EXHIBIT A

AT&T to Offer Next-Generation iPhone on Its High-Performance 3G Network

Broadband Speed and New Capabilities Enhance Iconic Mobile Device

$199 Starting Price Significantly Expands Mass Market Appeal

New Corporate E-Mail and Web Applications Move iPhone Further Into Business Market

Note: AT&T will hold a conference call today for investors and analysts to provide background on the new iPhone 3G launch and AT&T's wireless data strategy. The call will include comments from Ralph de la Vega, president and CEO, AT&T Mobility, and Rick Lindner, senior executive vice president and CFO for AT&T. The conference call will be broadcast live via the Internet at 4:30 p.m. ET on Monday, June 9, 2008, at www.att.com/investor.relations.

Broadcast satellite video available. Details follow at end of release.

San Antonio, Texas, June 9, 2008

AT&T Inc. (NYSE:T) today announced it will be the exclusive U.S. provider of the new iPhone 3G, details of which were outlined earlier today at Apple's Worldwide Developer's Conference in San Francisco.

Under the terms of a new agreement with Apple, AT&T remains the exclusive U.S. carrier of the iPhone 3G, which will be available beginning July 11 at a starting price of $199 with a two-year contract. The iPhone 3G boasts several significant enhancements, including:

3G broadband wireless connectivity, which gives customers a home broadband-like speed experience when surfing the Internet, sharing files and using media-rich Web applications.

Business-class capabilities, including e-mail, viewed on a large, touch-screen device and designed to meet the needs of companies of all sizes.

The ability for developers, including AT&T, to create customized consumer and business applications using the Apple software developer's kit (SDK).

Customers can get more information on the iPhone 3G at www.att.com/iphone.

AT&T expects that the iPhone 3G's attractive pricing and rich set of features including business e-mail and other applications, combined with the broadband speeds of AT&T's 3G network, will spur significant subscriber and revenue growth — particularly in wireless data — and strengthen AT&T's wireless leadership and long-term growth profile.

"The iPhone 3G will take mobile communications and computing to a whole new level by combining a terrific user interface with a great experience accessing the Internet and subscribers' favorite applications on our 3G wireless network at unsurpassed speeds," said Ralph de la Vega, president and chief executive officer of AT&T Mobility. "Combine our high-performance 3G broadband wireless network, the new iPhone's business-class capabilities and a starting price of $199, and I expect that we will continue to increase revenue per user and attract customers who spend the most on wireless. The device is built, and priced, to sell."

AT&T will sell iPhone 3G in more than 2,200 company-owned retail stores and kiosks, as well as through its direct business sales teams.

New Agreement With Apple Reflects Significant Growth Opportunity
The new agreement between Apple and AT&T eliminates the revenue-sharing model under which AT&T shared a portion of monthly service revenue with Apple. Under the revised agreement, which is consistent with traditional equipment manufacturer-carrier arrangements, there is no revenue sharing and both iPhone 3G models will be offered at attractive prices to broaden the market potential and accelerate subscriber volumes. The phones will be offered with a two-year contract and attractive data plans that are similar to those offered for other smartphones and PDAs. AT&T anticipates that these offers will drive increased sales volumes and revenues among high-quality, data-centric customers. Currently, less than 20 percent of AT&T's postpaid subscribers have integrated devices capable of voice, Web and data applications. Based on the company's experience, average monthly revenues per iPhone subscriber are nearly double the average of the company's overall subscriber base.

With a two-year contract, the price of an 8GB iPhone 3G will be $199; the 16GB model will be priced at $299.

Unlimited iPhone 3G data plans for consumers will be available for $30 a month, in addition to voice plans starting at $39.99 a month.

Unlimited 3G data plans for business users will be available for $45 a month, in addition to a voice plan.

In the near term, AT&T anticipates that the new agreement will likely result in some pressure on margins and earnings, reflecting the costs of subsidized device pricing, which, in turn, is expected to drive increased subscriber volumes. The company anticipates potential dilution to earnings per share (EPS) from this initiative in the $0.10 to $0.12 range this year and next, with a 2008 adjusted consolidated operating income margin of approximately 24 percent and a full-year 2008 wireless OIBDA margin in the 39-40 percent range. As recurring revenue streams build without any further revenue sharing required, AT&T expects the initiative to turn accretive in 2010.

AT&T's 3G Wireless Network
The iPhone 3G harnesses the power of AT&T's broad and powerful 3G mobile broadband network, which offers 3G mobile phones download speeds of up to 1.4 Mbps. AT&T's 3G network is currently available in 280 leading U.S. metropolitan areas; by year-end, the company plans to offer 3G service in nearly 350 metro areas. Following the recent turndown of its TDMA network, the company is further enhancing its 3G network, with improved coverage quality made available through reallocated 850 MHz spectrum.

AT&T's 3G network is the best positioned among American carriers to grow in line with customer demand, evolving to next-generation speeds incrementally during the next few years. Between 2005 and the end of 2008, AT&T will have invested more than $20 billion in wireless network improvements and upgrades.

AT&T has the best global coverage of any provider, with voice-roaming available in more than 200 countries and data-roaming in more than 145 countries, including more 3G roaming than any other carrier.

In addition, the new iPhone 3G will operate in Wi-Fi mode through wireless modems in homes and offices, as well as public hot spots.

Marketing the iPhone to Businesses
iPhone 3G includes new business capabilities, including access to corporate e-mail and intranets, as well as the ability to certify mobile business applications to suit the needs of an array of industries, ranging from health care and real estate to higher education and financial services. Starting July 11, AT&T will begin marketing to its business customers, which includes all of the Fortune 1000. To prepare for the rollout, AT&T will be conducting extensive training among its thousands of enterprise and small business sales force and customer-support employees. AT&T is the world's leading provider of corporate wireless e-mail solutions.

"We're anticipating significant demand from companies of all sizes based on the feedback we've received from the many corporate customers who have already purchased the first-generation iPhone, as well as from companies waiting for the new iPhone's business applications," said Ron Spears, group president, AT&T Global Business Services. "Businesses will benefit from all of the iPhone's new features, as well as the ability to maximize productivity by using the combination of 3G broadband connectivity and customized applications."

Through its work over the years with the developer community, AT&T has developed a robust catalog of hundreds of enterprise applications (www.att.com/choice). AT&T will work with Apple, using the SDK process, to enable many of

these applications, which today operate on other AT&T-powered wireless devices, to also work on the iPhone. The growth of mobile applications represents a huge opportunity for companies to improve productivity through reduced overhead expenses, access to real-time information and higher levels of speed and efficiency.

Unleashing Innovative Applications With the SDK
AT&T is working closely with Apple to roll out several new and innovative applications that take advantage of the iPhone's advanced capabilities. For example, AT&T is finalizing YELLOWPAGES.COM mobile for the iPhone, an innovative location-based application that combines local search with social networking capabilities, giving users the ability to search for information, share reviews and plan activities with friends, neighbors and co-workers. In addition, the company will work to certify many of its existing mobile applications for businesses, created in conjunction with third-party developers, for use on the iPhone.

FIND MORE INFORMATION ONLINE

Related Media Kits:

The iPhone

Related Fact Sheets:

AT&T Network Coverage Map
iPhone and AT&T's Wireless Data Network
3G Coverage: Cities with 3G Service

Related News Releases:

AT&T Nears Completion of 3G Wireless Technology Deployment That Delivers Broadband Wireless Speeds - for Downloads and Uploads
AT&T Introduces New iPhone Text Accessibility Plan for Customers with Disabilities

Web Sites:

AT&T Web Site
AT&T Wireless Web Site
AT&T iPhone Web Site
About the AT&T 3G Network
Apple iPhone

Bookmarks and Tags:

del.icio.us digg

Learn more about bookmarks and tags.

Technorati:

AT&T, iPhone, 3G Network, Mobile Broadband, Wireless Internet Service

About AT&T
AT&T Inc. (NYSE:T) is a premier communications holding company. Its subsidiaries and affiliates, AT&T operating companies, are the providers of AT&T services in the United States and around the world. Among their offerings are the world's most advanced IP-based business communications services and the nation's leading wireless, high speed Internet access and voice services. In domestic markets, AT&T is known for the directory publishing and advertising sales leadership of its Yellow Pages and YELLOWPAGES.COM organizations, and the AT&T brand is licensed to innovators in such fields as communications equipment. As part of its three-screen integration strategy, AT&T is expanding its TV entertainment offerings. In 2008, AT&T again ranked No. 1 on Fortune magazine's World's Most Admired Telecommunications Company list and No. 1 on America's Most Admired Telecommunications Company list. Additional information about AT&T Inc. and the products and services provided by AT&T subsidiaries and affiliates is available at .

