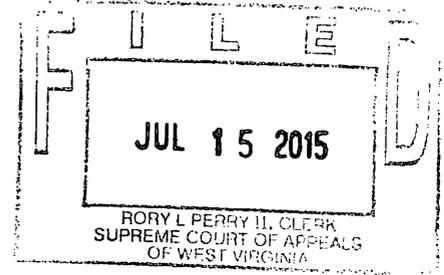


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' REPLY 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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STATEMENT OF THE CASE

This appeal arises from a dispute over the enforceability of an arbitration clause contained in an assumption of risk and waiver of liability agreement, the execution of which was required of all participants in an entirely voluntary, and somewhat hazardous, recreational activity. Avishek Sengupta, a 28 year-old Senior Account Executive for a website engineering firm, chose to take part in the April 20, 2013 Tough Mudder Mid-Atlantic Event (the "Event") in which participants attempted to complete a ten to twelve mile course while tackling a variety of physically strenuous and potentially dangerous military-style obstacles. *See* Complaint, ¶¶1, 33-35, Appendix Record, hereinafter referred to as "A.R." 443, 452. Regrettably, as he attempted to negotiate one of the obstacles Avishek Sengupta sustained injuries from which he later died.

Prior to his participation in the Event, over the span of some three months Avishek Sengupta twice reviewed and accepted an Assumption of Risk, Waiver of Liability, and Indemnity Agreement that contained a provision requiring both parties to submit all disputes arising out of participation in the Event to mediation and, if mediation did not resolve the dispute, to arbitration. Nevertheless, Respondent Sengupta (the decedent's mother and Personal Representative of his Estate) filed the instant wrongful death and declaratory judgment action in the Circuit Court of Marshall County ("Circuit Court"). *See* Complaint, A.R. 443-477. In seeking to compel compliance with the arbitration clause, Petitioners (the "Tough Mudder Defendants" below) presented evidence of the agreement signed by hand by Avishek Sengupta immediately prior to his participation in the Event. *See* Exh. A to Motion to Compel Arbitration, A.R. 58-59 (the "Agreement").² This evidence was supplemented by facts presented in the

² For purposes of that motion, the parties stipulated that the Agreement was a true and accurate copy of the original signed by Avishek Sengupta at the Event itself. *See* January 9, 2015 Order at ¶6, A.R. 3.

uncontested Affidavit of Lucas Barclay. *See* Affidavit of Lucas Barclay, Exh. 1 to Opposition to Cross-Motion, A.R. 347-396 (“Barclay Affidavit”).³ This brief but uncontroverted factual record establishes that Avishek Sengupta reviewed and accepted an arbitration provision when he registered on-line for the Event in January, 2013 that was identical, word-for-word, with the one contained in the hard copy Agreement that he executed three months later at the Event itself. *Compare* Exh. A, Barclay Affidavit, A.R. 361, 363 *with* the Agreement at p.2, A.R. 59.⁴ The record also establishes, again without contradiction, that all registered participants, including Avishek Sengupta, were sent reminder notices by e-mail twice before the Event (once on April 11, 2013 and again on April 18, 2013) that included a reminder to print, sign and bring with them a copy of the participant waiver agreement. Barclay Affidavit, ¶¶10-19 and Exhs. D & E, A.R. 350-353, 383-392. Those participants who forgot to bring signed waiver forms with them were provided with blank forms at the Event itself, and with as much time as they wanted to review it and, if they wanted to participate, to sign it. Barclay Affidavit, ¶20, A.R. 353. This was the case for Avishek Sengupta - immediately prior to the Event he separately initialed each of the five sections of the Agreement, including the section that contained the provision requiring binding arbitration. Further, by his on-line acceptance, and by his handwritten signature of the Agreement on the day of the Event itself, he twice indicated his acceptance of all of its terms.⁵

³ At a June 3, 2014 hearing on Sengupta’s motion for a preliminary injunction to stay arbitration, the Circuit Court authorized briefing on the issue of arbitrability, without the benefit of formal discovery. January 9, 2015 Order at ¶17, A.R. 6.

⁴ The form of the agreement that was on-line in January, 2013 was an older version that differed in minor, immaterial respects from the version that Avishek Sengupta signed at the Event.

