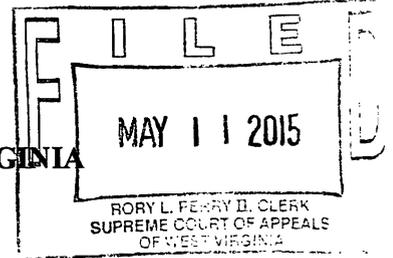


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0123



STATE OF WEST VIRGINIA EX REL. AIRSQUID
VENTURES, INC. (DBA AMPHIBIOUS MEDICS), and
TRAVIS PITTMAN

Defendants Below, Petitioners,

v.

MITA SENGUPTA, as Personal Representative of the
ESTATE OF AVISHEK SENGUPTA,
Plaintiff Below, Respondent.

BRIEF OF PETITIONERS

Action Pending in the Circuit Court of Marshall County
Civil Action No. 14-C-66-H

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ASSIGNMENTS OF ERROR

First Assignment of Error:

The Circuit Court of Marshall County erred in finding the Arbitration Clause unenforceable based upon “state law contract formation principles,” and, for that reason, the Circuit Court erred in denying defendant’s motion to compel arbitration.

Second Assignment of Error:

The Circuit Court of Marshall County erred in failing to enforce the Arbitration Clause because it is enforceable under the Federal Arbitration Act as recognized and adopted by this Court.

STATEMENT OF THE CASE

The underlying wrongful death action arises from the accidental drowning of Avishek Sengupta on April 20, 2013, as he participated in the Tough Mudder Mid-Atlantic Event (Event), held in Gerrardstown, Berkeley County, West Virginia. [000443] Mr. Sengupta’s Estate, the plaintiff below, alleges that, as a result of defendants’ negligence, Mr. Sengupta drowned during the Event. [000465ff] Defendants deny all allegations of wrongdoing and assert that Mr. Sengupta, an adult, educated person, signed (twice, actually) an assumption of risk document in which he acknowledged repeatedly his willingness to accept the challenges ahead and the structuring of the recourses available to him in case of loss. [000149] The process for Avi Sengupta began at least as early as January 2013, as follows. [000347]

Avishek Sengupta, a resident of Maryland, was recruited by friends and coworkers to enter and compete in the Tough Mudder Mid-Atlantic Event to be held in Gerrardstown, Berkeley County, West Virginia, on April 20, 2013 (“the Event”). [000443, 000452] Prior to the

Event, on January 11, 2013, Mr. Sengupta visited the Event website and registered to participate in the Gerrardstown event. [000347ff, 000371] While on the website, Mr. Sengupta reviewed and accepted an online version of the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“Agreement”). [000352, 000360]

Months later, on or about April 20, 2013, Mr. Sengupta traveled from his home in Maryland to West Virginia to participate in this extreme obstacle course competition. [000116] After arriving at the Event, Mr. Sengupta – along with all other participants – was provided with a copy of the Agreement once again. [000315] While this Agreement varied slightly from the online version, it did include the same Arbitration clause, which he reviewed and executed when he registered to attend (in January 2013):

In the event of a legal issue, I 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 [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 shall be shared equally by the parties.

(emphasis in the original). [000316] Mr. Sengupta initialed his acceptance of the section of the Agreement that contained this provision.¹ [000316] The Agreement also contained an

¹ The Agreement between Mr. Sengupta and Tough Mudder further states as follows:

Parties:

Released Parties include TOUGH MUDDER LLC and its directors, officers, employees, agents, contractors, insurers...; PEACEMAKER NATIONAL TRAINING CENTER, LLC and its directors, members, officers, employees, agents, contractors...; all TOUGH MUDDER LLC event sponsors, organizers...

Releasing Parties include: the participant as well as participant’s spouse, children, parents, guardians, heirs, next of kin, and any legal or personal

“**Acknowledgment of Understanding**” section, which states, in a clear and unambiguous manner, in capitalized and bold-faced letters, *inter alia*, that the contestant understands and accepts the provisions of the Agreement:

‘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.’