Cautionary Language Concerning Forward-Looking Statements
Information set forth in this news release contains financial estimates and other forward-looking statements that are subject to risks and uncertainties, and actual results may differ materially. A discussion of factors that may affect future results is contained in AT&T's filings with the Securities and Exchange Commission. AT&T disclaims any obligation to update or revise statements contained in this news release based on new information or otherwise. This news release may contain certain non-GAAP financial measures. Reconciliations between the non-GAAP financial measures and the GAAP financial measures are available on the company's Web site at www.att.com/investor.relations. Previously released pro forma comparisons are available on AT&T's Investor Relations Web site at www.att.com/investor.relations.

Note: This AT&T news release and other announcements are available as part of an RSS feed at .

Satellite B-roll News Feed
A satellite feed with b-roll of AT&T's stores and 3G network is available for downlink at: C-band, Galaxy 26, C-7, downlink freq. 3840 V at 4 p.m., 5 p.m. and 8 p.m. EDT.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS – WESTERN DIVISION

AARON WALTERS, Individually and on Behalf of All Persons Similarly Situated, Plaintiff, v. APPLE COMPUTER, INC., AT&T, INC. and AT&T MOBILITY LLC, Defendants.	Case No. 4:08CV002484-JLH

DECLARATION OF RICHARD A. NAGAREDA

I, Richard A. Nagareda, hereby declare as follows:

1. I am a tenured Professor of Law at Vanderbilt University Law School with thirteen years of experience as a teacher and scholar in the area of complex civil litigation—particularly, class actions and other forms of aggregate litigation. In 2005, I was appointed Director of the Law School's Cecil D. Branstetter Litigation and Dispute Resolution Program. In 2006, I was appointed to the Tarkington Chair in Teaching Excellence, a three-year rotating chair. My teaching in recent years has included courses on Complex Litigation, Evidence, Administrative Law, and a year-long Civil Litigation Capstone Seminar for third-year law students interested in advanced study of the civil justice system.

2. Prior to joining the legal academy in 1994, I served as a law clerk for Judge Douglas H. Ginsburg of the United States Court of Appeals for the District of Columbia Circuit. I subsequently practiced law as an Attorney-Advisor in the Office of Legal Counsel of the United States Department of Justice and, thereafter, as a litigation associate with the law firm of Shea & Gardner in Washington, D.C. (now, part of the Goodwin Procter firm). I hold an A.B.

degree in political science from Stanford University (1985) and a J.D. degree from The University of Chicago Law School (1988).

3. A copy of my curriculum vitae is attached to this declaration.

4. My articles on class action litigation have appeared in the Columbia Law Review, the Georgetown Law Journal, the Harvard Law Review, the Michigan Law Review, the Texas Law Review, the University of Chicago Law Review, and the University of Pennsylvania Law Review among other scholarly journals. In 2003, the American Law Institute appointed me as Associate Reporter for its project on Principles of the Law of Aggregate Litigation. In 2007, the University of Chicago Press published my scholarly book *Mass Torts in a World of Settlement.* In 2009, Foundation Press will publish my casebook *The Law of Class Actions and Other Aggregate Litigation.*

5. As part of my ongoing scholarly research, I have written an article entitled *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, which was published in the November 2006 issue of the Columbia Law Review (at 106 COLUM. L. REV. 1872). The issue includes several scholarly articles that, like mine, were prepared for a May 2006 conference sponsored by the Institute for Law & Economic Policy. In July 2006, I posted a preliminary draft of the article on the Social Science Research Network (http://papers.ssrn.com/sol13/papers.cfm?abstract_id=920833). The final version, as it appears in print, differs in only minor respects from the preliminary draft, in keeping with the usual editorial process of law reviews. Apart from a summer research grant from Vanderbilt University Law School, I received no other financial support for the preparation of the article. No individual or organization exercised editorial review over the views expressed in the article.

6. In *Aggregation and its Discontents*, I unite the discussion of three significant debates in the law of aggregate litigation. Two of those debates bear upon matters that I understand to be involved in the present case. The first and most directly pertinent debate concerns challenges to provisions in consumer contracts with providers of goods or services that not only call for arbitration of disputes but also waive the opportunity to conduct the arbitration proceeding on an aggregate basis (or, for that matter, to bring suit by way of a conventional class action or consolidated litigation). Existing commentary and judicial decisions have split over the permissibility of these waivers of class-wide arbitration—in particular, over whether such waivers should be deemed unconscionable as a matter of contract law.

7. In my article, I describe the inquiry that should govern the permissibility of such waivers. I suggest that courts should ground the unconscionability inquiry in the underlying principle—repeatedly stated by the Supreme Court of the United States in its decisions under the Federal Arbitration Act—that, by agreeing to arbitrate disputes, consumers do not forgo the rights of action afforded to them by substantive law. Rather, consumers merely agree to dispute resolution in a more streamlined and informal process, as compared to conventional civil litigation. In short, the key question in a given instance is whether consumers may effectively vindicate their private rights of action in the arbitration process. In keeping with this principle, I argue that waivers of class-wide arbitration are impermissible when they amount, in practical terms, to the effective elimination of consumers' private rights of action—something that legislation might do but that arbitration clauses in private contracts lack authority to do. I go on to discuss the considerations that should bear upon the determination whether a waiver of class-wide arbitration effectively eliminates a private right of action in a given instance, with particular attention to small-stakes consumer claims. I contend that courts should make an informed

prediction of the market for legal representation of consumers in the absence of the opportunity to aggregate claims—specifically, whether there are substantial grounds on which to believe that such a market for representation would exist. Relevant considerations for such a prediction include not only the costs and expenses associated with the bringing of claims (e.g., filing fees, the costs of the arbitration proceeding, and litigation expenses) but also the potential financial upside for both consumer and attorney and the applicable regime for attorneys' fees (e.g., whether fee shifting is available and whether the fee would be calculated by the lodestar method).

8. My article places me between two extreme positions in the scholarly literature on waivers of class-wide arbitration. I neither accept that all class waivers are categorically unenforceable when claims are small, nor endorse the view that class waivers are categorically enforceable so long as the arbitration provision does not restrict the remedies available to the consumer. Under the approach set forth in my article, many arbitration provisions with which I am familiar would likely be unenforceable when claims are small, because they do not otherwise provide a sufficient incentive for consumers and attorneys to pursue such claims.

9. Another part of the article analyzes the contention that class certification can exert an undue, illegitimate pressure on defendants to settle litigation. Among the points I make in this part of the article is that class certification is inappropriate where the legislature has included in substantive law other measures by which to facilitate the bringing of claims on an individual basis: e.g., statutory damages not keyed to the actual losses suffered by consumers. The adding up of statutory damages by way of class certification would amount, I contend, to an inappropriate form of double counting that would disrupt, rather than advance, the remedial scheme of underlying substantive law.

10. After I had completed the last round of changes in the Columbia Law Review editorial process, I was asked by counsel for AT&T Mobility LLC ("ATTM") (formerly Cingular Wireless LLC) to review a revised version of the arbitration clause used in ATTM's consumer contracts ("the 2006 Clause") and to provide my opinion on the permissibility of the 2006 Clause in light of the analysis in my article. I agreed to do so under the terms that I routinely quoted at the time for outside consulting work: a rate of $500 per hour, with a $5000 retainer (against which I apply my initial hours of work).

11. In my opinion, the 2006 Clause represents an innovative measure likely to facilitate the fair and efficient resolution of disputes between individual consumers and ATTM. Indeed, I have never seen an arbitration provision that has gone as far as this one to ensure that consumers and attorneys have adequate incentives to bring claims. Applying the analysis in my article, I conclude that the 2006 Clause reduces dramatically the cost barriers to the bringing of individual consumer claims, is likely to facilitate the development of a market for fair settlements of such claims, and provides financial incentives for consumers (and their attorneys, if any) to pursue arbitration in the event that they are dissatisfied with whatever offer ATTM has made to settle their dispute.

