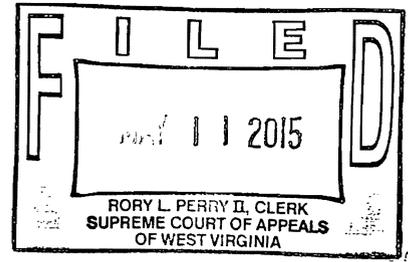


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0114



TOUGH MUDDER, LLC;¹)
PEACEMAKER NATIONAL TRAINING)
CENTER, LLC; GENERAL MILLS, INC.; and)
GENERAL MILLS SALES, INC.,)
)
Petitioners/Defendants Below,)
)
v.)
)
MITA SENGUPTA, as Personal Representative)
of The Estate of Avishek Sengupta,)
)
Respondent/Plaintiff Below.)

Appeal from an Order of the
Circuit Court of Marshall
County (No. 14-C-66)

PETITIONERS' BRIEF

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¹ Tough Mudder, LLC has changed its name since the instant matter was filed. The entity's new name is Tough Mudder Incorporated.

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DENYING THE TOUGH MUDDER DEFENDANTS' MOTION TO COMPEL ARBITRATION BY FAILING TO FIND A VALID ARBITRATION AGREEMENT EXISTS BETWEEN THE PARTIES, AND THAT THE CLAIMS AVERRED BY PLAINTIFF SENGUPTA FALL WITHIN THE SUBSTANTIVE SCOPE OF THE ARBITRATION AGREEMENT
2. THE CIRCUIT COURT ERRED IN DENYING THE TOUGH MUDDER DEFENDANTS' MOTION TO COMPEL ARBITRATION BY FAILING TO FIND THAT THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

STATEMENT OF THE CASE

A. Introduction

This appeal presents important issues that are central to federal policy favoring arbitration and to West Virginia's law on generally accepted contract defenses, in particular the doctrine of unconscionability. Here, Petitioners (Defendants below) indisputably made a *prima facie* case supporting the issuance of an order to compel arbitration because the claims brought by Respondent (Plaintiff below) unquestionably fall within the substantive scope of the arbitration agreement between the contracting parties. Plaintiff then failed to meet her burden of demonstrating both procedural and substantive unconscionability, which she must do in order to prevent enforcement of the arbitration clause. The Circuit Court's less than critical acceptance of Plaintiff's assertions has seemingly validated Plaintiff's efforts to subvert the purpose of this Court's comprehensive exposition of the elements of both procedural and substantive unconscionability in the context of enforcing arbitration agreements. This ruling, though interlocutory, is cognizable in this Court under the collateral order doctrine, and should be reviewed *de novo*.

B. Factual Background

Avishek Sengupta, a 28 year-old Senior Account Executive for a website engineering and optimization firm, voluntarily chose to take part in a Tough Mudder event in which participants attempt to complete a ten to twelve mile course while tackling a variety of physically strenuous and potentially dangerous military-style obstacles. This particular event was held at the Peacemaker National Training Center in Gerrardstown, West Virginia on April 20, 2013. *See* Complaint, ¶¶ 1, 33-35, Appendix Record, hereinafter referred to as “A.R.” 443, 452.

Avishek Sengupta registered for the April 20, 2013 event on January 11, 2013 – more than three months before the event. Affidavit of Lucas Barclay, Exh. 1 to Opposition to Cross-Motion at ¶ 5, A.R. 348. (“Barclay Affidavit”). He reviewed and accepted an on-line version of the Assumption of Risk, Waiver of Liability and Indemnity Agreement at the time he registered.² Barclay Affidavit at ¶¶ 6-7, A.R. 349. Even before he registered, a copy of the Assumption of Risk, Waiver of Liability and Indemnity Agreement was publicly available on-line on Tough Mudder’s Frequently Asked Questions web page. Barclay Affidavit at ¶¶ 8, 9, A.R. 349-350. Later, Tough Mudder sent Mr. Sengupta two separate e-mails, one on April 11, 2013 and the other on April 18, 2013, providing further information and links to Tough Mudder’s event information packet. Each one contained a specific reminder of the need to sign the Assumption of Risk, Waiver of Liability and Indemnity Agreement, as did the information packet itself. Barclay Affidavit at ¶¶ 11-19, A.R. 350-352.

² The form of the agreement that was on-line in January, 2013 was an older version that differed in minor respects from the version that Avishek Sengupta signed on April 20, 2013. It served to put him on notice of the nature and content of all of the contractual terms relevant to the issue of arbitrability.

By virtue of this information, Mr. Sengupta was made aware of the specific nature of the Tough Mudder event, which is described in the Assumption of Risk, Waiver of Liability, and Indemnity Agreement itself in the following terms:

The Tough Mudder event . . . is meant to be an extreme test of toughness, strength, stamina, camaraderie, and mental grit that takes place in one place in one day. It is not a race against other contestants, but rather a competition with oneself and the course. The object is to complete the course. Venues are part of the challenge and usually involve hostile environments that might include extreme heat or cold, snow, fire, mud, extreme changes in elevation, and water. Some of the activities include runs, military style obstacles, going through pipes, traversing cargo nets, climbing walls, encountering electric voltage, swimming in cold water, throwing or carrying heavy objects, and traversing muddy areas. In summation, the [Tough Mudder] event is a hazardous activity that presents the ultimate physical and mental challenge to participants.

Barclay Affidavit at ¶¶ 6-7 and Exh. A thereto, A.R. 349, 360.

Avishek Sengupta executed a paper copy of the Assumption of Risk, Waiver of Liability, and Indemnity Agreement on April 20, 2013, the substantive terms of which were identical with those that he had reviewed and accepted on-line three months previously. Exh. A to Motion to Compel Arbitration, A.R. 58-59 (the “Agreement”); *compare* Barclay Affidavit at ¶¶ 6-7, A.R. 349. It is undisputed that he initialed each of the five sections of the Agreement, including the section that contained the provision requiring binding arbitration of disputes in accordance with American Arbitration Association rules, and signed and dated the Agreement in his own hand.³

³ Like the Plaintiff below, the Circuit Court makes the point that Avishek Sengupta did not place his initials adjacent to the Mediation and Arbitration clause itself. Plaintiff’s Brief at p.8, A.R. 166; January 9, 2015 Order at ¶¶ 24, 45, A.R. 8, 15. The simple answer to that, plainly apparent from the face of the document itself, is that participants placed their initials next to each of the five major sections in the agreement, and “Mediation and Arbitration” is a subordinate clause within the major section “Other Agreements.” Avishek Sengupta’s initials were inscribed next to the “Other Agreements” heading. *See* Exh. A to Motion at p. 2, A.R. 59.

