

15-0114

CJF/klc: 09/22/14

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

MITA SENGUPTA, as Personal Representative of the
Estate of Avishek Sengupta,

Plaintiff,

v.

No. 14-C-66-H

TOUGH MUDDER LLC, AIRSQUID VENTURES,
INC. (d.b.a. AMPHIBIOUS MEDICS), TRAVIS
PITTMAN, PEACEMAKER NATIONAL TRAINING
CENTER, LLC, GENERAL MILLS, INC. and
GENERAL MILLS SALES, INC.,

Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL
ARBITRATION AND GRANTING PLAINTIFF'S MOTION TO DECLARE
ARBITRATION CLAUSE UNENFORCEABLE**

On the 22nd day of August, 2014, came Plaintiff Mita Sengupta, as Personal Representative of the Estate of Avishek Sengupta, by her attorneys, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of Fitzsimmons Law Firm PLLC and Robert J. Gilbert and Edward J. Denn of Gilbert & Renton LLC, and, as well, came Defendants, Tough Mudder, LLC; Peacemaker National Training Center, LLC; General Mills, Inc.; and General Mills Sales, Inc.; by their attorneys, Samuel D. Madia of Flaherty Sensabaugh & Bonasso PLLC, Robert N. Kelly of Jackson & Campbell, P.C., and Robert O'Brien of Niles, Barton & Wilmer, LLP; and also came Defendant Airsquid Ventures, Inc. (d.b.a. Amphibious Medics) by its attorneys, David L. Shuman and David L. Shuman, Jr., of Shuman, McCuskey & Slicer P.L.L.C; as well as Defendant Travis Pittman, by his attorney, Karen E. Kahle of Steptoe & Johnson, PLLC, for a hearing on *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman,*

Motion to Stay and Compel Arbitration, Motion to Dismiss for Improper Venue, and Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration, and Plaintiff's Cross-Motion and Brief (1) Opposing Defendants' Motions to Compel Arbitration and (2) Supporting Plaintiff's Cross-Motion to Declare the Arbitration Clause Unenforceable. Having fully considered the pleadings, the parties' arguments and authorities, other materials filed by the parties, and the entire record herein, the Court makes the following findings of fact with respect to all motions, and the following conclusions of law and order with respect to the cross-motions concerning the enforceability of the arbitration clause:

FINDINGS OF FACT

1. This case arises from the death of Avishek Sengupta, who was a participant in the Tough Mudder Mid-Atlantic event in Gerrardstown, Berkley County, West Virginia on April 20, 2013 (hereinafter the "Event"). Mr. Sengupta was a 28-year old man who drowned while attempting to complete an obstacle that was part of the event and known as "Walk-the Plank." Avishek Sengupta was on life support until April 21, 2013, his official date of death.

2. Plaintiff Mita Sengupta is Avi's mother and personal representative of the Estate of Avishek Sengupta. Mrs. Sengupta instituted the instant civil action on April 18, 2014 asserting that Avi's death resulted from Defendants' grossly negligent and reckless failure to follow basic safety precautions or effectuate a minimally competent rescue.

3. Mrs. Sengupta makes claims against six parties whose alleged negligence caused and/or contributed to Avi's death: (1) Tough Mudder, who she alleges to have had primary

responsibility for participant safety; (2) Airsquid Ventures, who she alleges to have provided safety personnel and services; (3) Travis Pittman, the rescue diver; (4) Peacemaker National Training Center, who she alleges to have participated in advertising, construction and permitting of the Obstacle and Event; and (5-6) the two General Mills entities, who she alleges to have partnered with Tough Mudder to promote and sponsor the Obstacle and the Event. As pled in the Complaint, each Defendant caused or contributed in some way to Avi's death.

4. Specifically, her claims include Count I (Wrongful Death), Count II (Declaratory Relief – Unenforceability of Arbitration Clause), and Count III (Declaratory Relief – Unenforceability of Waiver). *See* Complaint, *passim*.

5. Plaintiff's request for a declaratory judgment relates to a provision styled "**Mediation and Arbitration**" found on page 2 of a document styled "Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring – 2013" (hereinafter the "Agreement").

6. The parties have stipulated for purposes of these motions that the Agreement is a true, accurate and authentic copy of a document purportedly signed and initialed by Avishek Sengupta on April 20, 2013.

7. On the same date that Mrs. Sengupta filed the instant civil action (April 18, 2014), Defendant Tough Mudder LLC filed a competing demand for arbitration before the American Arbitration Association ("AAA"). The demand for arbitration identifies the Respondents as Mrs. Sengupta, her husband (and Avi's father) Bijon Sengupta, and their daughter (and Avi's sister) Priyanka Sengupta. Tough Mudder's original AAA filing was brought only on behalf of itself. Tough Mudder subsequently amended its filing to include Peacemaker and the two General Mills

entities as Claimants. Mr. Pittman and Airsquid Ventures are not involved as parties in the AAA matter.