⁵ Respondent Sengupta, like the Circuit Court, makes the point that in executing the Agreement Avishek Sengupta did not place his initials adjacent to the Mediation and Arbitration clause itself. Opposition Brief at pp. 9, 30; 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

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to W.Va. R. App. P. 18(a) to aid in this Court's consideration of this case. Petitioners requested oral argument because this case involves assignments of error in the application of settled law and arising from rulings made below that are unsupported by the record. *See* W.Va. R. App. P. 19(a)(1) and (3). Contrary to Respondent's contention, consolidated argument pursuant to Rule 18(c) is not warranted because Petition Nos. 15-0098 and 15-0102, on the one hand, and Petition Nos. 15-0114 and 15-0123, on the other, do not involve the same or related assignments of error or questions of law.

ARGUMENT

This appeal arises out of Respondent's refusal to participate in an arbitration proceeding initiated by Petitioners in accordance with the mandatory arbitration clause in the Agreement, notwithstanding its clear application to Sengupta's claims. Petitioners assert two assignments of error: first, the Circuit Court erred in failing to find that a valid arbitration agreement exists between the parties and that Sengupta's claims fall within its substantive scope; and second, the Circuit Court erred by failing to find that the arbitration clause is not unconscionable. In her Opposition, Sengupta fails to address the first assignment of error, and with respect to 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 to Compel Arbitration at p. 2, A.R. 59.

Respondent also makes much of the fact that the Agreement consists of 2,742 words on three pages. Opposition Brief at pp. 8, 28-29; 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. Thus, the arbitration clause, which follows a highlighted heading stating **Mediation and Arbitration**, is a prominent part of a two-page document.

second, fails to meet her burden of showing that the arbitration clause contained in the Agreement is both procedurally and substantively unconscionable.

I. STANDARD OF REVIEW

The parties are in agreement that 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. See Credit Acceptance Corp. v. Front, 231 W.Va. 518, 525, 745 S.E.2d 556, 563 (2013).

II. RESPONDENT HAS FAILED TO RESPOND TO ALL OF PETITIONERS' ASSIGNMENTS OF ERROR

Rule 10(d) of the West Virginia Rules of Appellate Procedure required Sengupta to "respond to each assignment of error, to the fullest extent possible." Indeed, "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." W.Va. R. App. P. 10(d).

Petitioners first assign as error the Circuit Court's failure 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. As set forth at length in their Opening Brief, 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. Tellingly, Sengupta failed to even address these threshold issues in her Opposition Brief. Based on the plain and unambiguous language of the arbitration clause contained in the Agreement, the parties intended to resolve "all disputes, controversies, or claims" through binding arbitration. For the reasons more fully explained in Petitioners' Opening

Brief, the Circuit Court committed reversible error by failing to find that a valid arbitration agreement exists between the parties and that the claims averred by Sengupta fall within the substantive scope of the arbitration agreement.

III. THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

The parties are in general agreement that the issue of whether a contract requiring arbitration is enforceable is governed by the contract formation and interpretation principles of the forum state. An arbitration agreement may be declared unenforceable by generally accepted contract defenses, such as fraud, duress or unconscionability, preserved in the “savings clause” of the Federal Arbitration Act, which provides that an arbitration agreement 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., Inc. v. Brown, --- U.S. ---, 132 S.Ct. 1201, 1203 (2012); AT&T Mobility LLC v. Concepcion, ---U.S.---, 131 S.Ct. 1740, 1746-1747 (2011); State ex rel. Richmond American Homes of West Virginia v. Sanders, 228 W.Va. 125, 134, 717 S.E.2d 909, 918 (2011). The issue presented in this appeal therefore devolves into the question of whether the Agreement’s arbitration clause should be set aside because of the existence of an adequate contract defense. Here, Respondent contends that “[t]he Arbitration Clause is unconscionable and thus unenforceable.” Opposition Brief at p. 24.