12. As to costs, Paragraph 3 of the 2006 Clause commits ATTM to pay all filing, administration, and arbitrator fees for arbitration. The same Paragraph provides for the possibility of using a streamlined, low-cost hearing process for claims of $10,000 or less, the usual dollar range for the kinds of consumer claims of greatest concern in the debate over waivers of class-wide arbitration.

13. Paragraph 4 of the 2006 Clause provides for a "premium" to both consumers and their attorneys, if any, in the event that the arbitrator finds in favor of the consumer on the merits

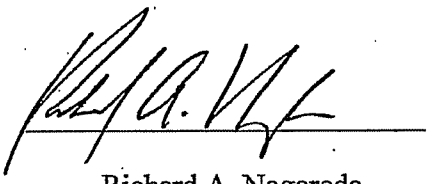
of the claim and issues an award greater than the value of ATTM's last written settlement offer made before the arbitrator was selected. The premium for the consumer would be at least $5000—the median of the various states' jurisdictional limits for small claims court. My further understanding is that, in setting the premium for the attorney at twice the fees that he or she "reasonably accrues for investigating, preparing, and pursuing [the consumer's] claim in arbitration," Paragraph 4 calls for the use (with doubling) of the lodestar method of fee calculation. The lodestar method decouples the premium for the attorney from the magnitude of the award to the consumer. The lodestar method would calculate the premium, instead, by multiplying the number of hours reasonably spent on the specified activities times a reasonable hourly rate (with further multiplication by two). This approach is in keeping with the longstanding use of the lodestar method in such settings as civil rights litigation, where the law seeks to facilitate the bringing of claims that do not necessarily result in financial awards to individual claimants of a magnitude that otherwise would be likely to induce legal representation.

14. My informed prediction is that the availability of the foregoing premium will drive settlement offers toward levels comparable to those that legislatures have understood to be sufficient to facilitate individual claims in settings involving statutory damages. In economic terms, settlement offers in ATTM arbitrations will need to account not only for the expected value of the consumer's claim (in the manner of conventional settlement offers in the civil justice process) but also the expected value of the premium (i.e., the premium discounted by the likelihood that it will be triggered). In providing for statutory damages to facilitate individual claims under a variety of statutes, legislatures routinely have selected dollar amounts considerably less—sometimes, by an order of magnitude—than those described in the Paragraph

4 of the 2006 Clause. *See, e.g.*, 47 U.S.C. § 227(b)(3)(B) (2000) ($500 in statutory damages per junk fax transmitted in violation of the Telephone Consumer Protection Act of 1991); 47 U.S.C. § 551(f)(2)(A) ($1000 in statutory damages per violation of consumer privacy under the Cable Communications Policy Act of 1984). Paragraph 5 of the 2006 Clause goes on to underscore that the premium described in Paragraph 4 supplements any right to attorney's fees and expenses that consumers already have under applicable law.

15. As I discussed in my article, courts properly, in my view, have exercised their discretion to deny class certification outside the arbitration context where the legislature already has provided for statutory damages to facilitate claiming on an individual basis. The 2006 Clause would provide at least as strong of an incentive for individual claiming as longstanding statutory damage provisions in public legislation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 19, 2008.



Richard A. Nagareda

Respectfully submitted,

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/s/JoAnn C. Maxey (83117)
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Counsel for AT&T Inc. and AT&T Mobility LLC

CERTIFICATE OF SERVICE

I, JoAnn C. Maxey, hereby certify that on this 20th day of November, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filings to the following:

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/s/JoAnn C. Maxey

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

AARON WALTERS, ***Individually***
and on Behalf Of All Persons Similarly Situated, **PLAINTIFF**

v. **Case No. 4:08cv002484-JLH**

APPLE COMPUTER, INC.,
AT&T, INC., & AT&T MOBILITY LLC **DEFENDANTS**

NOTICE OF VOLUNTARY DISMISSAL

PLEASE TAKE NOTICE, that Plaintiff Aaron Walters hereby voluntarily dismisses his claims without prejudice against all Defendants in the above-referenced action pursuant to Federal Rule of Civil Procedure 41(a)(1)(i).

DATED: January 5, 2009

Respectfully submitted,

EMERSON POYNTER LLP

/s/ Scott E. Poynter
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CERTIFICATE OF SERVICE

I, Scott E. Poynter, hereby certify that on this 5th day of January, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filings to the following:

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/s/Scott E. Poynter

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JUDY LARSON, BARRY HALL, JOE MILLIRON and TESSIE ROBB, individually and on behalf of all others similarly situated **Plaintiffs,** **v.** **AT&T MOBILITY LLC f/k/a CINGULAR WIRELESS LLC, et al.,** **Defendants.**	**Civil Case No. 07-CV-5325 (JLL-ES)** **DECLARATION OF RICHARD A. NAGAREDA IN SUPPORT OF AT&T MOBILITY LLC f/k/a CINGULAR WIRELESS LLC'S MOTION TO COMPEL ARBITRATION**

I, Richard A. Nagareda, hereby declare as follows:

1. I am a tenured Professor of Law at Vanderbilt University Law School with thirteen years of experience as a teacher and scholar in the area of complex civil litigation—particularly, class actions and other forms of aggregate litigation. In 2005, I was appointed Director of the Law School's Cecil D. Branstetter Litigation and Dispute Resolution Program. In 2006, I was appointed to the Tarkington Chair in Teaching Excellence, a three-year rotating chair. My teaching in recent years has included courses on Complex Litigation, Evidence, Administrative Law, and a year-long Civil Litigation Capstone Seminar for third-year law students interested in advanced study of the civil justice system.

2. Prior to joining the legal academy in 1994, I served as a law clerk for Judge Douglas H. Ginsburg of the United States Court of Appeals for the District of Columbia Circuit. I subsequently practiced law as an Attorney-Advisor in the Office of Legal Counsel of the United States Department of Justice and, thereafter, as a litigation associate with the law firm of Shea & Gardner in Washington, D.C. (now, part of the Goodwin Procter firm). I hold an A.B. degree in political science from Stanford University (1985) and a J.D. degree from The University of Chicago Law School (1988).

3. A copy of my curriculum vitae is attached to this declaration.

4. My articles on class action litigation have appeared in the Columbia Law Review, the Georgetown Law Journal, the Harvard Law Review, the Michigan Law Review, the Texas Law Review, and the UCLA Law Review, among other scholarly journals. In 2003, the American Law Institute appointed me as Associate Reporter for its project on the Principles of the Law of Aggregate Litigation. In 2007, the University of Chicago Press published my scholarly book *Mass Torts in a World of Settlements*.

5. As part of my ongoing scholarly research, I have written an article entitled *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, which was published in the November 2006 issue of the Columbia Law Review (at 106 COLUM. L. REV. 1872). The issue includes several scholarly articles that, like mine, were prepared for a May 2006 conference sponsored by the Institute for Law & Economic Policy. In July 2006, I posted a preliminary draft of the article on the Social Science Research Network (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920833). The final version, as it appears in print, differs in only minor respects from the preliminary draft, in keeping with the usual editorial process of law reviews. Apart from a summer research grant from Vanderbilt University Law School, I received no other financial support for the preparation of the article. No individual or organization exercised editorial review over the views expressed in the article.

6. In *Aggregation and its Discontents*, I unite the discussion of three significant debates in the law of aggregate litigation. Two of those debates bear upon matters that I understand to be involved in the present case. The first and most directly pertinent debate concerns challenges to provisions in consumer contracts with providers of goods or services that not only call for arbitration of disputes but also waive the opportunity to conduct the arbitration proceeding on an aggregate basis (or, for that matter, to bring suit by way of a conventional class action or consolidated litigation). Existing commentary and judicial decisions have split over the permissibility of these waivers of class-wide arbitration—in particular, over whether such waivers should be deemed unconscionable as a matter of contract law.

