albeit occasionally false testimony) by NAF's Executive Director, affidavits from notable West Virginia attorneys, including retired Justice Thomas McHugh, that they were not NAF arbitrators as NAF had represented to the court, sworn interrogatory answers from another case, and similar admissible evidence of concrete misbehavior. The records in both Gilmer and Coates[10] were barren compared to the mountain of evidence compiled regarding NAF's bias. The Supreme Court has cautioned that arbitration will not be avoided based on supposition and presumptions about the adequacy of arbitration generally. The plaintiffs have not relied on any such presumptions – hard undisputed evidence exists demonstrating the arbitration forum at issue in the case, the for-profit NAF, is biased in favor of finance companies and the particular subprime lender defendants in this case.

Likewise, none of the handful of cases in which courts have approved arbitration clauses forcing consumers to take their claims to the NAF or even in the few cases where courts have praised the NAF have the factual records that remotely compare to this one. None of these cases make reference to documents establishing that NAF made inappropriate promises to lenders, NAF

[10] In Coates, the plaintiffs apparently presented no evidence, instead relying on the legal theory that "Bank One has the burden to demonstrate the chosen arbitral forum's impartiality." 125 F. Supp. 2d at 835.

made false and self-serving statements to courts, NAF ruled for lenders in 99.6% of cases, or to any of the other pieces of evidence in the record here. Simply put, the conclusions reached by other courts based upon records bereft of the powerful undisputed evidence present in this case are unpersuasive.[11]

In the face of a comprehensive factual record composed of actual evidence, the subprime lender defendants retreat to economic theory. There can never be a biased arbitrator, they reason, because "simple logic dictates that the marketplace will police any arbitrator so biased." (Br. of Defs. Meritech Mtg Servs., Inc. and The Chase Manhattan Bank at 2.) By this simple but flawed logic, there is no need for any law of unconscionability, or any consumer protection laws for that matter, because the free market will police against unfairness. This utopian vision ignores the realities of the actual market, as demonstrated by the evidence here: the subprime lender defendants, unhampered by any consumer involvement, decided to select their own arbitration firm.[12] The correspondence and deposition testimony establishes that when the subprime lender defendants drafted an arbitration clause specifying that arbitrations were to be conducted by the American Arbitration Association ("AAA"), NAF aggressively pursued the business with promises that the NAF's system would be more favorable to the subprime lenders (and correspondingly less favorable to consumers) than would be the AAA. The market of decisionmakers here was the subprime

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[11] The Court may recall that historically, asbestos companies won more than a dozen trials in the beginning, before plaintiffs gathered enough of the important facts about the product to turn the trend around. So to here. Consumers have heretofore been unable to present to a court the evidence gathered here, presumably in part because of the difficulty in collecting evidence from an arbitration provider, who is typically not a party to the litigation.

[12] This factual reality (though not its obvious implications) is recognized in the subprime lender defendants' own brief: "it is the lenders, not the consumers that draft the loan documents that include arbitration agreements." (Id. at 25.)

lenders, and that market rewards, rather than punishes, decisionmaking tilted in favor of the finance companies.

The finance companies also claim, without any support in the evidentiary record, empirical evidence demonstrates individual "plaintiffs *and* defendants" win more often in arbitration than in Court. (See Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 10 (emphasis added).) There are a litany of reasons why the Court should reject this dubious assertion. First, often, consumers forced into mandatory arbitration before lender-designated arbitrators, which may impose up-front large fees for the arbitration, simply recognize the futility of the process and therefore give up. Second, because of the enormous secrecy surrounding NAF's procedures due to its own rules, (see Defs' Resp. to Plfs.' Mot. for Summ. J., NAF CODE OF PROCEDURE, Rules 4 and 46) there is little independently-verified hard data on this subject. This Court should take NAF's unverified claims in promotional material on its website, with great skepticism, after NAF submitted false information to the trial court, (see Pls.' Resp. to Defs.' Mot. to Reconsid. at Exs. 14-16) and after NAF's designee, Mr. Anderson, testified falsely in his deposition that NAF had not promised "to improve the bottom line" in its solicitations. (Compare id. Dep. of Anderson at 69 with id. Ex. 9.) Third, where there is evidence on the subject, the sworn interrogatory answers of First USA Bank demonstrate that NAF ruled for that lender 99.6% of the time in nearly 20,000 cases. (See id. at Ex. 17.) Fourth, the study of labor cases cited by the *Amici* tells little about arbitration in this setting, as labor unions have a far different relationship with arbitrators – where they are repeat players and typically have an equal role in selecting arbitrators – than consumers do with arbitration service providers such as NAF. Fifth, other courts have recognized that even in the employment setting, the empirical evidence demonstrates that arbitrators give employees far less generous awards than