(underscoring added). [000316] Mr. Sengupta, a senior account executive at a software engineering company, executed the Agreement fully, without marking-out provisions, seeking counsel, or questioning and/or rejecting any of the provisions. [000452]

Mr. Sengupta then proceeded to participate in the Event, arriving at the Walk the Plank obstacle at approximately 12:30 p.m. [000453] At that obstacle, Mr. Sengupta suffered injuries that resulted ultimately, directly or indirectly, in his death. [000454-55] The Estate of Avishek Sengupta, by and through its personal representative Mita Sengupta, filed a wrongful death claim

representatives, executors, administrators, successors and assigns, or anyone else who might claim or sue on participant’s behalf

[000315] Pursuant to this language, the Agreement applies to Mita Sengupta as the personal representative of the Estate and to each defendant in the underlying action, including Airsquid and Mr. Pittman.

arising from the injuries Mr. Sengupta sustained during this extreme obstacle course competition held in Berkeley County, West Virginia. [000469]

After Mr. Sengupta's death but prior to suit being filed, a portion of the parties attempted to resolve the Estate's claims through the process set out in the Agreement, beginning with mediation. [000402] When those efforts failed, the Estate filed suit in the Circuit Court of Marshall County on April 18, 2014. [000443] On the same day, several defendants filed a demand for arbitration with the American Arbitration Association (AAA), as provided for by the express terms of the Agreement. [000064] By letter dated May 9, 2014, to AAA, the Estate (by and through its already retained counsel) requested that AAA stay any further arbitration proceedings until the Circuit Court or another Court of competent jurisdiction could rule upon the validity of the arbitration clause and the arbitrability of this case. [000087] On May 21, 2014, AAA denied the Estate's request to stay the arbitration. [000140] In response, on May 23, the Estate filed an Emergency Motion for Temporary Restraining Order in Marshall County, requesting that the arbitration proceedings be enjoined. [000478] By Order dated May 23, 2014, the Circuit Court granted the Motion for a Temporary Restraining Order, also setting a hearing for June 3, 2014, at which time the Court would address the request for preliminary injunction.² [000523, 000530] Thereafter, on May 30, the defendants below filed motions to stay the civil matter and to compel arbitration. [000141] As part of that process, the parties briefed the issue of whether the arbitration provision contained in the Agreement was enforceable, and the Circuit Court of Marshall County heard oral argument on the same on August 22, 2014. [000701]

² The preliminary injunction was granted by order dated June 23, 2014.

By letter dated September 15, 2014, the Circuit Court ruled on the arbitration issue, “adopting, with little if any exception, the reasoning and analysis set forth by Plaintiff herein in both the written filings and oral argument of counsel” [000594] The Estate submitted a proposed order on or about November 5, 2014, which included the following summary of the Estate’s arguments in opposition to arbitration:

Plaintiff asserts that the arbitration clause is invalid because, *inter alia*, (a) it was procured by fraud; (b) it was obtained without accurate and full disclosure; (c) is vague, confusing and unduly complex; (d) was obtained without a meeting of the minds; (e) was one sided and overly harsh; (f) entails high costs that might deter meritorious claims; (g) it is against public policy; and/or (h) it is procedurally and substantively unconscionable.

[000596, 616]³ Airsquid submitted objections to entry of the proposed order on November 13, 2014, on the basis that West Virginia law mandates that an order “adopted by the circuit court accurately reflect the existing law and the trial record.” Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996). [000685] Because the proposed

³ The Estate’s order as adopted by the Circuit Court further stated as follows:

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

[000007]

order failed to be “reflective of the Court’s . . . determinations,” Airsquid urged the Circuit Court to reconsider the content of the proposed order in light of the evidence adduced.⁴ [000685]