8. Tough Mudder asserts in its arbitration demand that it is not liable for Avi's death or, in the alternative; it is immunized from liability by the doctrine of assumption of risk, by the contributory negligence of Avishek Sengupta, or by the intervening and superseding acts and omissions of Airsquid Ventures, LLC (dba Amphibious Medics). *See Ex. 2* to Plaintiff's Cross Motion and Brief at ¶ 24 ("Claimants are also immunized from any potential liability to the Senguptas by virtue of ... the intervening, superseding cause arising from the acts and omissions of Amphibious Medics."). However, Tough Mudder did not join Airsquid as a party to the arbitration, nor did Airsquid attempt to join the Maryland arbitration before it was stayed per the prior order of the Court.

9. By letter dated May 9, 2014 to AAA, a copy of which was sent to counsel for Defendant Tough Mudder, Mrs. Sengupta's counsel requested that AAA stay any further arbitration proceedings until this Court or another Court of competent jurisdiction could rule upon the validity of the arbitration clause and the arbitrability of this case.

10. Tough Mudder, by and through their attorneys from Jackson & Campbell, P.C., objected to Mrs. Sengupta's request for a stay, contending that the arbitration provision is valid and, if there is an issue as to arbitrability, it should be decided by the arbitrator.

11. The AAA denied Mrs. Sengupta's request to stay the arbitration proceedings and indicated that "in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration."

12. Before arbitration can proceed where (as here) arbitrability is disputed, a court of law must determine the threshold question of arbitrability. *See, e.g., AT&T Technologies, Inc. v.*

Communications Workers of Amer., 475 U.S. 643, 649 (1986) (“a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty”) (internal citations and quotations omitted); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-331 (4th Cir. 1999) (“determination of the arbitration provision’s scope and meaning is for the court to resolve”) (internal citation and quotation omitted); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 556, 567 S.E.2d 265, 272 (2002) (“it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties”).

13. The arbitration provision at issue contains no "delegation provision" which might delegate to the arbitrator the authority to resolve any dispute about the enforceability of the arbitration provision.

14. In response to the denial of her request for a stay of the AAA arbitration, Mrs. Sengupta filed in this court a Motion for Temporary Restraining Order seeking to enjoin all parties from proceeding with arbitration and to stay the arbitration proceedings with AAA. By Order dated May 23, 2014, this Court granted the Motion for a Temporary Restraining Order pending a hearing on Mrs. Sengupta’s accompanying Motion for a Preliminary Injunction.

15. On June 2, 2014, Tough Mudder and others filed an action in the United States District Court for the Northern District of West Virginia, Martinsburg Division, seeking to stay the proceedings in this Court and to compel arbitration.

16. On June 3, 2014, a hearing on Mrs. Sengupta's Motion for Preliminary Injunction was held and on June 23, 2014, this Honorable Court entered an Order Granting a Preliminary Injunction in favor of Mrs. Sengupta pursuant to W.Va. R. Civ. P. 65, prohibiting Defendants

from proceeding with arbitration and staying the AAA proceedings until such further Order of this Court or other court of law of competent jurisdiction or until May 23, 2015.

17. Rather than filing an Answer, Defendants joined issue on Count II of Mrs. Sengupta's Complaint (Declaratory Relief – Unenforceability of Arbitration Clause) by filing motions to enforce the Arbitration Clause based on the four corners of the Agreement. Defendants also filed a motion to dismiss on various grounds as discussed below. Accordingly, at the hearing on June 3, 2014, Mrs. Sengupta's motion for preliminary injunction, the Court authorized briefing on the issue of arbitrability, based on the four corners of the Agreement without the benefit of formal discovery, to determine if enforceability of the Arbitration Clause can be determined on an expedited basis. At that time, Mrs. Sengupta reserved the right to take discovery relating to enforceability of the Arbitration Clause if the Court could not resolve arbitrability in her favor on the present record.

18. Also at the June 3, 2014 hearing, the Court authorized expedited discovery by all parties on the venue-related motions brought by the Defendants. The Court set a briefing schedule on these motions as well a hearing date of August 22, 2014.

19. On August 22, 2014, the Court heard argument on the pending motions and cross-motion concerning arbitrability as well as the pending motions concerning venue-related issues.

CONCLUSIONS OF LAW

20. Plaintiff asserts that the arbitration clause is invalid because, *inter alia*, (a) it was procured by fraud; (b) it was obtained without accurate and full disclosure; (c) is vague, confusing and unduly complex; (d) was obtained without a meeting of the minds; (e) was one-

sided and overly harsh; (f) entails high costs that might deter meritorious claims; (g) it is against public policy; and/or (h) it is procedurally and substantively unconscionable.¹

21. The arbitration agreement at issue here is contained in a two-page document entitled "ASSUMPTION OF RISK, WAIVER OF LIABILITY AND INDEMNITY AGREEMENT" (the "Agreement"). *See Ex. 1*. That document appears to have been joined with a second, one-page document entitled "Entry and Participation Agreement." Both the two-page Agreement and the Entry and Participation Agreement contain numerous sections and subsections, nearly all of which are printed in seven-point font. At five different points, Avi's initials appear, including four places on page 2. The Agreement, and the Entry and Participation Agreement together have 2,742 words across three pages of tiny print. *See Ex. 6, Reilly Aff.*

22. Here, Tough Mudder asked participants to review, absorb and accept the equivalent of a nine-page legal brief (assuming 300 words per page) written in 7-point font with dense legal language.