are the norm in a court of law. See Armendariz, 6 P.3d at ___, 25 Cal. 4th at 111 ("[The amount awarded [in arbitration] is on average smaller."); see also MARCUS NIETO AND MARGARET HOSEL, ARBITRATION IN CALIFORNIA MANAGED HEALTH CARE SYSTEMS 21 (2000) ("Large medical malpractice awards are less common in arbitration than in jury trials.").[13]

The subprime lender defendants finally suggest that a proper reading of Alexander Hamilton's writings in the Federalist Papers demonstrate that lender-selected arbitrators dependent upon lenders for their income are no more likely to be biased than are courts, because courts are dependent upon the voters. (See Br. of Defs. Meritech Mtg. Servs., Inc. and the Chase Manhattan Bank at 25-26.) As the subprime lender defendants see it, the real problem is the bias of courts such as this one, not bias from arbitrators hand-picked by the out-of-state lenders. The plaintiffs, on the other hand, have far more faith, and indeed pride, in the West Virginia judicial system. The members of this Court will not be beholden to either party in a given civil dispute merely because they might be voters, as the voting public of West Virginia Court consists of almost a million citizens, only a few of whom are involved in any given dispute. When NAF judges disputes involving the modestly sized community of lenders on which it depends for business and for referrals and "Information Resources," however, the influence is far more profound. Moreover, the courts of West Virginia do not contact prospective litigants and urge them to bring disputes to court with the promise of better treatment, like NAF, which targets solicitations to lenders stressing how its system will more effectively squelch consumer lawsuits than its competitors. The subprime lender defendants' argument is poor history and logic, at best.

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[13] The Nieto study, performed for the California legislature, found that arbitrators are roughly twenty times more likely than judges to grant summary judgment in favor of HMO defendants in medical malpractice and insurance coverage cases.

C. The Plaintiffs' Proposed Rule Is Not Preempted by the FAA.

Both the subprime lender defendants and their *Amici* argue that federal law, and more particularly the FAA, bar this Court from answering the Certified Question in the affirmative. This argument is flatly wrong. Nothing in the FAA creates a federal right for a company to set up an arbitration system with a structure that creates powerful incentives for the arbitrators to be unfair or biased. Generally applicable principles of West Virginia law for more than a century created outside of the arbitration setting and not preempted by the FAA permit this Court to answer the Certified Question with a yes without running afoul of any federal law.

It is true enough that the FAA creates a policy in favor of the enforcement of arbitration agreements. But that policy does not require courts to enforce any kind of arbitration agreement no matter how unfair. The FAA permits courts to strike down arbitration clauses that are unconscionable under generally applicable state law, and a good many courts, including this Court, have struck down arbitration clauses as unconscionable in the context of particular cases. See, e.g., Arnold, 204 W. Va. at 236-37, 511 S.E.2d at 861-62; Shankle v. B-G Maintenance Management of Colorado, 163 F.3d 1230, 1235 (10th Cir. 1999); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940-41 (S.D. Tex. 2001); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1100-01 (W.D. Mich. 2000); Nicholson v. Labor Ready, Inc., No. C 97-0518 FMS, *available in* 1997 WL 294393, *5-6 (N.D. Cal. 1997); In re Knepp, 229 B.R. 821, 850 (Bankr. N.D. Ala. 1999); Armendariz, 6 P.3d at 699; Iwen v. U.S. West Direct, 977 P.2d 989, 996 (Mont. 1999); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 867 (Ohio 1998); Sosa, 924 P.2d at 361-62; Powertel, Inc. v. Bexley, 743 So. 2d 570, 577 (Fla. Dist. Ct. App. 1999); In re Turner Bros. Trucking Co., Inc., 8 S.W.3d 370, 377 (Tex. Ct. App. 1999); Teleserve Sys., Inc. v. MCI Telecomm. Corp., 659 N.Y.S.2d

659, 665 (N.Y. App. Div. 1997); Worldwide Ins., Group v. Klopp, 603 A.2d 788, 791-92 (Del. 1992); Zak v. Prudential Property & Cas. Ins. Co., 713 A.2d 681, 684 (Penn. Super. Ct. 1998); Ballard v. Southwest Detroit Hosp., 327 N.W. 2d 370, 372 (Mich Ct. App. 1982).