The Circuit Court entered “Order Denying Defendants’ Motions to Compel Arbitration and Granting Plaintiff’s Motion to Declare Arbitration Clause Unenforceable” (hereinafter “Order Denying Arbitration”) on January 9, 2015, ruling that “these elements of procedural and substantive unconscionability . . . render the arbitration clause unenforceable and compel an order rejecting the arbitration clause.” [000025]⁵

⁴ In its letter of November 13, 2014, Airsquid objected to the inclusion of ancillary, improper and unnecessary arguments and issues, including mischaracterizations of the Agreement and argumentative ancillary statements. By example only, Airsquid objected to paragraph 22 of the proposed order:

“Here, Tough Mudder asked participants to review, absorb and accept the equivalent of a nine-page legal brief [] written in 7-point font with dense legal language; **and to do so while being moved through a registration line immediately before a 10-plus mile obstacle event**, on a weekend morning in a rural location more than 60 miles from home.”

[000686] Airsquid proposed less inflammatory language that reflected the evidence in the case to date: “The Court also notes that the version of the waiver that Decedent was presented on the morning of the event differs from the version that Tough Mudder states was downloaded by Decedent on a date several months prior to the event.” [000685] Nonetheless, the Court entered the Estate’s proposed order virtually verbatim.

Timeline of Events:

January 11, 2013	Avi Sengupta registers online and executes the initial agreement
April 20, 2013	Avi Sengupta travels from Maryland into WV for the Event Avi Sengupta executes Agreement Avi Sengupta suffers fatal injuries
Interim	Mediation efforts begin and fail Arbitration efforts begin
April 18, 2014	Suit filed in Marshall County, WV

Airsquid seeks this Court’s review of the process below relative to the Arbitration Clause contained in the Agreement, as it is an unambiguous statement of the parties’ intent to resolve “all disputes, controversies, or claims” through binding arbitration. The Circuit Court erred in failing to apply the Clause as written. *See* Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962) (“A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent”). *See also* Syl. pt. 3, *Schumacher Homes of Circleville, Inc., v. Spencer*, __ W. Va. __, __ S.E.2d __ (2015) (Docket No. 14-0441), *citing State ex rel. Richmond American Homes of West Virginia, Inc., v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909 (2011).

Additionally, because Mr. Sengupta traveled interstate to participate in this Event, his registration and participation constitute a transaction that affects interstate commerce. Therefore,

April 18, 2014	Defendants file demand for arbitration
May 21, 2014	Estate requests stay of arbitration
May 23, 2014	AAA denies the Estate’s request to stay
May 23, 2014	Estate moves Circuit Court for emergency stay
May 30, 2014	Circuit Court grants emergency stay
June 3, 2014	Defendants move to compel arbitration
June 23, 2014	Hearing on preliminary injunction
August 22, 2014	Preliminary injunction granted
September 15, 2014	Oral argument on arbitration
November 5, 2014	Court issues ruling
November 13, 2014	Estate presents proposed order
January 9, 2015	Airsquid submits objections to proposed order
February 6, 2015	Court enters Order Denying Arbitration
	Notice of Appeal filed pursuant to collateral order doctrine

the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (hereinafter “FAA”), applies.⁶ When a trial court is required to rule upon a motion to compel arbitration pursuant to the FAA, the trial court’s authority 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 the plaintiff fall within the substantive scope of that arbitration agreement. Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). *See also* Syl. pt. 4, *Schumacher Homes*, __ W. Va. __ S.E.2d __ (Docket No. 14-0441). The Arbitration Clause by its express terms applies “in the event of a legal issue,” which is the case herein. Further, as this Court has stated, “[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syl. pt. 1, *State ex. rel. Johnson Controls, Inc. v. Tucker*, 229, W. Va. 486, 729 S.E.2d 808 (W. Va. 2012).