In spite of all this, Tough Mudder also inserted language at the bottom stating that "I have been given the opportunity to take this waiver to an attorney of my choosing for his or her review prior to the signing of the same and I have chosen not to do so." *Ex. 1* at 2. The Court also notes that the version of the waiver that Avi was presented on the morning of the event differs in numerous ways from the version that Tough Mudder states was downloaded by Avi on a date several months prior to the event.

¹ While some grounds raised by Mrs. Sengupta in her Complaint for non-enforcement of the arbitration clause can be adjudicated based on known information, discovery is needed before the Court can decide several grounds, such as fraud, lack of full and fair disclosure, and unconscionability in the procurement of the Arbitration Clause. *See Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 395, 729 S.E.2d 217, 230 (2012) ("*Brown II*") (authorizing discovery to resolve arbitrability issues). That discovery has not yet taken place and therefore the Court does not reach those issues.

23. The Agreement contains three provisions of particular relevance to the instant motions. First, near the top of page two, the Agreement sets forth the "Jurisdiction and Venue Clause" requiring that any "legal action" be brought solely in a state or federal court in West Virginia:

Venue and Jurisdiction: I understand that *if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the sole and exclusive jurisdiction* and that only the substantive laws of the State in which the TM Event is held shall apply.

See Ex. 1 at 2 (emphasis added). This clause begins immediately next to a place where Avi was required to place his initials.

24. Second, the Agreement contains, near the middle of page two, the "Arbitration Clause," which appears to require the opposite of the Venue and Jurisdiction Clause:

Mediation and Arbitration: In the event of a legal issue, I agree to engage in good faith efforts to mediate any dispute that may arise. Any agreement reached will be formalized by a written contract agreement at that time. Should the issue not be resolved by mediation, *I agree that all disputes, controversies or claims arising out of my participation in the TM event shall be submitted to binding arbitration* in accordance with the applicable rules of the American Arbitration Association then in effect. The cost of such action shall be shared equally by the parties.

See id. (emphasis added). The Arbitration Clause is the last of four consecutive subsections in seven-point font. Unlike the Venue and Jurisdiction Clause, it has no initials placed next to it.

25. Finally, the Agreement contains on page two the "Indemnity Clause," requiring Avi to pay all attorney's fees, costs and expenses incurred in any legal action involving Tough Mudder or any of the other Defendants in this case:

Indemnification Agreement: In consideration of being permitted to participate in the TM event and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, *I hereby agree to hold harmless, defend and indemnify Tough Mudder LLC (and the other Released Parties) from and against: 1) Any and all claims made by me (or any Releasing Party) arising from injury or loss due to my participation in the TM event; and 2) Against any and all claims of co-participants, rescuers, and others arising from my conduct in the course of my participation in the TM*

event. For the purposes hereof, “claims” includes all actions and causes of action, claims, losses, costs, expenses and damages, including legal fees and related expenses. This indemnity shall survive the expiration or sooner termination of the TM event.

See id. (emphasis added).

26. Avi apparently initialed the Indemnity Clause.

27. On its face (and contrary to the Arbitration Clause), the Indemnity Clause purports to require Mrs. Sengupta to pay all legal fees and related expenses (including AAA filing fees, arbitrator fees, expert fees, transcripts, constable fees, and other costs) incurred by every Defendant, not just in this case but also in the federal suit and the Maryland arbitration initiated by Tough Mudder, in any arbitration to be initiated against Mrs. Sengupta by Airsquid and/or Travis Pittman, and in any proceedings between Defendants, who have already started pointing fingers at each other.

28. Arbitration clauses are no more, and no less, enforceable than any other contract or provision. Under the Federal Arbitration Act (FAA), written agreements to arbitrate disputes involving interstate commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.” 9 U.S.C. § 2; *Brown II*, 229 W. Va. at 389, 729 S.E.2d at 224. “The [FAA] does not favor or elevate arbitration agreements to a level of importance above all other contracts ... [T]he purpose of Congress in adopting it ‘was to make arbitration agreements as enforceable as other contracts, but not more so.’” *Dan Ryan Builders*, 230 W. Va. at 286, 737 S.E.2d at 555, quoting *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 681, 724 S.E.2d 250, 285 (2011) (“*Brown I*”).