This Court has generally described the doctrine of unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Brown v. Genesis Healthcare Corp., 229 W.Va. 382,

391, 729 S.E.2d 217, 226 (2012)(“Brown II”). The question of whether a bargain is unconscionable is one of law for the Court to decide, as it rests on equitable principles. *See* “Brown I,” Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 680, 724 S.E.2d 250, 284 (2011), *vacated on other grounds*, Marmet Health Care Ctr., Inc. v. Brown, --- U.S. ---, 132 S.Ct. 1201 (2012). A party attacking the contract has the burden of proving that the contract is **both** procedurally **and** substantively unconscionable, and Respondent bears that burden on appeal. *Id.*; *see also* Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 289, 737 S.E.2d 550, 558 (2012).⁶

The Circuit Court plainly erred in finding that Sengupta met her burden of proving that the arbitration clause is unconscionable. On appeal, rather than responding to Petitioners’ assignment of error, Sengupta essentially restates the unconscionability argument that she presented to the Circuit Court, which the Circuit Court adopted in its Order. *Compare* Opposition Brief at pp. 24-40 *with* A.R. 171-183; *see* January 9, 2015 Order, A.R. 6-25. She also raised a new argument of procedural unconscionability that was not raised below. Opposition Brief at pp. 27-28, 32-33. Further, she raised an “additional and independent[.]” ground for not enforcing the arbitration clause. Opposition Brief at 40-45. Each of those arguments will be refuted below.

⁶ Pointing to footnote 8 authored by Justice Davis in Credit Acceptance Corp., Respondent suggests that Justice Davis questioned the need for establishing both procedural and substantive unconscionability to find a contract term is unenforceable. However, Justice Davis made clear that the case did not present a proper opportunity for such an analysis. Consequently, West Virginia law still requires that both forms of unconscionability be proven before a finding of unenforceability can be rendered. In any event, and as shown below, Petitioners here succeed in defeating unconscionability on both procedural and substantive grounds.

A. The Arbitration Clause is Not Procedurally Unconscionable

“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. This Court in Brown I listed various factors to be considered in making this determination:

- ~~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.

Here, the factual record establishes, without contradiction, that Avishek Sengupta had some three months (from the time he reviewed the terms on-line in January, 2013, until the date of the Event in April, 2013) to review the form of the contract, and therefore had a more than ample and certainly a reasonable opportunity to understand its terms, including the arbitration clause. *See* A.R. at 348-353. The arbitration clause was neither hidden in a maze of fine print, nor was it hidden from view in any way; 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 which included an arbitration provision “clearly marked in bold typeface” that was held to be enforceable in Kucharek v. Dan Ryan Builders, Inc., No. 3:12-CV-77, 2013 WL 3365249 at *12 (N.D.W.Va. July 3, 2013). Perhaps most importantly, Avishek Sengupta, at the age of 28, was neither a child nor elderly; had the benefit of education at the college level; and had the business acumen that necessarily came through working variously as a

plan administrator for an investment firm, then as a Senior Account Executive for a website engineering and optimization firm. *See* A.R. 452. These facts alone provide virtually a textbook example of what is not meant by procedural unconscionability in West Virginia.

Nor is it **any impediment to this** conclusion that the Agreement was, necessarily, a **contract of adhesion**. It is generally **understood** that adhesion contracts are 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). 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 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. On the other hand, 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 have some degree of 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 and having no demonstrable public utility. Brown I, 228 W.Va. at 687, 724 S.E.2d at 291. During the hearing **on the cross-motions, the Circuit Court Judge professed** to note this Court’s identification of such **activities, like paintball,⁷ but nonetheless erred** in his subsequent Order by failing to acknowledge the obvious: that the Tough Mudder Event plainly falls within the group of activities described by example in Brown I.

Here, the Agreement’s arbitration clause plainly withstands judicial scrutiny, first because it was an agreement made in connection with a voluntary recreational activity that is not **subject to heightened scrutiny, and second** because even if it were subject to heightened scrutiny, it would survive: it imposes no terms that are beyond the reasonable expectations of an ordinary person in this context. This Court’s acknowledgement in Brown I that contracts of adhesion tend to be enforceable in connection with voluntary recreational activities would seem to be proof enough of that. For this additional reason, the Circuit Court erred in finding that Sengupta met her burden of proving procedural unconscionability.