Airsquid Ventures d/b/a Amphibious Medics and Travis Pittman (hereinafter “Airsquid”) seek relief from the Order Denying Arbitration to the extent it violates well-settled law and

⁶ Whereas the Order Denying Arbitration cites the FAA, it cites West Virginia law that limits its applicability rather than reflecting the current state of the law for arbitration agreements and the FAA. *See* Order Denying Arbitration at 11 [000011], stating that “[the FAA] does not favor or elevate arbitration agreements to a level of importance above all other contracts ... [T]he purpose of Congress in adopting it was to make arbitration agreements as enforceable as other contracts, but not more so.” *Dan Ryan Builders*, 230 W. Va. at 286, 737 S.E.2d at 555, quoting *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 681, 724 S.E.2d 250, 285 (2011) (“*Brown I*”).

further seek enforcement of the subject Arbitration Clause as valid, irrevocable and enforceable pursuant to West Virginia law.

SUMMARY OF ARGUMENT

Avishek Sengupta, a Maryland resident, registered online to participate in a Tough Mudder sports event held in Berkeley County, West Virginia. At that time (January 2013), he executed the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“Agreement”) that included *inter alia* an arbitration provision. Mr. Sengupta traveled to West Virginia to attend the Event on or about April 20, 2013, at which time he was provided with a slightly different version of the Agreement, although the Arbitration Clause was unchanged. Nonetheless, all parties agree that Mr. Sengupta signed the Agreement and initialed five key passages, all without requesting amendment, modification or counsel.

It is undisputed that Avi Sengupta was an educated, intelligent and business-savvy young man who resided in Maryland. It is undisputed that Mr. Sengupta traveled into West Virginia for the sole purpose of participating voluntarily in an extreme obstacle course event. It is undisputed that Mr. Sengupta was shown an agreement on at least two occasions.⁷ It is undisputed that Mr. Sengupta initialed five pertinent paragraphs and signed the document prior to participating in the Event. No evidence has been adduced whatsoever that Mr. Sengupta challenged or declined any

⁷ Evidence has been adduced that Mr. Sengupta had access to and had viewed a similar version of the release online as he completed the enrollment process and that, in particular, upon his arrival at the Event, Mr. Sengupta was provided with an Agreement that included *inter alia* an arbitration provision and a venue selection clause.

of the provisions of the Agreement. Mr. Sengupta died as a result of injuries sustained at the Event.

Thereafter, Mr. Sengupta's Estate alleged that the Event was mishandled such that Mr. Sengupta's death was unnecessary and avoidable. The Estate and selected Event organizers participated in pre-suit mediation. However, when mediation failed, the Estate filed the subject wrongful death action in Marshall County, West Virginia, on April 18, 2014. The defendants filed motions to compel arbitration, which were denied, and plaintiff moved for an emergency stay, which was granted. After motions practice and oral argument, the Circuit Court denied the motions to compel arbitration, which order Airsquid brings before this Court today.

Airsquid seeks this Court's review of the process below relative to the Arbitration Clause contained in the Agreement, as it is an unambiguous statement of the parties' intent to resolve "all disputes, controversies, or claims" through binding arbitration. The Circuit Court erred in failing to apply the Clause as written. Additionally, because Mr. Sengupta traveled interstate to participate in this Event, his registration and participation constitute a transaction that affects interstate commerce. Therefore, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (hereinafter "FAA"), applies, limiting the trial court's involvement to determining (1) whether a valid arbitration agreement exists between the parties and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.⁸ The trial court erred in

⁸ Whereas the Order Denying Arbitration cites the FAA, it cites West Virginia law that limits its applicability rather than reflecting the current state of the law for arbitration agreements and the FAA. *See* Order Denying Arbitration at 11 [000011], stating that "[the FAA] does not favor or elevate arbitration agreements to a level of importance above all other contracts ... [T]he purpose of Congress in adopting it was to make arbitration agreements as enforceable as other

failing to recognize that a valid arbitration agreement exists that expressly covers the allegations raised by the Estate in this matter.