Siding with the Plaintiff below, the Circuit Court also makes much of the fact that the Agreement consists of 2,742 words on three pages. Plaintiff’s Brief at p. 7, A.R. 165; January 9, 2015 Order at ¶¶ 21, 48, A.R. 7, 15-16. But to get to that number of words and pages, they admittedly include the Entry and Participation Agreement, a one-page document that is separate from the two-page Assumption of Risk, Waiver of Liability and Indemnity Agreement that is the subject of this dispute over arbitrability.

Although he signed the printed version at the site of the event itself, it was (and remains) Tough Mudder's policy to allow participants as long as they need or want to review and decide whether to sign the Assumption of Risk, Waiver of Liability and Indemnity Agreement on-site, even if it means missing their planned starting time. Barclay Affidavit at ¶ 20, A.R. 353.

While participating in the Tough Mudder event, Avishek Sengupta sustained injuries which resulted in his death on the following day, April 21, 2013, after life support was withdrawn. Complaint, ¶¶ 101-102, A.R. 465.

The Assumption of Risk, Waiver of Liability, and Indemnity Agreement contained the following relevant language regarding arbitration:

Mediation and Arbitration: In the event of a legal issue, I [Avishek Sengupta] agree to engage in good faith efforts to mediate any dispute that might arise. Any agreement reached will be formalized by a written contractual 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 [Tough Mudder] 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.

* * *

Acknowledgement of Understanding: I CERTIFY THAT I HAVE CAREFULLY READ THIS ENTIRE WAIVER, THAT I FULLY UNDERSTAND ITS CONTENTS, AND THAT I FULLY UNDERSTAND THAT BY SIGNING THIS WAIVER, I AM GIVING UP IMPORTANT LEGAL RIGHTS AND/OR REMEDIES WHICH MAY BE AVAILABLE TO ME. FOR THAT REASON, 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.

/signed/ Avishek Sengupta 4/20/13

Exh. A to Motion, p. 2, A.R. 59.⁴

⁴ The Circuit Court characterizes the foregoing as "dense legal language," January 9, 2015 Order at ¶ 22, A.R. 7, but the import of the Mediation and Arbitration clause, as well as the Acknowledgement of Understanding, is straightforward and requires no special training or expertise to understand.

C. Procedural History

Following the death of Avishek Sengupta, the Personal Representative of his estate and his immediate family members claimed damages from, *inter alia*, Tough Mudder, LLC ("Tough Mudder"). These claims resulted in an actual dispute between Plaintiff below and Tough Mudder, which in turn triggered the mediation provision contained in the Assumption of Risk, Waiver of Liability, and Indemnity Agreement. *See* Exh. A, p. 2, A.R. 59. On two separate occasions, representatives of Tough Mudder met with members of the Sengupta family before a qualified mediator in a good-faith attempt to resolve the dispute. By an electronic mail message of April 15, 2014, counsel for the Senguptas provided notification that they were terminating the mediation. Exh. 3 to Opposition to Cross-Motion, A.R. 402.

On April 18, 2014, Tough Mudder filed a Demand for Arbitration with the American Arbitration Association ("AAA"). Exh. B to Motion to Compel Arbitration, A.R. 63-74.⁵ On the same day, Avishek Sengupta's mother and personal representative, Respondent Mita Sengupta ("Sengupta" or "Plaintiff") filed the instant wrongful death action and a declaratory judgment action in the Circuit Court of Marshall County. *See* Complaint, A.R. 443-477. In this action Sengupta seeks, *inter alia*, declarations regarding the enforceability of the Agreement signed by Avishek Sengupta.

Sengupta quickly sought to halt the arbitration proceeding by requesting that the AAA stay the matter. After the AAA denied her request, on May 23, 2014, Sengupta, on an *ex parte* basis, requested that the Circuit Court suspend the arbitration through a temporary restraining order ("TRO") and a preliminary injunction. After issuing an *ex parte* TRO, the Circuit Court

⁵Tough Mudder subsequently amended its filing before the AAA to include Peacemaker National Training Center, LLC ("Peacemaker"), General Mills, Inc., and General Mills Sales, Inc. as Claimants. *See* Amended AAA Demand, Exh. C to Motion, A.R. 77-85.

conducted a hearing on June 3, 2014. The arbitration proceeding has since been stayed by the Circuit Court's preliminary injunction of June 23, 2014. *See* May 23, 2014 Order, A.R. 523-531; May 28, 2014 Order, A.R. 532-533; June 23, 2014 Order, A.R. 582-593.

In responding to Sengupta's Complaint, Tough Mudder, along with Peacemaker and the General Mills entities (collectively, "Tough Mudder Defendants") timely filed a 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. *See* Motion, A.R. 27-140. Defendants Airsquid Ventures, Inc. ("Airsquid") and Travis Pittman ("Pittman") likewise filed a Motion to Dismiss for Improper Venue that contained an alternative request that the action be moved to Berkeley County for the convenience of the parties. Defendants Airsquid and Pittman also filed a separate Motion to Stay and Compel Arbitration. Plaintiff Sengupta cross-moved for an order declaring the arbitration clause unenforceable. *See* Plaintiff's Brief, A.R. 159-295.