Moreover, this Court may answer the Certified Question as yes without discriminating against arbitration agreements, or singling them out for negative treatment as compared with other contracts, and therefore running afoul of the preemptive scope of the FAA. The rule of law urged by the plaintiffs in this appeal is a generally applicable rule of West Virginia law, which is not aimed specifically at arbitration clauses, and which does not discriminate against them. The generally applicable constitutional law in West Virginia has long been that a decisionmaker may not be given a financial incentive to favor creditors over consumers. See Shrewsbury, 157 W.Va. at 545-47, 202 S.E.2d at 631-32. This rule was not adopted in a case involving arbitration, but instead in a case involving Justices of the Peace. See id. While the FAA does not permit treating arbitration clauses more poorly than other types of contracts, neither does it require that arbitration systems be held to a lower standard of fairness or ethical behavior than Justices of the Peace or other types of decisionmakers. Cf. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating state law grounds may invalidate arbitration agreements under § 2 challenges so long as the law is not applicable "*only* to arbitration").

Additionally the Certified Question may be answered yes without running afoul of the FAA because doing so merely applies West Virginia's generally applicable law with respect to exculpatory clauses. If an arbitration system is structured in such a way as to make it likely to be biased against a consumer, then the arbitration clause essentially becomes an exculpatory clause that permits a corporation to evade liability without respect to whether it has broken the law. Holding

that such an unfair or biased arbitration system is unconscionable is no different from forbidding exculpatory clauses in general, which West Virginia already does. See Murphy v. North Am. River Runners, 186 W. Va. 310, 315, 412 S.E.2d. 504, 509 (W. Va. 1991) ("[W]hen a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable."). More importantly, under the West Virginia Consumer Credit and Protection Act, waiver of the right to enforce claims is prohibited. See W. VA. CODE § 46A-1-107; U.S. Life Credit Corp., 171 W. Va. at 540-41, 301 S.E.2d at 171-72. The plaintiffs and the defendant, Salmons Agency, Inc. are not asking this Court to disapprove of mandatory arbitration in general. Instead, they ask this Court merely to say that arbitration agreements structured in an inherently unfair manner likely to lead to biased decisionmakers are unconscionable, a ruling not barred by the FAA.

The plaintiffs' and the defendant, Salmons Agency Inc.'s argument is demonstrably not directed at arbitration in general. It would have been easy for the lender defendants to draft an arbitration clause that did not give the arbitrators a strong incentive to rule for the lender defendants by simply providing that the parties would jointly agree on an arbitrator. Arbitration clauses need not specify a single "lender-designated decision maker compensated through a case-volume fee system whereby the decision maker's income as an arbitrator is dependent on continued referrals from the creditor."[14] Answering the Certified Question with a yes will not bar or discriminate

[14] The *Amici*'s brief offers the alternative that rather than one arbitration forum designated by the lender, "many lenders now offer consumers a choice among several national arbitration administrators." (Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 15.) In reality, many arbitration clauses, such as Beneficial Finance Company, offer three separate arbitration providers, (continued...)

against the enforcement of arbitration agreements in West Virginia, but will simply ensure that those agreements meet the generally applicable minimum standards of fairness set out in Shrewsbury, that West Virginia has long imposed upon other decision makers.