Airsquid Ventures d/b/a Amphibious Medics and Travis Pittman (hereinafter "Airsquid") seek relief from the Order Denying Arbitration to the extent it violates well-settled law and further seek enforcement of the subject Arbitration Clause as valid, irrevocable and enforceable pursuant to West Virginia law. Further, Airsquid asks that this matter be allowed to progress as contracted between Mr. Sengupta and the defendants in the Agreement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure Revised Rule 19(a)(1), brief oral argument is necessary in this instance because this case presents questions that allege error in the application of settled law.

ARGUMENT

A. Factual Background

Mita Sengupta, as personal representative of the Estate of her adult son Avishek Sengupta, filed the instant action in the Circuit Court of Marshall County, West Virginia, on April 18, 2014. [000443] The Estate's Complaint alleges *inter alia* wrongful death pursuant to West Virginia Code Section 55-7-5 and 55-7-6 against Event organizer Tough Mudder; property owner Peacemaker National Training Center; Event sponsors General Mills, Inc., and General Mills Sales, Inc.; contractual Event support Airsquid and rescue diver Travis Pittman. [000469] According to the Complaint, Mr. Sengupta (a resident of Maryland) was recruited by friends and contracts, but not more so." *Dan Ryan Builders*, 230 W. Va. at 286, 737 S.E.2d at 555, quoting *Brown I*, 228 W. Va. at 681, 724 S.E.2d at 285.

coworkers to enter and compete in the Tough Mudder Mid-Atlantic Event held in Gerrardstown, Berkeley County, West Virginia on April 20, 2013. [000452]

In January 2013, Mr. Sengupta registered online for this extreme sport and, as part of that process, he reviewed and accepted the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“Agreement”). [000352, 000360] Thereafter, on the day of the event, Mr. Sengupta initialed and signed a similar agreement that included the same arbitration and venue clauses as the agreement he had reviewed and accepted online. [000398] Mr. Sengupta objectively demonstrated his assent to the Agreement both by signing and dating the two-page document and by initialing it in five separate locations, including the specific section of the Agreement containing the Arbitration Clause. [000398-99] As found by the Circuit Court, “The parties have stipulated for purposes of these motions that the Agreement is a true, accurate and authentic copy of a document purportedly signed and initialed by Avishek Sengupta on April 20, 2013.” [000003]

While participating in the Event, Mr. Sengupta arrived at a well-known obstacle, commonly referred to as “Walk the Plank” at approximately 12:30 p.m. [000453] There, he climbed the obstacle and waited his turn to jump into the water pit below. [000455-56] The allegations in this suit include that Mr. Sengupta and a female competitor jumped at or near the same time such that the female competitor struck Mr. Sengupta, who never resurfaced. [000456-57] The Estate alleges that, *inter alia*, the defendants were negligent in their procedures generally and their management specifically of the “Walk the Plank” obstacle, which alleged

negligence resulted in the Avi Sengupta's death. [000465ff] Mr. Sengupta was twenty-eight years old at the time of his death. [000443]

Whereas the Event entities have denied any and all allegations of wrongdoing in this matter, nonetheless, repeated efforts have been made to resolve this claim, including mediation pursuant to the agreements executed/acknowledged by Mr. Sengupta on at least two occasions prior to his participation in this Event. [000402] When the early resolution options failed, the Estate filed suit in the Circuit Court of Marshall County on April 18, 2014. [000402, 000443] On the same day, several defendants filed a demand for arbitration with the American Arbitration Association (AAA), as provided for by the express terms of the Agreement. [000064] The Estate wrote to AAA and requested that AAA stay the arbitration; on May 21, 2014, AAA denied that request. [000087, 000140] In response, on May 23, the Estate filed an Emergency Motion for Temporary Restraining Order in Circuit Court in an effort to enjoin the arbitration proceedings. [000478] By Order dated May 23, 2014, the Circuit Court granted the Motion for a Temporary Restraining Order. [000523] Thereafter, on May 30, the defendants below filed motions to stay the civil matter and to compel arbitration. [000141] As part of that process, the parties briefed the issue of whether the arbitration provision contained in the Agreement was enforceable, and the Circuit Court of Marshall County heard oral argument on August 22, 2014. [000701]