7. In my article, I describe the inquiry that should govern the permissibility of such waivers. I suggest that courts should ground the unconscionability inquiry in the underlying principle—repeatedly stated by the Supreme Court of the United States in its decisions under the Federal Arbitration Act—that, by agreeing to arbitrate disputes, consumers do not forgo the rights of action afforded to them by substantive law. Rather, consumers merely agree to dispute resolution in a more streamlined and informal process, as compared to conventional civil litigation. In short, the key question in a given instance is whether consumers may effectively vindicate their private rights of action in the arbitration process. In keeping with this principle, I argue that waivers of class-wide arbitration are impermissible when they amount, in practical terms, to the effective elimination of consumers' private rights of action—something that legislation might do but that arbitration clauses in private contracts lack authority to do. I go on to discuss the considerations that should bear upon the determination whether a waiver of class-wide arbitration effectively eliminates a private right of action in a given instance, with particular attention to small-stakes consumer claims. I contend that courts should make an informed prediction of the market for legal representation of consumers in the absence of the opportunity to aggregate claims—specifically, that courts should ask whether there are substantial grounds on which to believe that such a market for representation would exist. Relevant considerations for such a prediction include not only the costs associated with the bringing of claims (*e.g.*, filing fees and the costs of the arbitration proceeding) but also the potential financial upside for both consumer and attorney and the applicable regime for attorneys' fees (*e.g.*, whether fee shifting is available and whether the fee would be calculated by the lodestar method).

8. My article places me between two extreme positions in the scholarly literature on waivers of class-wide arbitration. I neither accept that all class waivers are categorically unenforceable when claims are small, nor endorse the view that class waivers are categorically enforceable so long as the arbitration provision does not restrict the menu of remedies available to the consumer. Under the approach set forth in my article, many arbitration provisions with

which I am familiar would likely be unenforceable when claims are small, because they do not otherwise provide a sufficient incentive for consumers and attorneys to pursue such claims.

9. Another part of the article analyzes the contention that class certification can exert an undue, illegitimate pressure on defendants to settle litigation. Among the points I make in this part of the article is that class certification is inappropriate where the legislature has included in substantive law other measures by which to facilitate the bringing of claims on an individual basis: *e.g.*, statutory damages not keyed to the actual losses suffered by consumers. The adding up of statutory damages by way of class certification would amount, I contend, to an inappropriate form of double counting that would disrupt, rather than advance, the remedial scheme of underlying substantive law.

10. After I had completed the last round of changes in the Columbia Law Review editorial process, I was asked by counsel for Cingular Wireless ("Cingular") to review a revised version of the arbitration clause used in Cingular's consumer contracts ("the 2006 Clause") and to provide my opinion on the permissibility of the 2006 Clause in light of the analysis in my article. I agreed to do so under the standard terms that I use for outside consulting work: a rate of $500 per hour, with a $5000 retainer (against which I apply my initial hours of work).

11. In my opinion, the 2006 Clause should not be deemed unconscionable. The 2006 Clause represents an innovative measure likely to facilitate the fair and efficient resolution of disputes between individual consumers and Cingular. Indeed, I have never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims. Applying the analysis in my article, I conclude that the 2006 Clause reduces dramatically the cost barriers to the bringing of individual consumer claims, is likely to facilitate the development of a market for fair settlements of such claims, and provides financial incentives for consumers (and their attorneys, if any) to pursue arbitration in the event that they are dissatisfied with whatever offer Cingular has made to settle their dispute.

12. As to costs, Paragraph 3 of the 2006 Clause commits Cingular to pay all filing, administration, and arbitrator fees for arbitration. The same Paragraph provides for the

possibility of using a streamlined, low-cost hearing process for claims of $10,000 or less, the usual dollar range for the kinds of consumer claims of greatest concern in the debate over waivers of class-wide arbitration.

13. Paragraph 4 of the 2006 Clause provides for a "premium" to both consumers and their attorneys, if any, in the event that the arbitrator finds in favor of the consumer on the merits of the claim and issues an award greater than the value of Cingular's last written settlement offer made before the arbitrator was selected. The premium for the consumer would be at least $5000—the median of the various states' jurisdictional limits for small claims court. My further understanding is that, in setting the premium for the attorney at twice the fees that he or she "reasonably accrues for investigating, preparing, and pursuing [the consumer's] claim in arbitration," Paragraph 4 calls for the use (with doubling) of the lodestar method of fee calculation. The lodestar method decouples the premium for the attorney from the magnitude of the award to the consumer. The lodestar method would calculate the premium, instead, by multiplying the number of hours reasonably spent on the specified activities times a reasonable hourly rate (with further multiplication by two). This approach is in keeping with the longstanding use of the lodestar method in such settings as civil rights litigation, where the law seeks to facilitate the bringing of claims that do not necessarily result in financial awards to individual claimants of a magnitude that otherwise would be likely to induce legal representation.

14. My informed prediction is that the availability of the foregoing premium will drive settlement offers toward levels comparable to those that legislatures have understood to be sufficient to facilitate individual claims in settings involving statutory damages. In economic terms, settlement offers in Cingular arbitrations will need to account not only for the expected value of the consumer's claim (in the manner of conventional settlement offers in the civil justice process) but also the expected value of the premium (*i.e.*, the premium discounted by the likelihood that it will be triggered). In providing for statutory damages to facilitate individual claims under a variety of statutes, legislatures routinely have selected dollar amounts

considerably less—sometimes, by an order of magnitude—than those described in Paragraph 4 of the 2006 Clause. *See, e.g.*, 47 U.S.C. § 227(b)(3)(B) (2000) ($500 in statutory damages per junk fax transmitted in violation of the Telephone Consumer Protection Act of 1991); 47 U.S.C. § 551(f)(2)(A) ($1000 in statutory damages per violation of consumer privacy under the Cable Communications Policy Act of 1984). Paragraph 5 of the 2006 Clause goes on to underscore that the premium described in Paragraph 4 supplements any right to attorney's fees and expenses that consumers already have under applicable law.

15. As I discussed in my article, courts properly, in my view, have exercised their discretion to deny class certification outside the arbitration context where the legislature already has provided for statutory damages to facilitate claiming on an individual basis. The waiver of class-wide arbitration by contract in this case is no more unconscionable than the judicial decisions denying class certification outside the arbitration setting in the presence of statutory damage provisions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 16, 2008.

Richard A. Nagareda

Updated: January 16, 2008

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EMPLOYMENT

2001-present	**Vanderbilt University Law School**, Nashville, Tennessee Professor, since 2001 Director, Cecil D. Branstetter Litigation & Dispute Resolution Program, since 2005 Tarkington Chair in Teaching Excellence (three-year rotating chair), since 2006 Visiting Associate Professor, Fall 2000 Subjects taught: Complex Litigation, Evidence, Administrative Law, Mass Torts Seminar, Civil Litigation Capstone Seminar
1994-2001	**University of Georgia School of Law**, Athens, Georgia Associate Professor (with tenure), 2000-2001 Associate Professor, 1999-2000 Assistant Professor, 1994-1999 Subjects taught: Administrative Law, Advanced Torts Seminar (Mass Tort Litigation), Criminal Law, Evidence, Supreme Court Seminar
Fall 1997	**University of Texas School of Law**, Austin, Texas Visiting Assistant Professor Subjects taught: Administrative Law, Mass Torts Seminar
1991-1994	**Shea & Gardner**, Washington, D.C. Associate Practice areas: Products Liability, Toxic Torts, Insurance Coverage
1989-1991	**Office of Legal Counsel**, United States Department of Justice, Washington, D.C. Attorney-Advisor Advised White House and federal administrative agencies on constitutional and federal statutory matters

1988-1989 **The Honorable Douglas H. Ginsburg**, United States Court of Appeals for the District of Columbia Circuit, Washington, D.C.
Law Clerk

EDUCATION

J.D. 1988 **The University of Chicago Law School**, Chicago, Illinois
Degree awarded *cum laude*
Executive Editor, *The University of Chicago Law Review*
Order of the Coif
Floyd Russell Mechem Prize Scholarship

A.B. 1985 **Stanford University**, Stanford, California
Degree awarded with honors in Political Science
Firestone Medal for Excellence in Research

PUBLICATIONS

Class Settlements under Attack (with Samuel Issacharoff), 156 University of Pennsylvania Law Review (forthcoming 2008), pre-publication draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031151

Class Actions in the Administrative State: Kalven and Rosenfield Revisited, 75 University of Chicago Law Review (forthcoming 2008), pre-publication draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014659

MASS TORTS IN A WORLD OF SETTLEMENT (University of Chicago Press 2007)