D. This Court Need Not Wait Until Arbitration Has Completed to Strike the Arbitration Clause as Unconscionable.

Unconscionable arbitration clauses, including arbitration clauses involving arbitrations systems structurally likely to lead to biased decisions, are not enforced. The proper and common practice is for a court to determine the unconscionability of the arbitration clause at the time it is challenged, which is typically before the parties submit to arbitration. The subprime lender defendants and finance companies *Amici* argue this Court should reverse this normal approach and hold that the neutrality of an arbitrator may not be considered before the parties are forced to

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[14](...continued)
one of which may be selected by the *lender*, not the consumer. (See Ex. A. (stating party initiating arbitration (typically the lender) selects the arbitration forum among the three lender-designated providers). Such a system increases rather than minimizes unfairness. Even if the consumer were to chose one of the three selected by the finance companies, the result would be the same, one step removed. What need is there for the lender to designate any arbitration provider? Why not simply have both parties select the arbitration provider? That way, instead of giving all power to the lender to designate a particular arbitration service provider – and thus to designate who will receive substantial fees for arbitration services – arbitration clauses could give the parties a significant choice in selecting who the arbitrator will be. And under the FAA, if the parties cannot agree on an arbitrator, the parties may petition the court to select the arbitrator. See 9 U.S.C. § 5. Were the parties required to jointly agree, then a true open market would exist and arbitrators would not be able to improve their incomes exclusively by marketing their services to lenders (which, in NAF's case, has been shown to mean making increasingly extravagant promises to favor the lender over the consumer), but will only receive fees if all parties agree to select their services over other arbitration service providers. Nevertheless, considering the potential preemptive effect of the FAA on any overly broad decision by this Court, see Doctor's Assoc., Inc., 517 U.S. at 688, the plaintiffs and the defendant, Salmons Agency, Inc., do not suggest that this Court go outside the record of this case to endorse or reject any particular arbitration clause not presented in this case.

arbitration.[15] (See Br. of Defs. Meritech Mtg. Servs., Inc. and The Chase Manhattan Bank at 16-18; Br. of Am. Fin. Servs. Assoc. as Amicus Curiae at 18-20.) They support this proposition by drawing upon a number of cases where a party seeks to have one arbitrator removed so another might take their place, a situation totally unlike this one, or cases taken from the context of claims under § 10 of the FAA, which provides that arbitration awards may be vacated where the arbitrator displayed "evident partiality," or with cases from other settings where the parties did not dispute the presence of an enforceable agreement. But case does not involve a § 10 challenge to a completed arbitration, it involves a § 2 challenge to enforceability. Compare 9 U.S.C. § 2 (providing agreements are not valid if unenforceable under "any grounds as exist at law or equity for the revocation of any contract") with id. § 10. The fact that § 10 challenges must be delayed until after the completion has nothing to do with the entirely different state law issues raised by § 2. Nothing in the FAA prevents a court from considering a challenge to an inherently biased arbitration system. See, e.g., Graham, 623 P.2d at 177 (concluding contract providing for biased arbitration system is unconscionable). Where the existence of an enforceable agreement is challenged, courts have no trouble prospectively refusing to enforce arbitration clauses where there are grounds to suspect the neutrality of the arbitrator. See, e.g., Hooters of Am., Inc. v. Phillips,173 F.3d 933, 940 (4th Cir. 1999) (refusing to enforce an arbitration clause that among other things allowed one party excessive control over the selection of the arbitrator).

E. Because the Arbitration Firm so Controls the Arbitration Panel, the Structural Bias of NAF may be Imputed to Prospective Arbitrators.

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[15] No doubt it has struck defendants and their industry *amici* that very few consumer plaintiffs would be sufficiently resilient and financially well grounded to take their cases all the way through a pointless proceeding before a biased arbitrator, only then to bring a court challenge under § 10 of the FAA.

The finance companies go so far as to say that whether "the arbitration *administrator* is biased has no bearing on the issue of whether an arbitrator will be biased." (Br. of Am. Fin. Servs. Assoc. at Amicus Curiae at 8.)[16]

A number of NAF's principals and highest ranking officers (Anderson, Haydock, and Brown) have effectively expressed a favoritism towards NAF's corporate financial clients and against those clients' customers. (See, e.g., Plfs.' Resp. to Defs.' Mot. to Reconsid. at Ex. 11.) The record here demonstrates that these persons will have ample ability to act upon those impulses. For one thing, NAF's Director of Arbitration selects the arbitrator who will be on the very small panel of arbitrators eligible to hear a given dispute, and NAF itself decides which arbitrators will be disqualified from hearing a given case. (See NAF CODE OF PROCEDURE, Rule 21.) These powers contain enormous potential for abuse. Suppose that the local rules of some court allowed plaintiff's counsel but not defense counsel to exercise the sole power to select which judge of that court, or more appropriately, which member of that court's bar, would hear a given case. Would anyone imagine such a procedure "neutral?" Of course not. In fact, any system allowing a biased party the sole power to select an arbitrator is not fair or neutral. The finance companies assert consumers play an equal role in determining which of several possible arbitrators will hear a case, ignoring that NAF can always effectively guarantee a pro-financial services industry arbitrator in every case.