On August 22, 2014, a hearing was held on the various motions relating to venue and also the cross-motions relating to arbitration. Transcript of August 22, 2014 Hearing, A.R. 701-836. On September 15, 2014, the Circuit Court sent a brief letter to all parties stating that it "has determined that as a matter of law the "Arbitration Clause" is ambiguous, non-mutual and unconscionable" and based on this determination, it was denying the Tough Mudder Defendants' Motion and granting relief in favor of Sengupta. September 15, 2014 Letter, A.R. 594-595. The letter continued "[i]n so doing, the Court adopts, with little if any exception, the reasoning and analysis set forth by Plaintiff herein both the written filings and oral arguments of counsel." A.R. 594. The Circuit Court then instructed Sengupta's counsel to draft an order "reflective of the Court's foregoing determinations." A.R. 595. On January 9, 2015, the Circuit Court entered the

Order denying the Tough Mudder Defendants' Motion and granting Sengupta's Cross-Motion. January 9, 2015 Order, A.R. 1-26. It is from this Order that the Petitioners now appeal.

SUMMARY OF ARGUMENT

This Court should consider this appeal *de novo* under the collateral order doctrine.

There is a compelling public policy basis for enforcing the arbitration clause at issue here that is in keeping with the emphatic federal policy favoring arbitration as a preferred mechanism for dispute resolution. A party seeking to avoid arbitration therefore has the burden of demonstrating that the claims at issue should not be submitted to arbitration, and Respondent Sengupta bears that burden on appeal.

While federal law governs the scope and application of arbitration clauses, state law controls the issues of contract formation and construction. Here, it is abundantly clear that the claims at issue fall within the substantive scope of the arbitration agreement.

The ultimate issue therefore becomes whether the arbitration clause should be set aside because it is unconscionable, as the Circuit Court incorrectly ruled. For that finding to be sustained, prior decisions of this Court indisputably establish that the arbitration agreement must be shown to be both procedurally and substantively unconscionable. Moreover, as this Court has previously observed, recreational activities such as the Tough Mudder events are not subject to the same level of judicial scrutiny as activities that have some degree of public utility.

Here, bearing in mind that the arbitration clause was a condition to Avishek Sengupta's participation in a totally voluntary recreational activity that he was under no compulsion to attend, the allegations of the Complaint itself, supplemented by the facts in the Appendix Record, demonstrate that there was no procedural unconscionability here. His age, education, training and experience, combined with the three months he had to consider the terms of the

Agreement and the multiple reminders sent to him prior to the event (including specific reminders to sign the Agreement), render the assertion of procedural unconscionability unsustainable.

Since the Agreement is not procedurally unconscionable, consideration of substantive unconscionability is not required but here, too, the Appendix Record shows that there was far more than the “modicum of bilaterality” required by this Court’s prior decisions on this subject, in which some degree of mutuality, though it need not be exact, is a paramount concern. Finally, the ruling that the cost of arbitration is an unconscionable feature of the arbitration agreement is entirely speculative and logically flawed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Petitioners request oral argument pursuant to Rule 19 because this case involves assignments of error in the application of settled law and in rulings below unsupported by the record. *See* W.Va. R. App. P. 19(a)(1) and (3).

ARGUMENT

STANDARD OF REVIEW

An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine and for *de novo* consideration by this Court. Credit Acceptance Corp. v. Front, 231 W.Va. 518, 525, 745 S.E.2d 556, 563 (2013). Moreover, whether an arbitration agreement constitutes a valid contract is a matter of state contract law. *See* State ex rel. Clites v. Clawges, 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (2009).

I. THE CIRCUIT COURT ERRED IN DENYING THE TOUGH MUDDER DEFENDANTS' MOTION TO COMPEL ARBITRATION BY FAILING TO FIND THAT A VALID ARBITRATION AGREEMENT EXISTS BETWEEN THE PARTIES, AND THAT THE CLAIMS AVERRED BY PLAINTIFF FALL WITHIN THE SUBSTANTIVE SCOPE OF THE ARBITRATION AGREEMENT

In erroneously basing its ruling upon unconscionability as discussed in detail below, the Circuit Court failed to address whether a valid arbitration agreement exists between the parties or whether the claims averred by Sengupta fall within the substantive scope of the arbitration agreement. For purposes of this Court's *de novo* review, those threshold issues must be considered herein.

A. Guiding Principles Under the Federal Arbitration Act

Before proceeding, it is critical to recognize key legal principles. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In a recent U. S. Supreme Court case, that Court held that the Federal Arbitration Act “requires courts to enforce the bargain of the parties to arbitrate.’ . . . It ‘reflects an emphatic federal policy in favor of arbitral dispute resolution’.” Marmet Health Care Ctr., Inc. v. Brown, --- U.S. ---, 132 S.Ct. 1201, 1203 (2012) (internal citations omitted); *see also*, Kucharek v. Dan Ryan Builders, Inc., No. 3:12-CV-77, 2013 WL 3365249 at *4 (N.D.W.Va. July 3, 2013). Indeed, the Federal Arbitration Act is a “congressional declaration of a liberal policy favoring arbitration.” Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983).

When determining the scope of a valid arbitration clause, a court (state as well as federal) is to use the federal substantive law of arbitrability. Montgomery v. Applied Bank, 848 F. Supp. 2d 609, 612 (S.D.W.Va. 2012), citing Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 n. 4 (4th Cir. 2000); see Moses H. Cone Mem'l Hosp., 460 U.S. at 24, 103 S.Ct. at 941 (the effect of § 2 of the Federal Arbitration Act is “to create a body of federal law of arbitrability, applicable to any arbitration agreement within the coverage of the Act” which governs the issue of arbitrability in either state or federal court).

It is true that the issue of whether a contract requiring arbitration is valid and enforceable is governed by the contract formation and interpretation principles of the forum state. See Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566, 569 (4th Cir. 1998). But while agreements to arbitrate may be invalidated by generally accepted contract defenses, such as fraud, duress or unconscionability, they may not be invalidated by application of defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. AT&T Mobility LLC v. Concepcion, --- U.S. ---, 131 S.Ct. 1740, 1746 (2011).

It follows that a party seeking to avoid arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91-92, 121 S.Ct. 513, 522-523 (2000). This Court has gone so far as to hold that it is presumed that an arbitration provision contained in a written contract was bargained for, and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract. State ex rel. Clites v. Clawges, 224 W.Va. at 305-306, 685 S.E.2d at 699-700.