By letter dated September 15, 2014, the Circuit Court issued a ruling on the issue of arbitration that "adopt[ed], with little if any exception, the reasoning and analysis set forth by Plaintiff herein in both the written filings and oral argument of counsel." [000594] The Estate submitted a proposed order on or about November 5, 2014 [000596], and Airsquid submitted

objections on November 13, 2014. [000685] On January 9, 2015, the Circuit Court entered plaintiff's proposed order, "Order Denying Defendants' Motions to Compel Arbitration and Granting Plaintiff's Motion to Declare Arbitration Clause Unenforceable" (hereinafter "Order Denying Arbitration"), in the form in which it was submitted. [000001, 000596]

In adopting wholesale the Estate's proposed order denying arbitration, the Circuit Court summarized the Estate's position on the Agreement as an unenforceable contract as follows:

Plaintiff asserts that the arbitration clause is invalid because, *inter alia*, (a) it was procured by fraud; (b) it was obtained without accurate and full disclosure; (c) is vague, confusing and unduly complex; (d) was obtained without a meeting of the minds; (e) was one sided and overly harsh; (f) entails high costs that might deter meritorious claims; (g) it is against public policy; and/or (h) it is procedurally and substantively unconscionable.

[000006-07]⁹ Finally, the Circuit Court of Marshall County ruled that "these elements of procedural and substantive unconscionability . . . render the arbitration clause unenforceable and compel an order rejecting the arbitration clause." [000025]

⁹ The Estate's order as adopted by the Circuit Court further stated as follows:

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

[000007]

B. Standard of Review

This appeal arises pursuant to the collateral order doctrine. The West Virginia Supreme Court has held that orders denying a motion to compel arbitration “fulfill the requirements of the collateral order doctrine.” *Credit Acceptance Corp v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013). *See also* Syl. pt. 3, *Schumacher Homes*, __ W. Va. __, __ S.E.2d __ (Docket No. 14-0441), *citing* Syl. pt. 1, *Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). Specifically, this Court has held “that an order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.” *Front*, 231 W. Va. at 525, 745 S.E.2d at 563. In reaching this holding, this Court reasoned that the purpose of arbitration is to avoid litigation in favor of a more expedient and less costly method of dispute resolution. Moreover, “a party who is required to wait until the conclusion of litigation to appeal the denial of arbitration has already borne the financial and temporal cost of such litigation and has, therefore, effectively lost, irreparably, the right to arbitration.” *Id.* The Court’s decision in *Front* states that orders denying arbitration are subject to immediate appellate review, with the main determining factor being the cost and expense associated with litigating a case that should otherwise be in arbitration. The standard of review is *de novo*.

ASSIGNMENTS OF ERROR

First Assignment of Error: The Circuit Court of Marshall County erred in finding the Arbitration Clause unenforceable based upon “state law contract formation principles,” and, for that reason, the Circuit Court erred in denying defendant’s motion to compel arbitration.

In denying Airsquid’s motion to compel arbitration, the Circuit Court of Marshall County found that

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

[000010] Arguably the most fundamental state law principle of contract formation is that “[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed.” *Haynes v. Daimler Chrysler Corp.*, 228 W. Va. 441, 720 S.E.2d 564 (2011), *citing* Syl. pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969). ““It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.”” Syl. pt. 3, *Haynes*, *citing* syl. pt. 5, *Dan’s Carworld, LLC v. Serian*, 223 W. Va. 478, 677 S.E.2d 914 (2009); Syl. pt. 1, *Hatfield v. Health Management Associates of West Virginia*, 223 W. Va. 259, 672 S.E.2d 395 (2008); Syl. pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1963). The terms of the Agreement at issue are clear and unambiguous, such that they should have been applied and

not construed. Nonetheless, in its Order Denying Arbitration, the Circuit Court of Marshall County construed the contract provisions and found that “the[] elements of procedural and substantive unconscionability . . . render the arbitration clause unenforceable and compel an order rejecting the arbitration clause.” The Circuit Court of Marshall County erred in so ruling, for all of the reasons set forth herein.