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[16] On a related track, the subprime lenders insist that this Court erred in deciding to hear the Certified Question because the NAF is not a lender designated decisionmaker because "the arbitrator is mutually agreed upon by all parties." (Br. of Defs. Meritech Mtg. Servs., Inc. and The Chase Manhattan Bank at 11-12.) While the subprime lender defendants repeatedly tout at face value NAF's claims that consumers may pick their own arbitrator, their brief never confronts the twin realities that (a) NAF determines who the arbitrators will be in any given case, so NAF itself maintains enormous control over who arbitrators will be; and (b) NAF's system for strikes ensures that NAF ensures a pro-lender arbitrator will sit in any case. (See NAF CODE OF PROCEDURE, Rule 21; Br. of Plfs. and Def. Salmons Agency, Inc. at 9 n.4.)

In addition to the power to select the arbitrator, the current version of the NAF rules[17] extend all sorts of other crucial powers to NAF's director and staff, refuting the claim that it does not matter whether the NAF is structured in an inherently biased manner. The Rules give the Director the ability to grant extensions (Rule 9.D), hear motions (Rule18), alter fees for intervention and hearings (Rule 19.B, 19.D), set the length of hearings (Rule 26), issue orders, including at his own initiative (Rule 38), request involuntary dismissal of a claim (Rule 41), waive fees (Rule 45), request sanctions (Rule 46), interpret the code (Rule 48.A), and change the code (Rule 48.F).

According to the subprime lender defendants, it is not enough that an arbitration system is structured in an unfair way, instead a consumer must prove that the arbitrator appointed to a given case is personally corrupt. In fact, many courts have not held themselves to such an impossible standard of specificity. When the United States Court of Appeals for the Fourth Circuit held it was not legal for Hooters Restaurant's arbitration clause to make it possible for a Hooters manager to decide a sexual harassment case against Hooters, the court did not initiate an inquiry into the purity of heart and good intentions of each Hooters manager. Instead, the Court flatly declared that Hooters's system had a basic level of unfairness built into the system and declared it to be illegal. See Hooters, 173 F.3d at 938-40. When the California Supreme Court held it was unconscionable for a union to control the arbitration system in disputes between union members and outsiders, there was no individualized inquiry into the good faith of each possible union-selected arbitrator. See Graham, 623 P.2d at 177. The subprime lenders defendants proposed approach blinks at reality, and is directly contradicted by a number of opinions addressing the issue. See, e.g., Hudson, 743 F.2d

[17] While there is a copy of NAF's Code of Procedure in the record, the following discussion of its Rules was confirmed by a review of the most recent rules posted on NAF's website. See <http://www.arb-forum.com/> (visited February 10, 2002).

at 1195; Cheng-Canindan., 57 Cal. Rptr. 2d at 874-77 (finding procedure dominated by employer does not qualify as arbitration); Ditto, 861 P.2d at 1004 ("[A]rbitration clause as would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced."); In re Cross & Brown Co.,167 N.Y.S.2d at 575 (A well-recognized principle of 'natural justice' is that a man may not be a judge in his own cause.").

F. This Court Did Not Err in Deciding to Hear this Case.

Unwilling to respect this Court's decision to hear this case, the subprime lender defendants persist in their curious position that the Certified Question is not necessary to the decision because the agreement is not compulsory. To begin, there is no question that the clause is compulsory. Compulsory means required by law or other rule. See WEBSTER ILLUSTRATED CONTEMPORARY DICTIONARY 145 (1987). The subprime lender defendants maintain that arbitration is mandatory for all disputes arising out of the loan. To be sure, the subprime lender defendants have filed a motion to *compel* arbitration. The contention that the clause is not compulsory not only flies in the face of common sense, it contradicts the subprime lender defendants entire litigation strategy to date, which can be characterized as an unending effort to compel arbitration. The trial court held the subprime lender defendants' arbitration clause is unconscionable. The Certified Question is plainly decisive as to the question of conscionability, demonstrating that the subprime lender defendants' procedural quibbles to this Court's jurisdiction are baseless.