In her response, rather than directly confront the Brown I factors (an implied concession that they militate against a finding of procedural unconscionability) Sengupta urges, like the Circuit Court, 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* Opposition Brief at pp. 26-27; January 9, 2015 Order at ¶¶ 44-48, A.R. 14-16. But Sengupta created this conflict out of whole cloth by ignoring the words “if legal action is brought” which is a predicate for the remainder of the Venue and Jurisdiction

⁷ August 22, 2014 Hearing Transcript at 54:11, A.R. 756.

clause. If the arbitration clause is honored, no legal action will be brought on the merits of the dispute, and the remainder of the clause becomes surplusage. If, as in this case, a party challenges arbitrability in court, then the clause limits that party's choice of forum to the **appropriate state or federal court for the state in which** the event took place – here, West Virginia.⁸ Sengupta's own decision to eschew arbitration and sue in Circuit Court is in itself a clear demonstration of the absence of any conflict between the clauses.

The available case law further supports this result, holding that contracts may contain both an arbitration clause and a venue selection clause without any semblance of internal contradiction. *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).

In a belated attempt to shore up her argument of procedural unconscionability, Sengupta lodges, for the first time, an attack on the Barclay Affidavit along with its appended documents. Sengupta contends that the terms of the Agreement are “further muddled by extrinsic inconsistencies,” pointing to the Venue and Jurisdiction Clause in the on-line version of the

⁸ Petitioners herein also have challenged, not the choice of forum *per se*, but rather the choice of venue selected by Sengupta, and that issue is also pending before this Court. *See Tough Mudder, LLC, et al. v. Sengupta*, Petition No. 15-0102.

Agreement and the Venue and Jurisdiction Clause in two other electronic documents made available to Avishek Sengupta. Opposition Brief at p. 27. The asserted differences were not material, and in any event, as indicated in Petitioners' Opening Brief at p. 11, a challenge to an **arbitration clause must be evaluated independently of the remainder** of the contract. While 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, the arbitration clause itself was identical with the one in the signed version. A.R. 59, 361, 363. Avishek Sengupta, a well-educated adult, had more than ample opportunity to review the entire Agreement, including the arbitration clause, and to consult legal counsel had he so chosen. 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 Agreement, including the arbitration clause. A.R. 59, 349, 361, 363. Consequently, this additional argument should be disregarded.

Respondent, like the Circuit Court, also focuses 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). Opposition Brief at pp. 33-34; January 9, 2015 Order at ¶57, A.R. 19. Having anticipated that argument, and nothing new having been raised in Respondent's Opposition Brief, Petitioners rely on their prior explanation of why Ocwan Loan is so readily distinguishable. Opening Brief at p. 20.

As in their Opening Brief, Petitioners again must stress what is perhaps the most compelling reason to reject any finding of procedural unconscionability: participating in the Tough Mudder Event, a purely recreational activity, was entirely voluntary. 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). Put another way, no outside consideration compelled Avishek Sengupta to participate in the Event, the choice was solely his own. Respondent must abide by that choice.

B. The Arbitration Clause is Not Substantively Unconscionable

Given that the Circuit Court plainly erred in reaching the conclusion that the Agreement’s arbitration clause was procedurally unconscionable, it is not necessary to reach the issue of substantive unconscionability since Sengupta cannot show, as she must, both procedural and substantive unconscionability. Brown I, 228 W.Va. at 680, 724 S.E.2d at 284. Here, however, the Court could use either prong of the unconscionability test to justify reversing the Circuit Judge, as the Agreement’s arbitration clause is no more substantively unconscionable than it is procedurally unconscionable, for the following reasons.

To show substantive unconscionability, Respondent must demonstrate a degree of unfairness within the contract itself. Whether a contract involves unfairness turns on whether a contract 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,” and the paramount consideration is mutuality. Brown I, 228 W.Va. at 683, 724

S.E.2d at 287. At any event, mutuality is the primary consideration on which Sengupta relies in disputing Petitioners' position on substantive unconscionability.

In evaluating the mutuality of the arbitration clause, it must be re-emphasized that the **standard for a finding of mutuality is not 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).

As highlighted in Petitioners’ Opening Brief, 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 literal 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.

(Underlined emphasis added; bold typeface emphasis in original.)