For an essay-length discussion of themes in the book, see *A Question of Settlements*, Vanderbilt Lawyer, Summer 2005

FDA Preemption: When Tort Law Meets the Administrative State, 1 Journal of Tort Law, issue 1, article 4 (2006) (peer-edited journal from Berkeley Electronic Press), available at http://www.bepress.com/jtl/vol1/iss1/art4

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Gun Litigation in the Mass Tort Context, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 176 (Timothy D. Lytton, ed., University of Michigan Press 2005)

Administering Adequacy in Class Representation, 82 Texas Law Review 287 (2003)

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Tobacco Litigation, in THE OXFORD COMPANION TO AMERICAN LAW 801 (Kermit L. Hall, ed. 2002) (entry for legal encyclopedia)

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Reconceiving the Right to Present Witnesses, 97 Michigan Law Review 1063 (1999)

Outrageous Fortune and the Criminalization of Mass Torts, 96 Michigan Law Review 1121 (1998)

In the Aftermath of the Mass Tort Class Action, 85 Georgetown Law Journal 295 (1996)

Turning from Tort to Administration, 94 Michigan Law Review 899 (1996)

Comment, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 University of Chicago Law Review 591 (1988)

Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 University of Chicago Law Review 705 (1987)

WORK IN PROGRESS

Complex Litigation Across the Atlantic and its Structural Dynamics (article)

THE LAW OF AGGREGATE LITIGATION: CLASS ACTIONS AND OTHER MULTIPLE-CLAIMANT LAWSUITS (casebook under contract with Foundation Press; preliminary draft in use for law school courses at University of Arizona, University of Connecticut, Cumberland, New York University, and Vanderbilt in spring 2008; expected availability of published casebook for fall 2009)

Associate Reporter (with Reporter Samuel Issacharoff), American Law Institute, *Principles of the Law of Aggregate Litigation*, Chapter 2: Aggregate Adjudication (Council Draft No. 1, November 19, 2007)

ACADEMIC CONFERENCES, WORKSHOPS, AND OTHER PRESENTATIONS

Panelist, *Class Actions in Europe and North America*, New York University School of Law and American Law Institute, Florence, Italy, June 12-14, 2008 (expected)

Panelist, *Class Actions*, Benjamin N. Cardozo School of Law and American Constitution Society, New York, New York, March 28, 2008 (expected)

Panelist, *Asbestos Litigation*, Southwestern Law School, Los Angeles, California, January 18, 2008 (expected)

Panelist, *The Vioxx Settlement*, American Enterprise Institute, Washington, D.C., January 7, 2008

Panelist, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, University of Pennsylvania Law School, Philadelphia, Pennsylvania, December 1, 2007

Faculty Workshop, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, James E. Rogers College of Law, University of Arizona, Tucson, Arizona, August 30, 2007

Panelist, *Resolving Mass Tort Products Liability Claims*, American Conference Institute, New York, New York, March 28, 2007

Complex Litigation and Dispute Resolution Workshop, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, University of Pennsylvania Law School, Philadelphia, Pennsylvania, October 23, 2006

Panelist, *Does Procedure Dominate Substance? Of Class Actions and Pretrial Motions*, Federalist Society and eSapience Center for Law & Business, New York University

School of Law, New York, New York, September 14, 2006

Faculty Workshop, *FDA Preemption: When Tort Law Meets the Administrative State*, Florida State University College of Law, Tallahassee, Florida, August 31, 2006

Panelist, *The Impact of Tort Litigation on Public Policy and Government Regulation*, Law & Society Association Annual Meeting, Baltimore, Maryland, July 6, 2006

Panelist, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, Institute for Law & Economic Policy, Paradise Island, Bahamas, May 5, 2006

Panelist, *Due Process and Class Actions: The 20th Anniversary of* Phillips Petroleum v. Shutts, University of Missouri-Kansas City, Kansas City, Missouri, April 7, 2006

Civil Justice Workshop, *Mass Torts in a World of Settlement, Introduction & Chapter 11: Peacemaking as Governance*, Boalt Hall School of Law, University of California, Berkeley, California, February 23, 2006

Commentator, *Emerging Issues in Class Action Law*, UCLA School of Law, Los Angeles, California, January 26, 2006

Panelist, *Preclusion, Due Process, and Adequacy of Representation*, American Bar Association, Tort Trial & Insurance Practice Section, Washington, D.C., November 11, 2005

Continuing Legal Education Presentation, *Recent Developments on the Confrontation Clause After* Crawford v. Washington, Office of the Federal Public Defender, Nashville, Tennessee, July 12, 2005

Faculty Workshop, *Mass Torts in a World of Settlement, Chapter 12: Peacemaking as Governance*, Vanderbilt University Law School, Nashville, Tennessee, May 3, 2005

Panelist, *Assessing the Medical, Regulatory, and Legal Landscape: The Past, Present, and Future of Cox-2 Inhibitors*, Academic Programs Committee, Vanderbilt University Board of Trust, Nashville, Tennessee, April 28, 2005

Faculty Workshop (with Samuel Issacharoff), *American Law Institute, Principles of the Law of Aggregate Litigation, Chapter 2: Judicial Resolution of Overlapping Common Issues*, Vanderbilt University Law School, Nashville, Tennessee, September 23, 2004

Faculty Workshop, *Gun Litigation in the Mass Tort Context*, Albany Law School, Albany, New York, November 6, 2003 (working conference for book chapter authors)

Faculty Workshop, *Administering Adequacy in Class Representation*, Benjamin N. Cardozo School of Law, New York, New York, October 13, 2003; Northwestern University

Law School, Chicago, Illinois, September 25, 2003; Vanderbilt University Law School, Nashville, Tennessee, September 2, 2003

Panelist, *Mass Tort Class Settlements after* Amchem *and* Ortiz, Association of American Law Schools, Joint Session for Conferences on Civil Procedure and Torts, New York, New York, June 18, 2003

Panelist, *The Right to "Opt-Out" of Class Action Suits*, University of Chicago Law School, Chicago, Illinois, November 1, 2002

Faculty Workshop, *The Preexistence Principle and the Structure of the Class Action*, Vanderbilt University Law School, Nashville, Tennessee, July 23, 2002

Panelist, Engle v. R.J. Reynolds Tobacco Co.: *Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making*, Wake Forest University School of Law, Winston-Salem, North Carolina, September 28, 2001

Panelist, *Self-Incrimination and Document Subpoenas*, Colorado Bar Association Annual Meeting, Section on Criminal Law, Vail, Colorado, September 21, 2001

Panelist, *Toxic Torts: Issues of Mass Litigation, Case Management, and Ethics*, Marshall-Wythe School of Law, College of William & Mary, Williamsburg, Virginia, March 24, 2001

Faculty Workshop, *Coordinating Substance and Procedure in the Mass Tort Class Action*, Vanderbilt University Law School, Nashville, Tennessee, October 31, 2000

Panelist, *Class Actions in the Gulf South*, Tulane University School of Law, New Orleans, Louisiana, March 31, 2000

Panelist, *Insurance Class Actions*, Section on Insurance Law, Association of American Law Schools Annual Meeting, Washington, D.C., January 7, 2000

Panelist, *Defining Injury: Mass Torts and the Courts in the Popular Imagination*, Law & Society Association Annual Meeting, Chicago, Illinois, May 29, 1999

Faculty Workshop, *Reconceiving the Right to Present Witnesses*, George Mason University School of Law, Arlington, Virginia, March 2, 1999

Faculty Workshop, *"Switching Institutions" in Mass Tort Litigation*, Marshall-Wythe School of Law, College of William & Mary, Williamsburg, Virginia, November 9, 1998

Faculty Workshop, *Outrageous Fortune and the Criminalization of Mass Torts*, University of Texas School of Law, Austin, Texas, October 24, 1997

PROFESSIONAL SERVICE

Advisory Board, Journal of Tort Law, Berkeley Electronic Press, 2006-present

Special Advisor, Executive Committee, Litigation Practice Group, Federalist Society, 2006-present

Member, Executive Committee, Section on Evidence, Association of American Law Schools, 2001-2004

LAW SCHOOL SERVICE (VANDERBILT UNIVERSITY LAW SCHOOL)

Director, Cecil D. Branstetter Litigation & Dispute Resolution Program, 2005-present