The evidence demonstrates overwhelmingly that this contract was adopted in a procedurally unconscionable manner. The fact that there was no gun held to the plaintiffs' heads forcing them to sign the agreement does not decide the unconscionability issue. The Certified Question is decidedly not a theoretical "advisory opinion" but instead resolves the central issue of whether the

defendants' justice-for-sale version of arbitration is substantively unconscionable. Accordingly, this Court did not err in deciding to hear this case.

F. This Court Should Reject the Suggestion That it Re-write the Arbitration Clause So That it Will Be Enforceable.

Perhaps reflecting a realistic assessment of the state of the record with respect to the NAF's conduct, after defending NAF for a while, the *Amici* finance companies turn to their emergency auxiliary backup plan: they suggest at the close of their brief that even if NAF is biased and the arbitration clause is unconscionable, this Court should re-write the clause in such a way as to affirmatively designate some new arbitrator who will be fair. This suggestion should be rejected.

If this Court holds that the arbitration agreement is unconscionable or contrary to the West Virginia Consumer Credit and Protection Act, the proper course is to invalidate the entire arbitration clause. The United States Supreme Court has instructed that the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced *according to their terms*." Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr., Univ., 489 U.S. 468, 479 (1979) (emphasis added); see also 9 U.S. C. § 4 ("[The court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*.") (emphasis added). Accordingly, if a private agreement to arbitrate cannot be enforced according to its terms, this Court should refuse to enforce it. This Court should not both draft and enforce a new "agreement" to arbitrate of its own making. Where a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a way for the drafter to enjoy the otherwise unobtainable results it sought. . See RESTATEMENT (2D) OF CONTRACTS § 184, comment b ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to

offend public policy by redrafting the agreement so as to make a part of the promise enforceable"); Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1249 (9th Cir. 1994) ("Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden"); Protective Life Ins. v. Lincoln Nat'l Life Ins., 873 F.2d 281, 282 (11th Cir 1989) (concluding § 4 of the FAA prohibits a district court from reading into an arbitration agreement a provision for the consolidation of arbitration proceedings); Sesito v. H.J. Meyers & Co., 1997 U.S. Dist. LEXIS 4960, at * 4-5 (N.D. Tex. Mar. 26, 1997) (refusing to fill in a missing term in a contract to give an arbitration clause effect); see also, e.g., Fraternal Order of Police, Lodge No. 69 v. Fairmont, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996) ("Our task is not to rewrite the terms of contact between the parties."). The United States Court of Appeals for the Eleventh Circuit recently cautioned against rewriting unconscionable or illegal arbitration clauses so that they will be enforceable:

> Globe requests that this court reform the agreement by severing the costs and fees provision and enforcing the remainder. To sever the costs and fees provision and force the employee to arbitrate a Title VII claim despite the employer's attempt to limit the remedies available would reward the employer for its actions and fail to deter similar conduct by others.
>
> If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an unknowledgeable employee from initiating arbitration, even if they would ultimately not be enforced. It would also add an expensive procedural step to presenting a claim; the employee would have to request a court to declare a provision unlawful and sever it before initiating arbitration.

Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001) (citation omitted). Likewise, in this case the Court should decline the finance companies' invitation to rewrite the arbitration clause and discourage lenders from relying on the Courts to rewrite their substantively unconscionable arbitration agreements.

III. CONCLUSION

In Shrewsbury, this Court compiled a hundred years of precedent and set out a powerfully reasoned decision establishing the law of West Virginia – decisionmakers in civil disputes should not be for sale. The inappropriate conduct of the NAF is illustrative of the same kind of abuse that prompted the Shrewsbury ruling. However, unlike Shrewsbury, this case dos not involve a dispute over the collection of relatively small delinquent accounts. Rather it concerns the right of thousands of West Virginians to save their homes. The subprime lender defendants and the *Amici* finance companies propose that the citizens of this State be denied a neutral forum in which to protect their home. This Court should reject this indecent proposal and apply the principles of Shrewsbury to the law of unconscionability and answer the Certified Question yes.

Respectfully submitted,

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