29. Where (as here) plaintiff disputes the making or enforceability of an agreement to arbitrate, there is no policy or presumption in favor of arbitration. *See Granite Rock Co. v. Teamsters*, 561 U.S. 287, 296-303, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (policy favoring

arbitration does not apply to disputes concerning validity or enforceability of agreement); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611 n.6 (4th Cir. 2013) (“presumption in favor of arbitration does not apply to questions of an arbitration provision’s validity”) (cases cited); *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (presumption does not apply “where there remains a question as to whether an agreement even exists between the parties in the first place”); *Applied Energistics, Inc. v. New Oak Cap. Mkts., LLC*, 645 F.3d 522, 526 (2nd Cir. 2011) (same).

30. “Whether an arbitration agreement was validly formed, and whether the claims maintained by the plaintiff fall within the scope of the agreement, are evaluated under state law principles of contract formation.” *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 34, 717 S.E.2d 909, 917 (2011) (cases cited). “Nothing in the FAA ‘overrides normal rules of contract interpretation.’” *Id.* (cases cited). “[T]he trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause.” *Id.* And, “[i]f necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.” *Id.*

31. Accordingly, the United States Supreme Court has authorized state courts to “consider whether ... arbitration clauses ... are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA,” including generally applicable contract defenses such as fraud, duress, or unconscionability. *See Brown II*, 229 W. Va. at 390, 729 S.E.2d at 225, quoting *Marmet Health Care Center, Inc. v. Brown*, 563 U.S. --, 132 S. Ct. 1201, 1204, 182 L. Ed. 2d 42 (2012); *Dan Ryan Builders, Inc.*, 230 W. Va. at 286, 737 S.E.2d at 555 n.6 (state courts “may void any arbitration clause on any general ground that exists

at law or in equity for the revocation of any contract, including fraud in the inducement"); *Richmond American Homes of WV, Inc.*, 228 W. Va. at 133-34 (same).

32. The FAA incorporates principles of state contract law to determine whether an arbitration clause is enforceable. Even without Mrs. Sengupta having received the discovery to which she is entitled under *Brown II*, good cause exists on the face of the Agreement for the Court to hold, as a matter of law, that the Arbitration Clause is unenforceable under generally applicable principles of West Virginia contract law.

33. West Virginia courts are "hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute." *Brown II*, 229 W. Va. at 382, quoting *Richmond American Homes*, 228 W. Va. at 129.²

34. Under the doctrine of unconscionability, a court will not enforce literal terms of a contract having an overall and gross imbalance, harshness or oppressiveness in its terms. The concept of unconscionability is applied flexibly, based on all facts of a particular case. *Brown I*, 724 S.E.2d at 284. "Undertaking an analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." *Brown II*, 729 S.E.2d at 226-27. "The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." *Id.*

² The pre-printed, standardized, fill-in-the-blank Agreement at issue in this case is plainly an adhesive contract. A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person. *See Brown I*, 228 W. Va. at 683.

35. "Unconscionability is an equitable principle, and the determination . . . should be made by the court." *Brown II*, 729 S.E.2d at 227. "Under West Virginia law, [courts] analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability." *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 102, 736 S.E.2d 91 (2012), quoting *Brown I*, 724 S.E.2d at 285.; *Brown II*, 729 S.E.2d at 227.

36. "A contract is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a sliding scale in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Grayiel*, 230 W. Va. at 102, quoting *Brown I*, Syl. Pt. 20.

37. Mutuality is also a significant consideration in determining substantive unconscionability. *Brown II*, 729 S.E.2d at 228. Moreover, "when an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable." *Id.*, 729 S.E.2d at 229. "No single, precise definition of substantive unconscionability can be articulated because the factors to be considered vary with the content of the agreement at issue. Accordingly, courts should assess whether a contract provision is substantively unconscionable on a case-by-case basis." *Id.*

38. The arbitration clause here is procedurally and substantively unconscionable and is, therefore, unenforceable.

39. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only

the opportunity to adhere to the contract or reject it." Syl. Pt. 18, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250, overruled in part on other grounds by *Marmet Health Care Center*, *supra*.

40. Here, the Arbitration Clause is plainly a contract of adhesion. It was submitted by a party with superior bargaining power (Tough Mudder) on a "take it or leave it basis." While contracts of adhesion are not *per se* unconscionable, our Supreme Court has regularly held that they "require greater scrutiny." *See, e.g., Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273; *Grayiel*, 230 W. Va. at 103, 736 S.E.2d at 103. In determining whether the arbitration clause is procedurally unconscionable, a "[f]inding that there is an adhesion contract is the beginning of the analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *Id.*

41. An example of a "good adhesion contract" that was found to be enforceable by our Supreme Court is discussed in *State ex rel. AT&T Mobility v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010) (*AT&T I*) and *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W. Va. No. 11-1649, June 17, 2013) (memorandum opinion) (*AT&T II*). In *AT&T I* and *AT&T II*, the plaintiffs filed a putative class action alleging violations of the Consumer Credit and Protection Act. The Supreme Court upheld the Circuit Court's allowance of AT&T's motion to compel arbitration. *AT&T II*, 2013 WL 2995944, at *6. In doing so, the Supreme Court noted that AT&T's arbitration agreement was "consumer friendly" and found it conscionable because:

- A. AT&T paid the costs of arbitration;
- B. There were no restriction on remedies available to the claimant;
- C. A customer's billing address determined the venue of arbitration;
- D. A customer may opt to have an in-person hearing, a telephonic hearing, or a "desk arbitration";
- E. AT&T was precluded from seeking attorney's fees; and

F. AT&T was required to pay the customers either the arbitration award or \$10,000 plus double attorney's fees if the award was more than AT&T's last settlement offer.