Thus, it has been held that a court “must” enter an order compelling arbitration “if it determines that a written agreement to arbitrate was ‘made’ and that the [party resisting arbitration] has refused to comply with it.” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe,

313 F. Supp. 2d 603, 608 (S.D.W.Va. 2004), citing Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 305 (4th Cir. 2001). Moreover, the court can only consider challenges to the arbitrability of a dispute that specifically relate to the arbitration clause, as distinct from the agreement generally. Merrill Lynch, 313 F. Supp. 2d at 608, citing Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 637 (4th Cir. 2002). “A challenge specifically relates to an arbitration clause if it would invalidate that clause while leaving the remainder of the contract intact.” Merrill Lynch, *supra*, 313 F. Supp. 2d at 608, citing Sydnor, 252 F.3d at 307. Indeed, the U.S. Supreme Court has held that challenges to the validity of the contract as a whole, only incidentally including the arbitration clause, must be referred to the arbitrator for decision. *See* Moses H. Cone Mem'l Hosp., 460 U.S. at 24, 103 S.Ct. at 941, citing Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 87 S.Ct. 1801 (1967).

The arbitrability of a dispute therefore is to be resolved in isolation, and expeditiously. As the U.S. Supreme Court advised in Moses H. Cone Mem'l Hosp., the issue is to be determined after “an expeditious and summary hearing, with only restricted inquiry into factual issues.” 460 U.S. at 22, 103 S.Ct. at 940.

B. The Record Demonstrates that All Necessary Elements Exist for Compelling Arbitration

In ruling on a motion to compel arbitration, the authority of the trial court “is limited to determining the threshold issues of: (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by plaintiff fall within the substantive scope of the arbitration agreement.” State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 251, 693 S.E.2d 293, 294 (2010). Federal decisions are essentially to the same effect, though they track the language of the statute itself more closely in noting four elements to a *prima facie* case: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration

provision which purports to cover the dispute; (3) the relationship of the transaction to interstate or foreign commerce; and (4) the failure, neglect or refusal of the [party opposing arbitration] to arbitrate the dispute. Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-501 (4th Cir. 2002), citing Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991).

Here, the existence of a dispute between the parties is evidenced by this lawsuit and by the arbitration proceeding in themselves. Element 1 is satisfied.

The Assumption of Risk, Waiver of Liability, and Indemnity Agreement is a written agreement that contains an arbitration provision that covers the dispute. Specifically, in executing that Agreement, Avishek Sengupta agreed that “all disputes, controversies, or claims arising out of my participation in the TM [Tough Mudder] event shall be submitted to binding arbitration in accordance with the applicable rules of the American Arbitration Association then in effect.” Exh. A at p. 2, A.R. 59. This dispute unquestionably arose out of Avishek Sengupta’s participation in the Tough Mudder event on April 20, 2013. The Agreement is binding on, *inter alia*, Avishek Sengupta’s parents, heirs, next of kin, and legal or personal representatives, executors, administrators, successors and assigns, or anyone else who might claim or sue on his behalf. Exh. A at p. 1, A.R. 58. Element 2 is satisfied.

The April 20, 2013 event, which took place in West Virginia, is related to interstate commerce in that it was organized by Tough Mudder, a Delaware company with its principal place of business in New York,⁶ and attended by participants from many different states, including Avishek Sengupta, then a resident of the State of Maryland.⁷ General Mills, Inc. and General Mills Sales, Inc., both Delaware corporations located in Minnesota, were sponsors of the Tough Mudder event. Element 3 is satisfied.

⁶ Amended AAA Demand at ¶ 1, Exh. C to Motion, A.R. 78.

⁷ Complaint at ¶ 3, A.R. 444.

All conditions precedent to filing an arbitration proceeding under the contract were met, in that the parties engaged in a good-faith attempt to mediate their dispute. Nevertheless, Sengupta refused to participate in the arbitration proceeding. Element 4 is satisfied.

Thus, the Record indisputably demonstrates that the Tough Mudder Defendants made a *prima facie* case supporting the issuance of an order to compel arbitration because the claims brought by Sengupta fall within the substantive scope of an arbitration agreement between the contracting parties.

II. THE CIRCUIT COURT ERRED IN DENYING THE TOUGH MUDDER DEFENDANTS' MOTION TO COMPEL ARBITRATION BY FAILING TO FIND THAT THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

As indicated above, agreements to arbitrate may be invalidated by generally accepted contract defenses, such as fraud, duress or unconscionability, preserved in the “savings clause” of the Federal Arbitration Act, which provides that arbitration agreements shall be valid, irrevocable, and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. It has long been universally accepted that grounds for revocation of any contract are to be found in the applicable state law, so long as those principles are not specific to arbitration, in which event they would be pre-empted by the Federal Arbitration Act. Marmet Health Care Ctr., 132 S.Ct. 1201 at 120; AT&T Mobility LLC v. Concepcion, 131 S.Ct. at 1746; State ex rel. Richmond American Homes of West Virginia v. Sanders, 228 W.Va. 125, 134, 717 S.E.2d 909, 918 (2011).

Here, Sengupta raised several grounds in support of unconscionability, none of which is persuasive and all of which should have been rejected by the Circuit Court. We begin our consideration of the issue of unconscionability with a complete (as distinct from Sengupta’s selective) reading of the seminal Brown I decision as supplemented by Brown II and other state

court decisions, which together express a comprehensive statement of the elements of both procedural and substantive unconscionability in the context of enforcing arbitration agreements in West Virginia. See “Brown I,” Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, 132 S.Ct. 1201 (2012); and “Brown II,” Brown v. Genesis Healthcare Corp., 229 W.Va. 382, 729 S.E.2d 217 (2012).

The threshold principles that this Court has established as necessary guideposts to the resolution of the issue of unconscionability are these:

- The question of whether a bargain is unconscionable is one of law for the Court to decide, as it rests on equitable principles. Brown I, 228 W.Va. at 680, 724 S.E.2d at 284.
- The burden of proving that a contract is unconscionable rests with the party attacking the contract. Id.
- Unconscionability is analyzed in terms of two component parts: procedural and substantive unconscionability. Brown I, 228 W.Va. at 681, 724 S.E.2d at 285.
- To be unenforceable, a contract term must be both procedurally and substantively unconscionable. Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 289, 737 S.E.2d 550, 558 (2012), citing Brown I at Syllabus Point 20 and State ex rel. Johnson Controls, Inc. v. Tucker, 229 W.Va. 486, 498-499, 729 S.E.2d 808, 820-821 (2012).