Respondent’s Opposition Brief does nothing more than reiterate the errors of the Circuit Court. This compels Petitioners for their part to reiterate the point made in their Opening Brief: 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

clause was drafted as an acknowledgment of its terms by the signing party, here Avishek Sengupta. What was it that Avishek Sengupta acknowledged by initialing and executing the Agreement? Plainly, it 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. And even should this Court find the phrasing to be less than ideal, it should defer to 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 “be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941 (1983).**

The case relied upon by Respondent and the Circuit Court, Noohi v. Toll Bros., Inc., 708 F.3d 599, 609-610 (4th Cir. 2013), is neither binding on this Court, nor is it in any way inconsistent with the position expressed by Petitioners on this point. In Noohi, the arbitration clause read “Buyer . . . hereby agree[s] that any and all disputes with the Seller . . . shall be resolved by binding arbitration” (emphasis added). The obvious lapse in mutuality is that the Seller was not bound by the same obligation to arbitrate its disputes with the Buyer, and in fact the Fourth Circuit necessarily came to that conclusion in holding that mutuality was absent. Here, in contrast, the arbitration clause applies to “all disputes” – and stops there, it does not qualify that description, as in Noohi, with language such as “all disputes with Tough Mudder.” 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. If Tough Mudder had a dispute with Avishek

Sengupta arising out of his participation in the event, this clause would compel Tough Mudder to submit the dispute to binding arbitration.⁹ The obligation that Avishek Sengupta acknowledged by his initials and acceptance of the Agreement as a whole was to submit all disputes to binding arbitration, and ~~since this obligation applied equally to both parties~~, complete and reciprocal mutuality – far more than the ~~modicum of mutuality~~ required by this Court’s precedent – therefore existed.

Respondent Sengupta, like the Circuit Court, also incorrectly maintains that the arbitration clause imposes unconscionably prohibitive costs. Opposition Brief at pp. 37-40; January 9, 2015 Order at ¶66, A.R. 22. Yet Sengupta did not meet her burden of proving excessive costs below, and likewise has failed to meet this burden on appeal. 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). As emphasized in Petitioners’ Opening Brief, in every decision cited by the Circuit Court on this point in its Order, the court issuing the opinion, while acknowledging the general principle, declined to apply it on the record before it. Moreover, Sengupta’s asserted risk of prohibitive costs is too speculative to justify the invalidation of the arbitration clause. Petitioners explained this to the Circuit Court, yet the Circuit Court failed to acknowledge that a “risk” of the potential high cost of arbitration is insufficient in itself to prove that those costs are prohibitive. This flatly conflicts with the holding of the U.S. Supreme Court in Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90, 121 S.Ct. 513, 522 (2000), that such a “risk”, without more, is too speculative to justify

⁹ 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.

invalidating an arbitration provision. Instead, prohibitive cost can only be shown through the presentation of specific evidence. 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. Respondent has submitted no such specific evidence, and her unsubstantiated and speculative assertions, without more, do not meet this standard.

C. Respondent's Public Policy Argument, Raised for the First Time on Appeal, is Misplaced and the Result of an Impermissible Expansion of Murphy v. North American River Runners, Inc.

Respondent argues for the first time on appeal that the arbitration clause is unenforceable due to public policy concerns. Although it is difficult to follow the thread of Sengupta's argument, it appears that she relies on Murphy v. North American River Runners, Inc., 186 W.Va. 310, 412 S.E.2d 504 (1991) for the supposed proposition that it is unconscionable to require arbitration to the extent that it encourages inherently hazardous recreational or amusement activities in violation of any safety standards. Opposition Brief at pp. 43-44. Stating that she has alleged in her Complaint that the Petitioners' violation of various public safety statutes and regulations contributed to Avishek Sengupta's death, Sengupta argues that "[j]ust as overly broad releases are unenforceable where they would effectively gut the enforcement of general welfare laws, so too must the Arbitration Clause be rejected as unconscionably depriving participants of judicial enforcement of statutes and regulations developed precisely to protect citizens and visitors of dangers inherent in man-made swimming and amusement facilities." Opposition Brief at pp. 43-44. With all respect, this makes no sense whatsoever, for several reasons.

