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No. 77406-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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**DOUG SCOTT, LOREN TABASINSKE &
SANDRA TABASINSKE,**

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

**RESPONDENT CINGULAR WIRELESS LLC'S
STATEMENT OF ADDITIONAL AUTHORITIES**

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Attorneys for Respondent

STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Respondent Cingular Wireless LLC submits this Statement of Additional Authorities to provide this Court with the recent decisions in *Dale v. Comcast Corp.*, __ F. Supp. 2d __, 2006 WL 2720624 (N.D. Ga. Sept. 18, 2006), *Chalk v. T-Mobile USA, Inc.*, 2006 WL 2599506 (D. Or. Sept. 7, 2006), and *Kinkel v. Cingular Wireless LLC*, __ N.E.2d __, 2006 WL 2828664 (Ill. Oct. 5, 2006).

In *Dale*, the United States District Court for the Northern District of Georgia rejected an unconscionability attack under Georgia law on the class-action waiver in the arbitration provision in the defendant's cable television service contract. In particular, the plaintiffs in *Dale*, "cit[ing] to *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)," "argue[d] that the effect of defendant's arbitration provisions will be to limit plaintiffs to inconsequential damages and thus permit defendant to avoid liability." *Id.* at *7. The *Dale* court rejected that argument and held that class-action waivers are not unconscionable under Georgia law, noting that "court[s] must take into account the federal policy favoring arbitration as a method for dispute resolution" and that "the simple and expeditious nature of arbitration is precisely what makes it 'an attractive vehicle for the resolution of low-value claims.'" *Id.* (quoting *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004)). This

holding is relevant to the argument Cingular made at pages 17-35 of its brief in the Court of Appeals and pages 3-6 of its Supplemental Brief.

In *Chalk*, the United States District Court for the District of Oregon rejected an unconscionability attack under Oregon law on the class-action waiver in the arbitration provision in the defendant's wireless service contract. According to the court, the "absence of a right to proceed collectively does not render * * * arbitration provisions unenforceable." *Id.* at *5 (quoting and relying on *Horenstein v. Mortgage Mkt., Inc.*, 1999 U.S. Lexis 22995, at *11 (D. Or. July 23, 1999), *aff'd*, 9 Fed. Appx. 618 (9th Cir. 2001), and *Graziani v. Nouvellus Sys., Inc.*, 2003 WL 23977829, at *9 (D. Or. Sept.16, 2003)). This holding is relevant to the argument Cingular made at pages 17-19 of its brief in the Court of Appeals and pages 1-2 of its Supplemental Brief.

In *Kinkel*, the Illinois Supreme Court held that the class-action waiver in an earlier version of Cingular's Wireless Service Agreement was unconscionable under Illinois law. The court found substantive unconscionability because the cost of arbitrating the claim was \$125, the claim itself was worth only \$150, and (the court presumed) attorneys' fees were not available under the provision so that "if [plaintiff] were to prevail on the merits of her claim * * *, it is an absolute certainty that she would not be made whole." 2006 WL 2828664, at *15. The court also relied on "sev-

eral other provisions of the arbitration clause” that “also burden an individual customer’s ability to vindicate this claim,” particularly the now-superseded confidentiality provision under which “even if an individual claimant recovers on the illegal-penalty claim, neither that claimant nor her attorney can share that information with other potential claimants.” *Id.* at *20.

The court went on to stress that it was not addressing Cingular’s current arbitration provision, which makes arbitration free for customers, provides for awards of attorneys’ fees, and does not require confidentiality. *See id.* at *16, *21. The court indicated that the propriety of that or any other arbitration provision “must be determined on a case-by-case basis, considering the totality of the circumstances” (*id.* at *21) and that “a class action waiver will not be found unconscionable * * * if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner.” (*id.* at *20) The court explained that, in general, “[i]t is not unconscionable or even unethical for a business to attempt to limit its exposure to class arbitration or litigation, but to prefer to resolve the claims of customers or clients individually.” *Id.* at *24. The Illinois Supreme Court’s analysis of Cingular’s original arbitration provision and its articulation of the standard for determining whether other arbi-

tration provisions are substantively unconscionable are relevant to Cingular's argument that its current arbitration provision is not unconscionable under Washington law. See Ct. App. Br. 23-30; Supp. Br. 3-4.

DATED: October 11, 2006

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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CAROL KNESS states as follows:

1. I am a secretary at the law firm of PERKINS COIE LLP, attorneys of record for respondent, Cingular Wireless LLC, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 11th day of October, 2006, I made arrangements to file Respondent Cingular Wireless, LLC's Statement of Additional Authorities and this Certificate of Service to the Clerk of the above-entitled Court by forwarding the same via email to supreme@courts.wa.gov

3. On the same day, I made arrangements for copies of the same documents to be delivered to counsel of record for Petitioners via email as follows:

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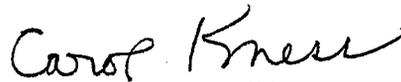
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I CERTIFY UNDER PENALTY OF PERJURY under the laws of
the State of Washington that the foregoing is true and correct.

SIGNED and DATED at Seattle, Washington this 11th day of
October, 2006 by CAROL KNESS.



Carol Kness

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TO E-MAIL