Each of these two aspects of unconscionability must be considered more fully below.

A. The Circuit Court’s Finding of Procedural Unconscionability was Unsupported by the Record and Established West Virginia Law

“Procedural unconscionability addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract.” Brown I, 228 W.Va. at 681, 724 S.E.2d at 285. Factors to consider, as itemized in Brown I, include:

- Whether each party had a reasonable opportunity to understand the terms of the contract;
- Whether important terms were hidden in a maze of fine print, or printed on the back side of a form contract; and
- Whether there was a real and voluntary meeting of the minds, which in turn requires consideration of factors such as (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the identity of the drafter of the contract; and (6) whether the terms were explained to the ‘weaker’ party.

It is understood and accepted that adhesion contracts, meaning contracts that are form contracts submitted by one party on a “take it or leave it” basis, form the bulk of all contracts signed in this country, and are generally enforceable because “[t]here is nothing inherently wrong with a contract of adhesion. Most of the transactions of daily life involve such contracts that are drafted by one party and presented on a take it or leave it basis. They simplify standard transactions.” Brown I, 228 W.Va. at 682, 724 S.E.2d at 286, quoting John D. Calamari, Joseph M. Perillo, *Hornbook on Contracts*, § 9.43 (6th Ed. 2009). Thus, “[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it.” Brown I, 228 W.Va. at 682, 724 S.E.2d at 286, quoting State ex rel. Dunlap v. Berger, 211 W.Va. 549, 557, 567 S.E.2d 265, 274 (2002). As this Court in Brown I recognized, a party signing a contract of adhesion tends to trust to the good faith of the party using the form, and in the tacit representation that like terms are being accepted regularly by others similarly situated, but even so they understand that they are assenting to the contract’s terms, even though they may have not read or understood them. Brown I, 228 W.Va. at 682, 724 S.E.2d at 286, citing *Restatement of Contracts (Second)*, § 211, comment b (1981). For this reason, a contract of adhesion may be enforceable but is subject to a degree of heightened scrutiny to determine if it imposes terms beyond the reasonable

expectations of an ordinary person (an objective standard), or oppressive or unconscionable terms. Brown I, 228 W.Va. at 683, 724 S.E.2d at 287.

Here, the Circuit Court erred in finding that Plaintiff met her burden of proving procedural unconscionability, for the following reasons.

The Circuit Court erroneously found that there are various internal conflicts in the language of the Agreement, pointing first to the Venue and Jurisdiction clause as somehow being in irreconcilable conflict with the Mediation and Arbitration clause. *See* January 9, 2015 Order at ¶¶ 44-48, A.R. 14-16. The Circuit Court created this conflict itself by ignoring the words, “if legal action is brought” which is a predicate for the remainder of the Venue and Jurisdiction clause. If arbitration is mandatory, no legal action will be brought, and the remainder of the clause becomes surplusage. If, as here, a party challenges arbitrability and brings an action in a court of law, then the clause limits that party’s choice of jurisdiction to the appropriate state or federal court for the state in which the event took place – here, West Virginia. It also is not unusual for a party to file an action in court to enforce a prior arbitration award. In other words, contracts may contain both an arbitration clause and a venue selection clause. *See, e.g., Personal Sec. & Safety Sys., Inc. v. Motorola, Inc.*, 297 F.3d 388, 396 (5th Cir. 2002) (“we interpret the forum selection clause to mean that parties must litigate in Texas courts only those disputes that are not subject to arbitration—for example, a suit to challenge the validity or application of the arbitration clause or an action to enforce an arbitration award”); Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400, 407 (3rd Cir. 1987) (there is nothing inconsistent between an arbitration obligation and a forum selection clause since both can be given effect, as in a subsequent judicial action to enforce a prior arbitration award), *abrogated on other grounds*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133 (1988).

The arbitration clause was not “buried” or hidden on the back side of a form contract; it was in a clause headed, in bold type, “Mediation and Arbitration” in a two-page document. Compare this with the “relatively short” seven-page contract with six pages of addenda examined by Judge Groh of the U.S. District Court for the Northern District of West Virginia in Kucharek, 2013 WL 3365249 at *12, which included an enforceable arbitration provision also “clearly marked in bold typeface.”⁸ That the plaintiffs in Kucharek did not read the contract did not render it unconscionable, both because they had ample opportunity to do so, and because they signed the contract under a provision in all capital letters and bold type by which they specifically acknowledged that they had read the contract and understood its provisions. Id. Similarly, Avishek Sengupta signed the Agreement below the following acknowledgment:

Acknowledgement of Understanding: I CERTIFY THAT I HAVE CAREFULLY READ THIS ENTIRE WAIVER, THAT I FULLY UNDERSTAND ITS CONTENTS, AND THAT I FULLY UNDERSTAND THAT BY SIGNING THIS WAIVER, I AM GIVING UP IMPORTANT LEGAL RIGHTS AND/OR REMEDIES WHICH MAY BE AVAILABLE TO ME. FOR THAT REASON, 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.

Avishek Sengupta had more than ample opportunity to review the entire Agreement, including the arbitration clause, and to consult legal counsel had he so chosen. This has been confirmed by Tough Mudder’s investigation of his on-line registration for the April 20, 2013 event, which has established that:

- Avishek Sengupta registered for the April 20, 2013 event on January 11, 2013 – more than three months before the event. Barclay Affidavit at ¶ 5, A.R. 348.

⁸ Kucharek is particularly instructive because it is one of the few decisions rendered by a court after a full evidentiary hearing, and therefore includes factual details relating to the issue of unconscionability, both procedural and substantive, that are absent from most other rulings.