Member, Dean Search Committee (by appointment of university provost), Fall 2004

Chair, Faculty Appointments Committee (Entry-Level), 2007-2008; member, 2006-2007 and fall 2002

Member, Student-Faculty Relations Committee, 2001-2002

Chair, Tenure Committee for Associate Professor Herwig Schlunk, 2003-2004

Member, Committee to Review Assistant Professor Christopher Yoo, 2001-2002

Faculty Advisor, Federalist Society, 2002-present

LAW SCHOOL SERVICE (UNIVERSITY OF GEORGIA SCHOOL OF LAW)

Member, Student Affairs Committee, 1994-2001 (Chair, Subcommittee on Judicial Clerkships, 1995-2001)

Member, Faculty Seminars and Special Programs Committee, 1994-1999, 2000-2001

Member, Faculty Recruitment Committee, 1999-2000

Member, Ad Hoc Committee to Review Student Honor Code, 1996-1999

Faculty Advisor, *Georgia Law Review*, 2000-2001

Faculty Advisor, Federalist Society, 1994-2001

LEGISLATIVE TESTIMONY

Finding Solutions to the Asbestos Litigation Problem: The Fairness in Asbestos Compensation Act of 1999, Hearing on S. 758 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Congress 115-123 (1999)

DEPOSITION TESTIMONY

Cruz v. Cingular Wireless LLC, No. 2:07-cv-00714-JES-DNF (M.D. Fla.) (expert witness in support of motion to compel arbitration)

In re Federal-Mogul Global, Inc., No. 01-10578 (JFK) (Bankr. D. Del.) (expert witness on asbestos-related reorganization plan)

Coneff v. New Cingular Wireless Services, Inc., No. C06-0944 RSM (W.D. Wash.) (expert witness in support of motion to compel arbitration)

Hercules, Inc. v. OneBeacon America Ins. Co. et al., No. 02C-11-237 SCD (Super. Ct., New Castle County, Del.) (expert witness in asbestos insurance coverage litigation)

In re Pittsburgh Corning Corp., No. 00-22876 JFK (Bankr. W.D. Pa.) (expert witness on asbestos-related reorganization plan)

ASARCO, Inc. et al. v. Allstate Ins. Co. et al., No. 01-2680-D (105th Jud. Dist. Ct., Nueces County, Tex.) (expert witness in asbestos insurance coverage litigation)

AWARDS

Hartman Outstanding Professor Award (Vanderbilt University Law School, second- and third-year classes, 2001-2002 academic year)

Student Bar Association Faculty Book Award "to the faculty member who most effectively conveys his knowledge and understanding of what the law is and inspires his students to think analytically and critically about what the law can become" (University of Georgia School of Law, Class of 2000)

Phi Delta Phi and John C. O'Byrne Memorial Faculty Award "in appreciation of significant contributions furthering student-faculty relations" (University of Georgia School of Law, Class of 1996)

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUDY LARSON, BARRY HALL, JOE MILLIRON and TESSIE ROBB, individually and on behalf of all others similarly situated, Plaintiffs, v. AT&T MOBILITY LLC f/k/a CINGULAR WIRELESS LLC and SPRINT NEXTEL CORPORATION and SPRINT SPECTRUM L.P. d/b/a SPRINT NEXTEL Defendants.	Civil Action No. 07-5325(JLL)

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE THE DECLARATION OF RICHARD NAGAREDA

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PRELIMINARY STATEMENT

Among the papers in support of AT&T's motion to compel arbitration is the Declaration of Richard Nagreda, a law professor at Vanderbilt University Law School. In his Declaration, Prof. Nagareda expresses his opinion that AT&T's class action waiver is enforceable, not unconscionable. Prof. Nagareda's opinion is based upon a standard contained in his own law review article entitled "Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA", which was published in the Columbia Law Review in 2006. *See* 106 Colum. L. Rev. 1872.

Plaintiffs move to strike Prof. Nagareda's Declaration. First, Prof. Nagareda's opinion is inadmissible because he is using his own subjective personal standard as to when class action waivers are unenforceable, not a standard based upon applicable law or any other generally accepted standard. Further, Prof. Nagareda's opinion is inadmissible under Fed.R.Evid. 702 because it is not intended to "assist the trier of fact to understand the evidence or to determine a fact in issue." Rather, Prof. Nagareda's Declaration is an opinion as to how the Court should decide a legal issue, which is a question which is solely within the province of the Court, based upon applicable case law. It is improper in any event for a party to offer an expert opinion relating to how the Court should decide a legal issue, but it is particularly improper here, because Prof. Nagareda suggests that the Court use a standard different than that provided by applicable law.

For the reasons set forth below, Plaintiffs' motion to strike Prof. Nagareda's Declaration should be granted.

FACTUAL BACKGROUND

Prof. Nagareda is a Professor of Law at Vanderbilt University. His primary areas of study is complex civil litigation and aggregate litigation, *i.e.*, class actions. (Nagareda Dec., ¶ 1). Among Prof. Nagareda's publications is "Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA", 106 Colum. L. Rev. 1872 (the "Article"). (Nagareda Dec., ¶ 5)

The Article discusses three issues related to class action litigation, 1) how class certification can pressure defendants into settlement by raising the stakes of the litigation; (Article at 1879-95); 2) how class arbitration waivers can affect claimants' remedies (Article at 1895-1909) and 3) how the Class Action Fairness Act ("CAFA") has affected aggregate litigation (Article at 1909-22).

In the section regarding class action waivers, Prof. Nagareda posits that class action waivers should be unconscionable if they effectively prevent private enforcement of statutory rights.

> The real question about a give waiver of class-wide arbitration is whether, if enforced, it would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis – specifically, the financial arrangements to do so in the absence to do so in the absence of aggregation.

(Article at 1904). In his Declaration, Prof. Nagareda further explains that it is his opinion that a class action waiver should be unenforceable where the amount of individual claims are small, because there is no economic incentive for consumers to pursue claims. (Nagareda Dec., ¶ 8). On the other hand, Prof. Nagareda theorizes that class action waivers should be enforceable where in cases where statutes provide for statutory damages unrelated to the actual losses suffered by consumers. (Nagareda Dec., ¶ 9).

Prof. Nagareda further explained his theory at his deposition:

Q. Okay. And what was the most important factor, as far as you are concerned, that a court should look at as to whether a class action waiver is unconscionable?

MR PARASHARAMI: Objection, vague. Do you understand the question. Professor, or do you need him to rephrase it?

THE WITNESS: I believe I understand the question. I want to be as specific as possible in citing you to the relevant portion or portions of the article,

As I state on page 1904 of the article in the middle of that page, I say, quote, The real question about a given waiver or class-wide arbitration is whether if enforced effectively, would write private enforcement out of the underlying statute. This question calls for courts to examine carefully the framework for the bringing of claims on an individual basis dash specifically, the financial arrangements to do so in the absence of aggregation. That is at clear and straightforward of a statement as I can make. That's the way I put it in the article.

Q. (By Mr. Taylor) Okay. When you are looking at the Issue or when a court — strike that. Under your analysis, when you are looking at whether a class action waiver would effectively bar a private right of action, what factors do you look at?

A. Well, as I made clear in my article and the passages after the one that I've quoted, relevant considerations would be things like the cost of the arbitration proceeding, the method for calculating attorneys' fees in a given situation. There would be a number of considerations, whether there is a fee shifting provision in underlying substantive law. I think those are the types of considerations I have laid out in my article. I mean, the basic question is whether there would be—likely to be a market for the bringing of claims on an individual basis.

Q. Could you explain to me what you mean by "a market for bringing claims on an Individual basis"?

A. Whether the financial stakes and costs of bringing claims on an individual basis make it reasonable for one to expect that representation would proceed in that manner or be available in that manner.

Q. So correct me if I'm wrong in my understanding, Your theory is that if there is enough at stake so that it would be economical for a claimant to bring a claim and for an attorney to represent that person in bringing that claim, that is what you look at?

A. Well, I wouldn't key it so directly to attorney representation. There are contexts in which claims are brought in our legal system that have minimal or no attorney involvement where the stakes are sufficient in a small claim situation or a statutory damage situation where the private right of action can be realistically exercised with little or no attorney involvement.