AT&T II, 2013 WL 2995944, at *2, n. 3.

42. The arbitration clause in this case is a "bad" adhesion contract containing harsh provisions unlike those found enforceable by the West Virginia Supreme Court of Appeals. As discussed in greater detail herein, the Arbitration Clause at issue here imposes upon Mrs. Sengupta drastically harsher terms than those found conscionable in *AT&T I* and *AT&T II*. Few, if any, of the "consumer friendly" terms contained in the AT&T arbitration agreement exist here. As such, the subject Arbitration Clause has many unconscionable features found in unenforceable "bad adhesion contracts."

43. Tough Mudder inserted irreconcilable clauses requiring legal disputes to go to court and *also* to arbitration. Whether analyzed (a) as a lack of contract formation, or (b) ambiguity subject to the rule of *contra proferentem*, or (c) a procedurally unconscionable use of deceptive language, these irreconcilable provisions preclude enforcement of the Arbitration Clause.

44. The Venue and Jurisdiction Clause plainly requires "that if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the sole and exclusive jurisdiction...." *See Ex. 1* at 2. Avi's initials appear directly adjacent to this clause. *See id* (emphasis added). It is difficult to imagine a clearer case of a participant being told that any legal disputes arising from the Tough Mudder event would be decided in a West Virginia courtroom.

45. However, half-way down the same page, buried as the last of four "Other Agreements," the document then states that "all disputes, controversies or claims arising

out of my participation in the TM event shall be submitted to binding arbitration"*Id.* (Arbitration Clause). No initials are placed next to this clause. But its words irreconcilably contradict the flat, unqualified statement in the Venue and Jurisdiction Clause that "if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the sole and exclusive jurisdiction." *Id.*

46. This conflict compels two conclusions. First, there is no basis upon which to conclude that Avi Sengupta, when signing this document, had formed an intent to agree to arbitrate all disputes. To the contrary, his focus was drawn only to the Venue and Jurisdiction Clause, next to which he placed his initials. His initials did not subsequently appear on the Agreement until the section below the Arbitration Clause. Tough Mudder has failed to demonstrate that Avi had (or should have had) any awareness that the Venue and Jurisdiction Clause did not mean exactly what it said, or that anything else in fine print in the Agreement might contradict it.

47. The language of Tough Mudder's Agreement is not just ambiguous but utterly irreconcilable, and therefore the Court finds that no meeting of the minds was formed.³

48. Quite aside from Avi's possible awareness of these two clauses, the irreconcilable conflict exemplifies procedural unconscionability, particularly when coupled with the known facts involving Avi's review of the Agreement. As noted above, Tough Mudder has produced no evidence that Avi ever saw the Agreement in its present form before it was handed to him just prior to the Event. (Defendants assert that Avi electronically agreed to a an online version of the

¹ Under West Virginia law, it also is relevant that the Arbitration Clause was inserted into a consumer contract, not a commercial agreement, and therefore the consumer would not have been expected to have the experience or expertise to anticipate the presence of an Arbitration Clause, let alone the wherewithal to try to parse the differences between the Venue and Jurisdiction clause (requiring disputes to go to a West Virginia court) and the Arbitration Clause (purporting to send disputes to arbitration). *See Brown I*, 228 W. Va. at 681, 724 S.E.2d at 285 ("courts are more likely to find unconscionability in consumer transactions . . . than in contracts arising in purely commercial settings involving experienced parties").

Agreement; however, that version -- even if agreed to by Avi, which is by no means established -
- differed in material ways from the one presented to Avi on the morning of the event.) He was
presented with three pages of dense legal language in tiny, 7-point font. Cumulatively, the
documents exceeded 2,700 words – the equivalent of a nine-page legal brief. Avi had no
reasonable opportunity to consult a lawyer, as the documents at issue were provided in a remote
location, on a weekend, shortly before he was to start the Event.