- Avishek Sengupta reviewed and accepted an on-line version of the Assumption of Risk, Waiver of Liability and Indemnity form agreement at the time he registered in January. Barclay Affidavit at ¶¶ 6-7, A.R. 349.
- Even before he registered, a copy of the Assumption of Risk, Waiver of Liability and Indemnity Agreement was publicly available on-line on Tough Mudder’s Frequently Asked Questions web page. Barclay Affidavit at ¶¶ 8-9, A.R. 349-350.
- Avishek Sengupta was sent two separate e-mails, one on April 11, 2013 and the other on April 18, 2013 (both in advance of the April 20, 2013 event) providing further information and links to Tough Mudder’s event information packet. Each one contained a specific reminder of the need to sign the Assumption of Risk, Waiver of Liability and Indemnity Agreement, as did the information packet itself. Barclay Affidavit at ¶¶ 11-19, A.R. 350-353.
- In addition to the numerous prior opportunities afforded him to look over the Agreement, it was (and remains) Tough Mudder’s policy to allow participants as long as they need or want to review and decide whether to sign the Agreement on-site, even if it means missing their planned starting time. Barclay Affidavit at ¶ 20, A.R. 353.

Altogether, Tough Mudder specifically directed Avishek Sengupta’s attention to the Assumption of Risk, Waiver of Liability and Indemnity Agreement on at least three separate occasions over the course of three full months, and there is proof that he acknowledged reviewing it at the time he registered on-line, long before the event itself.

It is also compelling that these facts are consistent with the allegations made by the Plaintiff below in Paragraphs 34 and 35 of the Complaint, in which it is alleged that “several months prior” to the April 20, 2013 event, one of Avishek Sengupta’s friends and co-workers

decided to participate, and recruited other friends and co-workers, including Avishek Sengupta himself, to form a team of participants. A.R. 452-453. It is further alleged in Paragraph 35 of the Complaint that all members of the team relied, directly or indirectly, on Tough Mudder's marketing and media materials, again consistent with the conclusion that Avishek Sengupta was aware of Tough Mudder's on-line materials and was informed of the Assumption of Risk, Waiver of Liability and Indemnity Agreement on multiple occasions long in advance of the event itself. A.R. 452-453.

Avishek Sengupta had the education, training and intelligence to understand and make reasoned decisions about such matters. As Plaintiff below alleges in Paragraph 33 of the Complaint,

Avi Sengupta was born and raised in the state of Maryland. After studying math and early education at Towson University, Avi went to work first as a plan administrator for T. Rowe Price and then as an account executive in the computer and internet industries. At the time of his death at age 28, Avi was a fulltime Senior Account Executive for Webmechanix, a website engineering and optimization firm. He also was nearing completion of a bachelor's degree in computer science at the University of Maryland – University College.

A.R. 452. Avishek Sengupta was neither a child, nor elderly. He was well educated. He was familiar with internet communications technology, and indeed had a responsible position with a company in that very industry. He had access to, and on two separate occasions (on-line on January 11, 2013, and in person on April 20, 2013) specifically indicated his acceptance of the Assumption of Risk, Waiver of Liability and Indemnity Agreement.

The fact that he clicked an on-line checkbox to indicate his assent on January 11, 2013 does not affect this analysis. In a recent decision concerning the enforceability of the very same arbitration clause associated with another Tough Mudder event, the United States District Court for the District of Massachusetts explained that “[s]uch ‘clickwrap’ agreements are commonly

enforced in Massachusetts and Federal Courts” and held that the agreement’s arbitration provision was valid and enforceable. Pazol v. Tough Mudder Inc., et al., No. 14-40180-TSH, 2015 WL 1815685 (D. Mass. Apr. 22, 2015).

The Circuit Court justified its ruling on procedural unconscionability by focusing on the absence of an opt-out provision, by which a party can opt out of an arbitration clause without allowing the other party to refuse to fulfill its agreement, relying on State ex rel. Ocwan Loan Servicing, LLC v. Webster, 232 W.Va. 341, 752 S.E.2d 372 (2013). January 9, 2015 Order at ¶ 57, A.R. 19. This is a mis-reading of that decision, as the trial court’s own description implies, because in Ocwan Loan this Court held that the presence of an opt-out provision in a contract did not render the agreement procedurally unconscionable. 232 W.Va. at 358, 752 S.E.2d at 389. There was not the slightest suggestion of the converse holding – that the absence of an opt-out provision renders an arbitration agreement procedurally unconscionable, and in point of fact agreements containing arbitration clauses without opt-out provisions are routine, and routinely receive court approval. We are simply back where we started, except that the case on which the Circuit Court principally relied in reaching its decision on procedural unconscionability is demonstrably distinguishable.

This leads us to perhaps the most compelling reason to reject any finding of procedural unconscionability: participating in the Tough Mudder event was entirely voluntary, and the event itself was a recreational activity with not even the slightest degree of general public utility. As such, Avishek Sengupta did have a meaningful choice about whether and how to enter into the contract - he could simply have chosen not to participate. *See* Saturn Dist. Corp. v. Williams, 905 F.2d 719, 727 (4th Cir. 1990) (“the mere fact that Saturn requires dealers to agree to its arbitration provisions in order to obtain a Saturn dealership does not make its Dealership

Agreement non-consensual. If a dealer does not wish to agree to the nonnegotiable arbitration provisions, the dealer need not do business with Saturn.”); Kucharek, 2013 WL 3365249 at *10 (in contracting for purchase of a home, plaintiffs were free to seek the services of another homebuilder). If Avishek Sengupta did not agree with the terms of Tough Mudder’s Assumption of Risk, Waiver of Liability and Indemnity Agreement, his remedy was simply to forego participating in the event.

To much the same effect, this Court in Brown I noted, in discussing the interplay between procedural and substantive unconscionability, that recreational activities – even recreational activities of a hazardous nature – are not subject to the same level of judicial scrutiny as activities that do have public utility through the provision of some sort of a public service. Such agreements “tend to be enforceable.” Brown I, 228 W.Va. at 686-687, 724 S.E.2d at 290-291. As examples of such activities, this Court specifically identified “skiing, parachuting, paintball, or horseback trail rides,” a grouping of potentially hazardous but voluntary recreational activities with no nexus to any general public service. Brown I, 228 W.Va. at 687, 724 S.E.2d at 291. During the hearing on the cross-motions, the Circuit Judge professed to note this Court’s identification of such activities, like paintball,⁹ but nonetheless erred in his subsequent Order by failing to acknowledge the obvious: that the Tough Mudder events plainly fall within the group of activities described by example in Brown I.