What I am talking about is whether there is reason to expect that claims will be brought on an individual basis. What the involvement of a lawyer for such a person would be or wouldn't be, it is pertinent to that question, but the ultimate question is whether there is a reason to believe that claims would be brought on an individual basis.

Q. Do you mean sufficient money at stake for the consumer or the claimant that it would be worthwhile for them to bring the claim?

A. Well, I think there are a variety of considerations that would inform any decision on whether to bring a claim, whether on the part of the actual claimant or a lawyer deciding whether to represent such a person.

As I made clear in my article, if the upside of the -- the potential upside of the litigation, what's at stake financially, if this were a financial loss of damage type of situation would be pertinent. The cost of going through the process would also be pertinent.

* * *

Q. Okay. And when you say there is a market for the claims, is there any considerations in addition to whether a claimant would be financially motivated to bring the claim?

A. Well, as I just testified, right, there would be a consideration of both the potential financial upside of bringing the claim on an individual basis and a downside risk--cost, expenses-- associated with the bringing of the claim.

Q. Basically, whether they have a potential for coming out ahead when you factor in the expenses versus potential recovery.

MR. PARASHARAMI: I am just going to object to the characterization of the testimony.

THE WITNESS: The potential upside and downside of the litigation, how one expects the course settlement negotiations to proceed. I mean, all of

these are very ordinary, standard ways of thinking about, and academic ways in addition, of thinking about why claims are brought or not brought.

Q. (by Mr. Taylor) Okay. Are there any considerations a court should use other than whether there was a market for these types of claims — or strike that, Let me start over again.

Are there any considerations as to whether a class action waiver is unconscionable other than, or in addition to, whether the class action waiver would essentially get rid of a market for the types of claims that you are talking about?

MR. PARASHARAMI: Objection to the characterization of the testimony.

THE WITNESS: Well, I read the relevant passage from my article and I am focusing on, as I've stated, quoted, "This question, the question that we are addressing, calls for the courts to examine carefully the framework for the bringing of claims on an individual, specifically the financial arrangements to do so in the absence of aggregation." That's what I've said the courts should be looking at.

Q. (By Mr, Taylor) Right. I understand that. My question to you is, is there anything in addition to that that a court should look at?

MR. PARASHARAMI: Objection vague.

THE WITNESS: I have said that the court should look at the relevant considerations for whether claims would realistically be brought on an individual basis. And we've talked about the potential of gain for the claimant in the event of success; we've talked about the cost of going through the proceeding; we've talked about the strategic dynamics of settlement negotiations or expectations about how settlement negotiations would proceed; the fee structure, how the fee would be calculated, All of those things are relevant to whether claims would realistically be brought on an individual basis, That is the question that the court should ask and considerations that have some effect on the likelihood or unlikelihood of individual claiming would be fair gain and appropriate for the court to consider.

Q. (By Mr. Taylor) Are there any other factors that you know of that a court should consider as to whether a class action waiver would or would not encourage individual claims to be brought?

A. The court should consider, under my analysis, all matters that bear on the likelihood on claims being brought on an individual basis, Are there other

> considerations other than matters that have some relevance to the likelihood of individual claiming? No.

(Dep. of Nagareda, p. 32, l. 7 to p. 35, l. 12; p. 37, l. 22 to p. 40, l. 15).

It is Prof. Nagareda's opinion that, based upon the standard set forth in his Article, AT&T's class action waiver is not unconscionable because the arbitration clause provides individual consumers within an economic incentive to bring claims.[1] (Nagareda Dec., ¶ 11). Those economic incentives include AT&T paying all AAA fees, the "premium" in the event that the consumer recovers more than AT&T's last settlement offer, and the potential to recover double attorney's fees, calculated by the "lodestar" method.[2] (Nagareda Dec., ¶¶ 12-13). According to Prof. Nagareda, the potential recovery for consumers in the range of statutory damages provided by various federal statutes, such as the Telephone Consumer Protection Act of 1991 ($500 statutory damages) and the Cable Communications Policy Act of 1984 ($1,000 statutory damages), makes the pursuit of individual claims economical. (Nagareda Dec., ¶ 14).

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[1] Prof. Nagareda states in his Declaration, referring to AT&T's arbitration clause, "I have never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims." (Nagareda Dec., ¶ 11). Prof. Nagareda's review of other arbitration clauses is based upon scholarly literature and case law regarding arbitration clauses, not upon a survey of arbitration clauses themselves. (Dep. of Nagareda, p. 25, l. 4 to p. 26, l. 1).

[2] Prof. Nagareda was unfamiliar with case law which ties what constitutes a "reasonable" attorney's fee to the amount in controversy in private disputes, but conceded that if such case law existed, it would affect the analysis as to whether there were sufficient economic incentives to bring a claim on an individual basis. *See* Brief in Opposition to Motion to Compel Arbitration at pp. 14-18. (Dep. of Nagareda, p. 55, l. 25 to p. 63, l. 8).

LEGAL ARGUMENT

PROF. NAGAREDA'S DECLARATION CONTAINS INADMISSIBLE OPINIONS

The statements made by Richard A. Nagareda regarding the enforceability of AT&T's class action waiver constitute inadmissible net opinions. Mr. Nagareda's analysis of the clause relies on subjective opinions rather than concrete sources and such unreliable statements are not permissible.

a) Admissibility of expert opinions

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Court is the "gatekeeper" for screening expert testimony. *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Rule 702 requires that the Court determine whether the offered expert evidence is reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993).[3] "Knowledge" for purposes of Rule 702 connotes more than subjective belief or unsupported speculation. *Daubert*, 509 U.S. at 590. *See also Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003)("the testimony must be reliable; it must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation"); *Cryovac Inc. v. Pechiney Plastic Packaging, Inc.*, 430 F.Supp.2d 346, 362 (D.Del. 2006)("The expert must explain how and why he or she has reached the conclusion being proffered and must have a basis other than a

[3] *Daubert* lists a number of different factors for the consideration of whether scientific expert testimony should be admissible. *Daubert*, 509 U.S. at 590-92.

subjective belief or speculation."); *Taylor v. DeLosso*, 319 N.J.Super. 174, 180 (App.Div. 1999)("opinion testimony must relate to generally accepted standards, not merely to standards personal to the witness). "Nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

The experts must have "good grounds' for his or her opinions. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742. (3rd Cir. 1994). In the case of "scientific" expert evidence, among the factors the court should consider in determining whether the evidence is admissible are: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. *Paoli*, 35 F.3d at 742, n. 8. In the case of "technical" or "other specialized knowledge", the Court *may* consider these factors, depending upon whether they might be applicable based upon the particular facts of the case. *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 150 (1999). In any case, the goal is to ensure that the expert testimony is reliable and relevant. *Kumho Tire*, 526 U.S. at 152.

b) <u>Prof. Nagareda's opinion is based solely upon his own subjective belief</u>

Based upon the standards set forth above, Prof. Nagareda's opinion that AT&T's class action waiver is not unconscionable is inadmissible. While Prof. Nagareda has the qualifications to be an expert witness under Rule 702, his opinion is based upon his own subjective belief and, thus is inadmissible.

Prof. Nagareda explains the analysis he performed in coming to the conclusion that AT&T's class action waiver is not unconscionable, but that analysis rests upon his own personal theory as to the circumstances under which class action waivers may be held to be unconscionable as is set forth in the Article. In short, Prof. Nagareda created his own personal legal standard for determining when a class action waiver should be unconscionable and applied that personal theory to the facts of this case.

Most of the *Paoli* factors are irrelevant to the issue of whether Prof. Nagareda's opinion is "reliable". However, we note that it is not generally accepted in the field. As Prof. Nagareda himself states, other law professors have opinions are all over the spectrum as to the circumstances under which class action waivers should be enforceable. (Nagareda Dec. at ¶ 8). Prof. Nagareda describes himself as being in the middle of that spectrum. (*Id.*). Nonetheless, no other law professor has adopted his theory, and, more importantly, neither has any court. (*See* Dec. of Counsel, Ex. G, KeyCite of Article). Further, Prof. Nagareda theorizes that there will be an effective market for the bringing of individual claims if the amount in controversy is equal to or more than the amount of federal statutory damages awards plus attorney's fees (Nagareda Dec. at ¶11-14). There is no objective data to back up that theory. Rather, that is a cutoff he has chosen as his belief on what should be sufficient financial incentive for individuals to bring claims. Prof. Nagareda has not, however, taken any steps to verify whether his theory translates into real life. Prof. Nagareda's theory is not objectively verifiable in any way.[4] Rather, it is simply his own personal analysis which he believes courts should apply to the issue of whether class action waivers are unconscionable.