49. In short, even if a skilled attorney could somehow reconcile the seemingly
irreconcilable Venue and Jurisdiction Clause and the Arbitration Clause, it is impossible to
conceive how a layman in Avi's situation could have intelligently done so. *See Brown I*, 228 W.
Va. at 681, 724 S.E.2d at 285 (“the particular setting existing during the contract formation
process” and “whether the terms were explained to the ‘weaker party’” are factors relevant to
determination of meeting of the minds and procedural unconscionability), *vacated sub nom on
other grounds, Marmet Health Care Center, supra.*⁴

50. Having presented the Agreement to Avi in circumstances not conducive to a
reasonable review, Tough Mudder exacerbated the situation through its formatting decisions
when drafting the Agreement. The Agreement's otherwise descriptive title (“Assumption of Risk,
Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring – 2013”) makes no mention
of arbitration. Moreover, Tough Mudder utilized bold print, headings and initials to direct
attention to certain terms that it evidently decided were important. For example, the headings
preceding clauses entitled "Assumption of Inherent Risks" and "Waiver of Liability for Ordinary

⁴ *Brown I* remains good law in nearly all respects, save one not relevant to this motion. In *Marmet Health Care Center, supra*, the United States Supreme Court overturned *Brown I*, due to the state Supreme Court's improper reliance on a blanket prohibition against pre-dispute agreements to arbitrate personal injury claims against nursing homes, in violation of an FAA requirement that arbitration agreements be placed on equal footing with other types of contracts. On remand, the West Virginia Supreme Court affirmed *Brown I* in all respects save for its reliance on the blanket prohibition, and then remanded the case to the trial court for findings consistent with its opinion. *See Brown II*, 229 W. Va. 382.

Negligence" are printed in larger, more prominent font and are underlined, and initials are required next to these clauses. However, such attention, detail and emphasis were avoided with respect to the Mediation and Arbitration clause. That clause does not have its own larger-font/underscored heading; and it is inconspicuously placed in fine print in the middle of page 2 of the Agreement, under a heading entitled "Other Agreements," coming just after legalistic clauses called "Severability" and "Integration." In contrast to numerous other provisions in the contract, no initials are required to be placed next to the Arbitration Clause.

51. In short, Tough Mudder not only called attention to some clauses, but also diverted attention from the Arbitration Clause. *See Brown I*, 228 W. Va. at 681, 724 S.E.2d at 285 ("fine print," "unduly complex contract terms," "the particular setting existing during the contract formation process," and "whether the terms were explained to the 'weaker party'" are relevant to meeting of the minds and procedural unconscionability); *id.* ("more likely to find unconscionability in consumer transactions . . . than in contracts arising in purely commercial settings involving experienced parties").

52. This situation – a layman faced with ambiguous or inconspicuous wording in a setting that precludes a fair opportunity to consider and understand the terms of the contract – is the essence of procedural unconscionability.

53. "Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction.... These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner

and setting in which the contract is formed, including whether each party had a reasonable opportunity to understand the terms of the contract." *Brown II*, 729 S.E.2d at 227.⁵

54. West Virginia is hardly alone in rejecting arbitration clauses found in an agreement with ambiguous and irreconcilable provisions. For example, the Montana Supreme Court refused enforcement of a mandatory arbitration clause where the document, on the one hand, promised that "nothing in this agreement shall construe any limit of Resident's or Owner's inalienable legal rights," while on the other hand stating that the parties "are giving up and waiving their right to have claims decided in a court of law before a judge and a jury." *Riehl v. Cambridge Court GF, LLC*, 355 Mont. 161, 170, 226 P.3d 581, 587 (2010). Finding that the "Agreement itself never explains how these two provisions are to be reconciled," the court concluded "that the Agreement, when considered as a whole, is ambiguous as to whether Riehl actually agreed to waive her rights to access to the courts and a trial by jury when she entered into the Agreement." *Id.* (refusing to enforce arbitration clause).

55. Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), the United States Supreme Court applied *contra proferentem* to construe an arbitration clause against the drafter, reasoning that the drafter of an ambiguous arbitration agreement cannot claim the benefit of the doubt created by the ambiguity. *Id.*

56. West Virginia is equally clear on this point. The doctrine of *contra proferentem* requires that, "[i]n case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it." *See, e.g., Lawyer Disciplinary Board supra*, --- S.E.2d ---

⁵ Procedural unconscionability often begins with a contract of adhesion . . . [but] finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *Brown II*, 729 S.E.2d at 228.

-, 2014 WL 5032586 (citing *Lee*, 228 W.Va. at 487, 721 S.E.2d at 57 (2011) (“[I]n case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it.’ ”)). In *Richmond American Homes of West Virginia*, 228 W. Va. at 140, 717 S.E.2d at 925, our Supreme Court applied this rule to invalidate an arbitration clause where inconsistencies in the agreement intimated a right to bring a "court action." Where (as here) an agreement uses ambiguous language suggesting both a right to file a court action and a mandate to arbitrate, the Supreme Court has found such a contradiction "muddles the language" and "creates an ambiguity in the arbitration provision that, pursuant to well-settled West Virginia contract law, must be construed against the drafting party...." *Id.*, 228 W. Va. at 140, 717 S.E. 2d at 924.