B. A Finding of Substantive Unconscionability is Unsupported By The Record and Established West Virginia Law

Unlike procedural unconscionability, which arises in the context of contract formation, substantive unconscionability involves unfairness within the contract itself. Brown I, 228 W.Va. at 683, 724 S.E.2d at 287. Whether a contract involves unfairness turns on whether a contract

⁹ August 22, 2014 Hearing Transcript at 54:11, A.R. 756.

term is one-sided and will have an overly harsh effect on the disadvantaged party. “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.

The Brown I decision suggests that in assessing substantive unconscionability, the paramount concern is mutuality. 228 W.Va. at 683, 724 S.E.2d at 287. Importantly, the standard is neither rigid nor does it require strictly equal mutuality – instead, “agreements to arbitrate must contain at least ‘a modicum of bilaterality’ to avoid unconscionability.” Brown II, 229 W.Va. at 393, 729 S.E.2d at 228, quoting from Abramson v. Juniper Networks, Inc., 115 Cal. App. 4th 638, 657, 9 Cal. Rptr. 3d 422, 437 (Cal. App. 2004), which in turn quoted from the California Supreme Court’s decision in Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83, 117-119, 6 P.3d 669, 692-693 (Cal. 2000) (expressly rejecting the notion that the absence of exact bilaterality in an agreement rendered it invalid under the mutuality of remedy doctrine, while holding that a modicum of bilaterality in arbitration agreements is needed to avoid substantive unconscionability).

Here, Sengupta persuaded the Circuit Court to effectively alter the plain meaning of the contract language through a selective reading of the Mediation and Arbitration clause. The Circuit Court thus evaded the import of the plain and unambiguous language of that clause, which states,

Mediation and Arbitration: In the event of a legal issue, I [Avishek Sengupta] agree to engage in good faith efforts to mediate any dispute that might arise. Any agreement reached will be formalized by a written contractual 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 [Tough Mudder] 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.

While the Circuit Court’s ruling emphasizes the use of the pronoun “I” throughout this clause, *see* January 9, 2015 Order at ¶ 61, A.R. 20-21, that is the logical corollary of the simple fact that the agreement was drafted as an acknowledgment of its terms by the signing party, here Avishek Sengupta. What Avishek Sengupta acknowledged by initialing and executing the Agreement was that “all disputes, controversies or claims” arising out of his participation in the Tough Mudder event would be arbitrated. It is not limited to “his” disputes, it applies to “all” disputes. Clearly this is a mutual obligation, and represents more than a “modicum of bilaterality.” That is sufficient, according to this Court in Brown II, to avoid a finding of substantive unconscionability on this ground. Brown II, 229 W.Va. at 394, 729 S.E.2d at 229. This conclusion is further reinforced by settled law to the effect that in giving due regard to the federal policy favoring arbitration, any ambiguity as to the construction of the arbitration clause itself must, as the U.S. Supreme Court put it, “be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp., 460 U.S. at 24-25, 103 S.Ct. at 941.

This straightforward language also distinguishes this case from one relied upon by the Circuit Court, Noohi v. Toll Bros., Inc., 708 F.3d 599, 609-610 (4th Cir. 2013), where the arbitration clause read, “Buyer . . . hereby agree[s] that any and all disputes with the Seller . . . shall be resolved by binding arbitration” (emphasis added). *See* January 9, 2015 Order at ¶ 64, A.R. 21-22. The point is that the Seller was not bound by the same obligation to arbitrate disputes with the Buyer, and mutuality is entirely absent. Analogous language is absent from the arbitration clause here, which applies to “all disputes” – period. Nor is it limited to one party at the expense of the other, it applies to all disputes “arising out of participation” in the Tough Mudder event - period.

Similarly, the acknowledgment clause above Avishek Sengupta's signature was drafted as an affirmation of his acceptance of those terms. From his perspective as the signatory, only limitations on "his" legal rights needed to be acknowledged. Since the arbitration clause is plainly mutual, Tough Mudder also had its legal rights affected and gave up its right to bring future legal actions.¹⁰ But since Tough Mudder did not sign the Agreement, there was no need for a corresponding acknowledgment clause.

The Circuit Court also erred by finding that the arbitration agreement imposes unconscionably prohibitive costs. January 9, 2015 Order at ¶ 66, A.R. 22. Sengupta did not meet her burden of proving excessive costs. State ex rel. Wells v. Matish, 215 W.Va. 686, 600 S.E.2d 583 (2004) (burden of proving excessive costs is upon the party challenging the arbitration provision). It is worth emphasizing at the outset that in every decision cited by the Circuit Court in its Order, the court issuing the opinion, while acknowledging the general principle, declined to apply it on the record before it.

The discussion of unconscionability found in the Brown II opinion is taken virtually verbatim from Brown I, with the addition of consideration of whether an arbitration agreement's imposition of such high costs that a potential litigant might be deterred from pursuing a claim would support a finding of substantive unconscionability. Brown II, 229 W.Va. at 394, 729 S.E.2d at 229. The Court in Brown II did not have an adequate factual record before it, and remanded the case to the Circuit Court to permit the parties to develop the evidence. Brown II, 229 W.Va. at 395, 729 S.E.2d at 230. Somewhat to the same effect, the Court in State ex rel.

¹⁰ Further evidence of the mutuality of this provision is found in the fact that Tough Mudder voluntarily participated in pre-litigation mediation, as both sides were obligated to do under the very same clause in the Assumption of Risk, Waiver of Liability and Indemnity Agreement at issue here that also contains the arbitration provision.

Richmond American Homes of West Virginia recognized the principle but did not base its decision on it. 228 W.Va. at 137, 717 S.E.2d at 921.