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[4] To the extent that objective evidence exists, it contradicts Prof. Nagareda's theory. As is set forth in Plaintiffs' Brief in opposition to AT&T's motion to compel, the number of individual class members who initiated claims related to AT&T's ETF under AT&T's dispute is in the thousandths of one percent. (Plaintiffs' Brief at 21).

c) Prof. Nagareda's opinions are inadmissible because they contain legal conclusions within the province of the Court

In addition to being inadmissible because they are solely Prof. Nagareda's subjective beliefs, Prof. Nagareda's opinions are inadmissible because they are "opinions" as to legal issues, which are within the province of the Court. Further, not only is he expressing an opinion as to legal questions, he is basing his opinion on a legal standard different than the one the Court must apply under applicable Supreme Court precedent.

i) Prof. Nagreda's statements amount to inadmissible legal conclusions

As a starting point in this analysis, as is set forth in Plaintiffs' Brief in opposition to AT&T's motion to compel arbitration, California law applies to the issue of whether AT&T's arbitration clause and class action waiver are enforceable. The issue of whether a contract term is unconscionable is a question of law for the Court. *Pardee Construction Co. v. Superior Court*, 100 Cal.App.4th 1081, 1087, 123 Cal.Rptr.2d 288, 292 (2002); *American Software, Inc. v. Ali*, 46 Cal.App.4th 1386, 1391, 54 Cal.Rptr.2d 477, 480 (1996). *See also Carter v. Exxon Co. USA, a Div. of Exxon Corp.* 177 F.3d 197, 207 (3d Cir. 1999). The law is clear that opinions as to questions of law are inadmissible. *Berkeley Investment Group, Ltd. v. Colkitt*, 455 F.3d 195, 216 (3d Cir. 2006); *U.S. v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan*, 812 F.Supp. 1376, 1378 (E.D.Pa. 1992).

Prof. Nagareda's Declaration is inadmissible because it is expressly an opinion regarding the legal issue of whether AT&T's class action waiver is not unconscionable and why he believes the class action waiver is enforceable.

> *In my opinion, the 2006 Clause should not be deemed unconscionable.* The 2006 Clause represents innovative measures likely to facilitate the fair and efficient resolution of disputes between individual consumers and Cingular. Indeed, I have never seen an arbitration procedure that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring

> claims. Applying the analysis in my article, I conclude that the 2006 Clause dramatically reduces the cost barriers to the bringing of individual consumer claims, is likely to facilitate the development of a market for fair settlement of such claims, and provides financial incentives for consumers (and their attorneys, if any) to pursue arbitration in the event they are dissatisfied with whatever offer Cingular has made to settle their disputes.

(Nagareda Dec., ¶ 11)(emphasis added). As a legal opinion, Prof. Nagareda's Declaration is inadmissible and must be stricken.

ii) Prof. Nagareda's opinion is based upon an incorrect legal standard

In deciding claims based upon state law, the Court is bound to apply the substantive law of the state whose laws govern the action. *Norfolk Southern Railway Co. v. Basell USA, Inc.*, 512 F.3d 86, 91 (3d Cir. 2008). If a state supreme court has ruled upon an issue, the Court would apply those state supreme court precedents. *Id.* at 92. As is set forth in Plaintiffs' Brief in opposition to AT&T's motion to compel, the California Supreme Court has set forth the standard for determining whether a class action waiver is unconscionable. Under California law, a class action waiver is unconscionable if: 1) the waiver is found in a consumer contract of adhesion; 2) in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and 3) when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. *Discover Bank v. Superior Court*, 37 Cal.4th 148, 162-63, 113 P.3d 1100, 1110, 30 Cal.Rptr. 76, 87 (2005). The Court is bound to follow and apply the *Discover Bank* test in determining whether AT&T's class action waiver is unconscionable.

Prof. Nagareda uses different analysis, as is set forth in his Article, to determine whether a class action waiver is unconscionable. (Dep. of Nagareda, p. 44, l. 2-11). Instead of focusing on whether a class action waiver acts as an exculpatory clause, as the California Supreme Court

did in *Discover Bank, id.*, Prof. Nagareda believes that the focus should be on whether there is an effective market for individual claims exists.

> Q. (By Mr. Taylor) What do you consider to be the important differences between the analysis in your article and the analysis that the California Supreme Court took in Discover Bank?
>
> A. Well, I would say two things: One, the article speaks for itself on that point and I stand by the analysis that is reflected in the entire article, Given that you have asked me to summarize the differences, the things that I would point to in the nature of an abbreviated or concise summary is that my analysis focuses, as we have discussed earlier, on whether a market for claims on an individual basis would realistically exist if the arbitration clause was enforccd. That's what I said on page 1904 of my article is the right question.
>
> Earlier on pages 1902 and 1903 of my article, I go through the analysis that was offered for the court in Discover Bank and I note any number of respects in which I think the court was not focusing as precisely as it could have, or should have in my view, on the right question which I have identified, So for example, the California court focused on whether the arbitration clause in the Discover Bank litigation would operate as a kind of exculpatory clause such that Discover Bank—there would be no avenue for Discover Bank to be held accountable if it indeed violated a substantive law in some respect.
>
> And as I point out on page 1902 and 1903, I don't think that this question of whether the arbitration clause operates as a kind of exculpatory provision is really the right question here. If you ask the question in that way, then there are – one would have to take into account -- as the dissenting justice in Discover Bank, one would have to take into account the likelihood or unlikelihood of a public enforcement action by some relevant state official or administrative agency. And I made clear over on 1903 and 1904 that the availability or unavailability of public enforcement action seems to me not a pertinent question if the right question to ask is whether a private right of action is being effectively written out of the statute.

(Nagareda Dep., p. 44, l. 18 to p. 46, l. 10).

Because Prof. Nagareda uses a different standard and analysis than the one enunciated by the California Supreme Court in *Discover Bank*, the Court must reject his opinion. This Court is constitutionally bound to follow the law as enunciated by the California Supreme Court, not as

enunciated by a law professor. Prof. Nagareda is perfectly free to offer his own theories as to how the issue of class action waivers should be enforced (or not), but that does not make his theories admissible expert opinions. Prof. Nagareda's opinions are inadmissible because not only are they opinions on questions of law, but they are opinions on questions of law which are based upon a standard other than the one the Court must apply here.

CONCLUSION

For the reasons set forth herein, Plaintiffs' motion to strike the Declaration of Prof. Nagareda should be granted.

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Attorneys for Plaintiff

By: /s/ James E. Cecchi
JAMES E. CECCHI

Dated: August 4, 2008

EXHIBIT F

American Arbitration Association
Dispute Resolution Services Worldwide

AAA Policy on Class ARBITRATIONS

July 14, 2005

On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle* , the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle* , the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.

Commentary to the American Arbitration Association's Policy on Class Arbitrations, February 18, 2005

It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement. The Association's practice has been neither to commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures was made because the law on the enforceability of class action waivers was unsettled; the Association takes no position as to whether such clauses are or should be enforceable.

In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law. Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator. In fidelity to its Due Process Protocols, the Association will continue to require all proceedings brought to it for administration to meet the standards of fairness and due process set forth in those protocols, but the Association will not seek to make decisions concerning class action agreements that the courts appear to have reserved for themselves.

The Executive Committee also determined at the same meeting to proceed forthwith in the creation of a special committee to explore the possibility of identifying counsel who could assist parties who cannot afford to pay for an attorney in arbitral proceedings. This effort would supplement the Association's current ability to provide arbitrators who will serve pro bono , or for a reduced fee, in appropriate cases.

The Association will continue to monitor developments in this rapidly evolving intersection of arbitration and the courts .

Click here to view the Supplementary Rules for Class Arbitrations

Click here to view the Class Arbitration Case Docket

- AAA MISSION & PRINCIPLES
- PRIVACY POLICY
- TERMS OF USE
- TECHNICAL RECOMMENDATIONS
-