57. Further, the lack of an opt-out provision weighs in favor of finding the arbitration clause procedurally unconscionable. In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372, 378 (2013), a loan servicer filed a petition for writ of prohibition to prevent the Circuit Court of Kanawha County from enforcing an order that denied the loan servicer's motion to compel arbitration in the underlying action, in which mortgagors alleged violations of the Consumer Credit and Protection Act. The Supreme Court granted the loan servicer's writ and found the arbitration agreement enforceable. *Id.* In regard to the determination of procedural unconscionability, the Supreme Court held the arbitration agreement was valid because it "contained a plainly worded statement, placed conspicuously above the signature line in all caps, which advised the [plaintiffs] that they could *reject* the arbitration agreement and the lender would not refuse to complete their loan due to such refusal." *Id.*, 232 W. Va. 341, 752 S.E.2d at 389. Here, the Arbitration Clause contains no similar opt out provision, which weighs in favor of finding it procedurally unconscionable.

58. In addition, the arbitration clause is non-mutual and is, therefore, substantively unconscionable.

59. "Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." *Id.* "The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement." *Id.* "Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." *Id.*⁶

60. A lack of mutuality – that is, "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party" – is a prototypical example of substantive unconscionability rendering an arbitration clause unenforceable. *See Brown II*, 229 W. Va. at 393 (cases cited). "Some courts suggest that mutuality of obligation is the locus around which substantive unconscionability analysis revolves." *Id.* (cases cited). "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *Id.* (cases cited).

61. The lack of mutuality of the Arbitration Clause in this case is manifest. The Arbitration Clause imposes on Mrs. Sengupta, and only on her, a unilateral obligation to arbitrate, by its language stating that "*I agree* to engage in good faith efforts to mediate any dispute that might arise. . . Should the issue not be resolved by mediation, *I agree* that all disputes, controversies, or claims arising out of my participation in the TM event shall be

⁶ For public policy reasons, West Virginia courts strictly scrutinize and seldom (if ever) enforce contractual provisions encouraging "inherently hazardous recreational or amusement activities" where (as here) "a violation of statutory safety standards or intentional or reckless misconduct or gross negligence" is involved. *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 315 n.6, 412 S.E.2d 504, 510 (1991). *Accord Kyriazis v. Univ. of W. Virginia*, 192 W. Va. 60, 65, 450 S.E.2d 649, 654 (1994). For the same reasons, the Court should scrutinize the Arbitration Clause at issue, to the extent it encourages such activities in violation of safety standards.

submitted to binding arbitration . . ." Ex. 1 at 2 (emphasis added). While participants like Avi were required to affirm their obligation to arbitrate, nothing in the Arbitration Clause, or anywhere else in the Agreement, required Tough Mudder or other Defendants to do so. On its face, the Arbitration Clause is non-mutual.

62. The unilateral nature of the Arbitration Clause is consistent with the entire body of the Agreement. The preamble to the Agreement states (inaccurately) that "THIS DOCUMENT . . . WILL AFFECT *YOUR* LEGAL RIGHTS AND WILL ELIMINATE *YOUR* ABILITY TO BRING FUTURE LEGAL ACTIONS." Ex. 1 at 1 (emphasis added). No statement is made that the document will eliminate Tough Mudder's or other Defendants' ability to bring future legal actions.⁷

63. Indeed, the word "I" appears fifty-seven times in clauses throughout the Agreement; for example, the Agreement purports to impose upon Avi (but not upon Tough Mudder or other Defendants) unilateral obligations of indemnity, payment of attorney's fees, assumption of risks, waiver of certain types of claims, and numerous other legal strictures that Tough Mudder cannot plausibly argue to be worded bilaterally or mutually. Any fair reading of the Agreement allows for only one conclusion: From start to finish, it imposes only unilateral obligations on the participant, while imposing no restrictions on Tough Mudder. Thus, the Court does not credit Tough Mudder's argument that the Arbitration Clause, alone among the sections of this unilateral contract, should be read to create mutual obligations.

64. This case closely matches the Fourth Circuit's decision in *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 609-10 (4th Cir. 2013), in which the arbitration clause in a purchase and sale agreement provided that "Buyer . . . hereby agree[s] that any and all disputes with Seller . . . shall

⁷ Notably, the preamble does not state that the Agreement will eliminate a participant's right to bring any or all future legal actions. Subsequent sections of the Agreement suggest that, if it eliminates any legal actions, it eliminates only those premised upon "ordinary negligence."

be resolved by binding arbitration" and that "BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN COURT . . ." Despite the blatant non-mutuality, the Seller attempted to argue that the arbitration clause should be *implicitly* read to apply mutually to all claims between the parties. Both the District Court and the Fourth Circuit rejected the concept of implicit mutuality, with the Fourth Circuit taking special note that "all subject and verb pairings relate to the buyer's obligations (i.e., buyer agrees, buyer waives, etc.); nowhere does the provision state that 'Buyer and Seller agree,' or the passive 'it is agreed.'" *Id.*

65. The situation is identical here. The Agreement, from beginning to end, imposes obligations solely on Avi; neither the Arbitration Clause nor any other provision of the Agreement purports to extract any explicit promise or to impose any express obligation on Tough Mudder. This Agreement – including the Arbitration Clause – can only be called non-mutual. Under *Brown II*, such non-mutual arbitration provisions are substantively unconscionable and thus unenforceable.