First, Respondent equates “enforcement” in the first clause of the quoted sentence with “judicial enforcement” in the second clause, thus glossing over the obvious fact that enforcement by arbitration remains enforcement. To eliminate arbitration as a vehicle of enforcement would fall afoul of the U.S. Supreme Court’s repeated holdings that the Federal Arbitration Act preempts state laws that would **apply only to arbitration or that derive their meaning** from the fact that an agreement to arbitrate is at issue. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” AT&T Mobility LLC v. Concepcion, --- U.S. ---, 131 S.Ct. 1740, 1746-1747 (2011). Were arbitration precluded as a vehicle of enforcement of public safety laws, the situation would be precisely the same as that before the U.S. Supreme Court in Marmet, in which that Court struck down a decision holding categorically that pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes violated public policy in West Virginia. Marmet Health Care Ctr., Inc., 132 S.Ct. at 1203-1204. Other U.S. Supreme Court decisions have struck down state law requirements that litigants be provided a judicial, as opposed to an arbitral, forum for specific kinds of disputes. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56, 115 S.Ct. 1212 (1995)(disputes involving punitive damages); Perry v. Thomas, 482 U.S. 483, 491, 107 S.Ct. 2520 (1987)(wage disputes); Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S.Ct. 852 (1984)(disputes arising under state financial investment statute). Respondent’s statement is the precise opposite of governing law: what the governing law requires is that a party to a valid arbitration clause cannot be deprived of its right to arbitrate disputes covered by that clause solely because a particular kind of claim is at issue.

Second, the analogy between the exculpatory clause before this Court in Murphy and the arbitration clause at issue here lacks any logical foundation. Arbitration clauses are to be

evaluated in isolation, as discussed above, so the exculpatory portion of the Agreement in this case is not at issue. Moreover, the conflict between the exculpatory clause and the Whitewater Responsibility Act discussed in Murphy arose out of the fact that the exculpatory clause purported to exempt the defendant from ~~tort liability for its failure to conform to the standard of care required by that Act.~~ Thus, there ~~was a direct conflict between the requirements of the Act and the scope of the exculpatory agreement.~~ There can be no analogy with an arbitration clause, which in itself cannot be inherently in conflict with any statute or regulation.

In sum, Respondent's arguments have no place whatsoever in this Court's consideration of the enforceability of the arbitration clause itself. Indeed, even the Circuit Court did not go as far down the rabbit hole as Respondent now **does in her Opposition Brief**. While Murphy was cited in the Circuit Court's Order, it was relegated to a footnote, where it was stated only that the arbitration clause at issue should be scrutinized to the extent it encourages inherently hazardous recreational or amusement activities in violation of safety standards. See January 9, 2015 Order at n.6, A.R. 20. The Circuit Court was silent as to whether the arbitration clause was problematic due to public policy concerns, and did not base its ruling on that ground.

Finally, Respondent attempts to revive her position through a distinction that has no real consequence. Citing to Hardin v. Ski Venture, Inc., 848 F. Supp. 58, 61 (N.D.W.Va. 1994), Sengupta postulates that "cases permitting contractual limitations on liability arising out of hazardous recreational activities tend to focus on hazards posed by natural conditions, as opposed to man-made hazards." Opposition Brief at p. 43, n. 24. Why this would make the slightest difference to the outcome is not explained with any clarity. But the essential flaw in the argument is that an agreement to arbitrate is not in any sense of the word a "contractual limitation on liability." Neither Hardin nor any other case (including Murphy) addressing the

enforceability of contractual limitations on liability can apply here, where the only issue before the Court is the enforceability of the arbitration clause itself.

CONCLUSION

For these reasons and for those set forth in their Opening Brief, 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: July 15, 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,)	
)	Appeal from an Order of the
v.)	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, counsel for Petitioners, do hereby certify that **PETITIONERS' REPLY BRIEF** was served on the 15th day of July, 2015 via first class U.S. mail, postage prepaid, to the following counsel of record:

Judge David W. Hummel, Jr.
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

David Ealy, Circuit Clerk
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

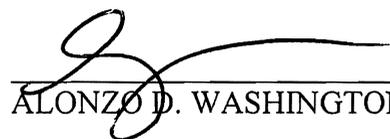
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