The Circuit Court also relied on State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002), which squarely held that arbitration provisions in a contract that would impose unreasonably burdensome costs on a party, to the extent that it would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights, could support a finding of substantive unconscionability. 211 W.Va. at 566, 567 S.E.2d at 282. Nonetheless, in the very next paragraph this Court held, “[a]pplying the foregoing to the instant case, Friedman’s, *et al.* [the parties seeking to compel arbitration] are correct that Mr. Dunlap’s contentions as to the cost of arbitration . . . are at best speculative and not well-supported in the record. . . Consequently Mr. Dunlap’s ‘excessive costs’ argument for reversal of the circuit court’s order is not persuasive.” 211 W.Va. at 567, 567 S.E.2d at 283.

Finally, the Brown II decision relied upon by the Circuit Court cited the U.S. Supreme Court’s decision in Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000). There, the party seeking to avoid arbitration argued that the arbitration agreement created a “risk” that she would have to bear prohibitive arbitration costs if she were to pursue her claims in an arbitral forum. 531 U.S. at 90, 121 S.Ct at 522. The Supreme Court held that the asserted risk of prohibitive costs was too speculative to justify the invalidation of the arbitration agreement. 531 U.S. at 91, 121 S.Ct. at 522.

Here, the situation is much the same. The arbitration clause at issue here specifies arbitration under the rules of the American Arbitration Association (“AAA”), and that “the costs of such action shall be shared equally by the parties.” Exh. A to Motion at p. 2, A.R. 59. In addition to the costs of the arbitration itself, Sengupta would be entirely responsible for her filing

fees, as would Tough Mudder for its filing fees. Those fees are calculated from an AAA schedule that applies to all arbitrations conducted under its auspices. It requires the calculation of a fee on a sliding scale proportional to the dollar amount at issue. It is not true that the AAA fee would be “somewhere” between \$12,500 and \$65,000, as stated in the Circuit Court’s decision. January 9, 2015 Order at ¶ 69, A.R. 23. Instead, it depends on the actual amount of Sengupta’s claim for damages. For example, a claim of \$10,000,000 (the example used in Plaintiff’s Brief and in the Circuit Court’s Order) would result in total fees of \$14,200. Claims over that amount result in fees calculated by adding to a base fee of \$12,800, 0.01% (that is to say, 0.0001) times the amount in excess of \$10,000,000, plus a final fee (due prior to the initial hearing) at the flat rate of \$6,000. A claim for \$20,000,000 therefore would result in a total fee of \$19,800. A claim of \$25,000,000 would result in a total fee of \$20,300. In order to reach the maximum fee of \$65,000 that the Circuit Court suggests that Sengupta is at risk of being charged, the amount of the claim would have to equal or exceed \$532,000,000! We have no idea, other than the assertion that Sengupta’s claim exceeds \$10,000,000, what the amount of the claim would be, and hence the amount of the AAA fee is speculative and cannot serve as the basis for a finding of substantive unconscionability.¹¹

It is true that the arbitrator’s hourly fee would be a cost of arbitration that has no counterpart in litigation before a judicial tribunal. Those costs, however, would be divided equally with Tough Mudder, and are off-set by the streamlined nature of arbitration proceedings which are intended to relieve litigants of other costs associated with judicial litigation. *See*

¹¹ The Circuit Court’s reliance on the asserted inequities of the Indemnity clause in the Agreement may be disregarded, as Tough Mudder agrees that the clause would be unenforceable if given the trial court’s interpretation, and expressly waives any rights it might have to enforce it against Sengupta in this case. The Severability clause requires that the provision be severed from the remainder of the Agreement. Exh. A at p. 2, A.R. 59. Counsel reiterated this point during oral arguments (August 22, 2014 Hearing Transcript at 63, A.R. 765) and there is no indication from the Circuit Court’s decision that it gave the Severability clause any consideration. January 9, 2015 Order, A.R. 1-26.

Kucharek, *supra*, 2013 WL 3365249 at *4 (the federal policy favoring arbitration “is supported by Congress’s view that arbitration constitutes a more efficient dispute resolution process than litigation”), citing Hightower v. GMRI, Inc., 272 F.3d 239, 241 (4th Cir. 2001) (“[i]n the FAA . . . Congress endorsed arbitration as a less formal and more efficient means of resolving disputes than litigation”); *see also*, Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 685, 130 S.Ct 1758, 1775 (2010) (“[i]n bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes”). Other costs – depositions, experts, etc. – would presumably be the same in either forum. But the point is that the assertion that an arbitrator might spend “hundreds” of hours on this case is, again, purely speculative. Put another way, evidence of the “risk” of possible costs of arbitration is insufficient to prove that the costs of arbitration are prohibitive, which can only be done through the presentation of specific evidence (through invoices, expert testimony, reliable cost estimates, or other comparable evidence) that the party objecting to arbitration would actually be charged excessive arbitration fees. *See In re Olshan Foundation Repair Co., LLC*, 328 S.W.3d 883, 895 (Tex. 2010), relying on Green Tree, 531 U.S. at 92, 121 S.Ct. at 513. The assertions of Plaintiff’s counsel, without more, do not meet this standard.

CONCLUSION

Petitioners respectfully request that the Circuit Court’s Order denying their motion to compel arbitration and granting the Respondent’s cross-motion to declare the arbitration clause unenforceable be reversed and that this case be remanded for entry of an order (1) compelling arbitration and (2) vacating the Circuit Court’s June 23, 2014 preliminary injunction staying the arbitration proceeding.

Dated: May 11^m, 2015

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0114

TOUGH MUDDER, LLC;)	
PEACEMAKER NATIONAL TRAINING)	
CENTER, LLC; GENERAL MILLS, INC.; and)	
GENERAL MILLS SALES, INC.,)	
)	
Petitioners/Defendants Below,)	
)	
v.)	Appeal from an Order of the
)	Circuit Court of Marshall
)	County (No. 14-C-66)
MITA SENGUPTA, as Personal Representative)	
of The Estate of Avishek Sengupta,)	
)	
Respondent/Plaintiff Below.)	

CERTIFICATE OF SERVICE

I, Alonzo D. Washington, counsel for Petitioners, do hereby certify that **PETITIONERS' BRIEF** was served on the 11th day of May, 2015 via first class U.S. mail, postage prepaid, to the following counsel of record:

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Moundsville, WV 26041

David Ealy, Circuit Clerk
Marshall County Courthouse
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