66. Furthermore, the arbitration clause imposes unconscionably prohibitive costs.

67. Our Supreme Court "noted in *State ex rel. Richmond American Homes v. Sanders* that when 'an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable.'" *Brown II*, 229 W. Va. at 394. "As even the United States Supreme Court has recognized, '[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her ... rights in the arbitral forum.'" *Id.* (cases cited). "[I]t is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Id.* (cases cited). "In *State ex rel.*

Dunlap v. Berger, [our Supreme Court] held that a trial court could consider the effect of those high costs in its substantive unconscionability analysis." *Id.*

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Id., quoting Syl. Pt. 4, *Dunlap*, 211 W.Va. at 551, 567 S.E.2d at 267.

68. In this case, the Arbitration Clause provides that "[t]he cost of such action shall be shared equally by the parties." *See Ex. 1.* Even if it were so, in order for Mrs. Sengupta to prosecute her claims for the wrongful death of her son, she would be required to pay huge upfront fees to the American Arbitration Association ("AAA") simply to be heard.

69. First, AAA charges filing fees on a sliding scale that increases with the size of the plaintiff's damages and demand. Where (as here) the damages and demand exceed \$10,000,000, AAA charges a "base fee" somewhere between \$12,800 and \$65,000. *See AAA Standard Fee Schedule, Ex. 4 at 40.*⁸ AAA also charges a "final fee" of \$6,000. *See id.* These fees become non-refundable once an arbitrator is appointed or, even if no arbitrator is appointed, 60 days after payment. *See id.*

70. In addition, Mrs. Sengupta will be responsible for the arbitrator's fees, which range from \$300 to \$500 per hour, as well as AAA's administrative fees for other services. Many of these additional fees must be deposited in advance. *See id.* at 38 ("Arbitrator compensation is

⁸ Where (as here) the "amount of claim" exceeds \$10,000,000, AAA charges a minimum "Base fee of \$12,800 plus .01% of the amount above \$10,000,000. Fee Capped at \$65,000." *See AAA Standard Fee Schedule, Ex. 4 at 40.*

not included in this schedule.”); Denn Aff., Ex. 3. Given the number of parties and witnesses, as well as the complexity of the factual issues and claims, an arbitrator would likely spend hundreds of hours on this case, at a cost of tens of thousands of dollars or more to Mrs. Sengupta, *simply to get a ruling on the merits*. In *Dunlap, supra*, the West Virginia Supreme Court cited numerous cases in which arbitration clauses were deemed unconscionable and therefore unenforceable based on costs far smaller than those at issue here. *See Dunlap*, 211 W. Va. at 565-566.

71. That is only the beginning of Mrs. Sengupta’s financial exposure. What Tough Mudder purports to give in the Arbitration Clause (*i.e.*, costs “shall be shared equally”), it takes away with a one-sided Indemnity Clause, which imposes a non-mutual obligation on Mrs. Sengupta “to hold harmless, defend and indemnify Tough Mudder LLC (and the other Released Parties) from and against: 1) any and all claims made by me (or any Releasing Party) arising from injury or loss due to my participation in the TM event; and 2) Against any and all claims of co-participants, rescuers, and others arising from my conduct in the course of my participation in the TM event.” *See Ex. 1*.

72. The Indemnity Clause specifically “include[es] legal fees and related expenses.” *See id.* Thus, if Mrs. Sengupta is compelled to arbitrate, she will be exposed to a claim for Defendants’ attorney’s fees, costs and damages in the arbitration, more than doubling her exposure. *Cf. Brown II*, 229 W. Va. at 394 (“[I]t is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process.”). Finally, she would need to reimburse Tough Mudder for all damages she recovers. The combination of the Arbitration Clause and the Indemnity Clause effectively provide that Mrs. Sengupta can recover nothing at arbitration.

73. Because the Arbitration and Indemnity Clauses place non-mutual and potentially ruinous costs upon participants, they would have a substantial deterrent effect upon not only Mrs. Sengupta but all other persons seeking fair compensation for injuries.

74. Cumulatively, these elements of procedural and substantive unconscionability, as discussed hereinabove, render the arbitration clause unenforceable and compel an order rejecting the arbitration clause.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is accordingly

ORDERED that *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman, Motion to Stay and Compel Arbitration* is denied as set forth herein. It is further

ORDERED that *Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration* is denied with respect to the motion to stay this action and compel arbitration as set forth herein. It is further

ORDERED that *Plaintiff's Cross-Motion and Brief (1) Opposing Defendants' Motions to Compel Arbitration and (2) Supporting Plaintiff's Cross-Motion to Declare the Arbitration Clause Unenforceable* is hereby granted and that the Arbitration Clause at issue is unenforceable. It is further

ORDERED that all exceptions and objections are noted and preserved. It is further

ORDERED that an attested copy of this Order shall be sent to all counsel of record.

ENTERED THIS 9th day of January, 2015



DAVID W. HUMMEL, JR.
Judge of the Circuit Court of
Marshall County, West Virginia

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