A. The Arbitration Clause and the Agreement itself are not ambiguous, and the Circuit Court erred to the extent that it found otherwise.

In denying the motion to compel arbitration, the Circuit Court adopted the Estate’s position that Mr. Sengupta’s assent could not have been knowing because the Agreement included both the Arbitration Clause and a Venue and Jurisdiction Clause. [000015] That is, the inclusion of both provisions raises the question of why, if the parties agree to arbitrate, would anyone need a forum for litigation; it would be superfluous. Based on that reasoning, the Estate questioned *inter alia* the effect the combination would have on any alleged meeting of the minds and on any alleged knowing acceptance. [000015-16] Conversely, Airsquid has demonstrated by persuasive authority that the inclusion of both clauses does not render an agreement ambiguous and that it does not render any assent, unknowing. In *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir.1987), *abrogated on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S. Ct. 1133 (1988), the Third Circuit found nothing inconsistent in including both an arbitration and forum selection clause in that both can be given effect. In *Patten*, the Third Circuit considered an agreement between a securities issuer, Diamond (a Colorado corporation that bred and trained greyhound dogs) and Patten, a New Jersey securities broker/dealer. 819 F.2d at 402. The agreement governed Patten’s sale of 200,000 units of Diamond shares at \$4.50 per unit. *Id.* The sale never occurred, with Patten

alleging that Diamond failed in conditions precedent to that sale and Diamond alleging that Patten was obligated to purchase the units and breached the agreement when it failed to do so. *Id.* Similarly to the case at hand, Diamond pursued arbitration pursuant to the NASD Rules of Fair Practice; simultaneously, Patten filed suit in district court, alleging that it had no liability to Diamond because the agreement was never binding. *Id.* Patten further alleged that Diamond had waived its right to request arbitration when it entered the agreement that included a forum selection clause. *Id.* at 403.

In sending the parties to arbitration, the Third Circuit found the two clauses to be complementary, not contradictory, given that arbitration awards are not self-enforcing; any enforcement action or challenges to the validity or application of the award or of the agreement itself would be pursued in the agreed-to tribunal. *Id.* at 404-05, citing *Hartford Financial Systems v. Florida Software Serv., Inc.*, 712 F.2d 724 (1st Cir. 1983). Further, the Third Circuit declined to infer that the inclusion of the venue clause was a waiver of the right to arbitrate, finding that a “party signing a waiver must know what rights it is waiving.” *Id.* at 407. Applied to the instant situation, to the extent that the Circuit Court denied the motion to compel arbitration based upon the fact that the Agreement includes both a forum selection and an arbitration clause, the Court erred in that the two clauses are complementary, not contradictory, expressly providing for the handling of “legal issues” (as stated in the Mediation and Arbitration provision) versus “legal claims” (as stated in the Venue and Jurisdiction provision). [000399] Additionally, to find that the use of one such clause expressly excludes the right to use the other would be an unknowing waiver that is not supportable under West Virginia law. *State ex rel.*

Dunlap v. Berger, 211 W. Va. 549, 561, 567 S.E.2d 265, 277 (2002). For these reasons, the Order Denying Arbitration cannot stand, and Airsquid seeks relief from the order below.

B. The Arbitration Clause is not unconscionable, and the Circuit Court erred to the extent that it found otherwise.

To the extent that the Circuit Court denied Airsquid's motion to compel arbitration on the basis that the arbitration clause was unconscionable, the Circuit Court erred. Under West Virginia law, before a contract term can be found unenforceable, it must be determined to be both procedurally and substantively unconscionable, measured on a sliding scale. Syl. pt. 20, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250 (2011). This Court has generally described the doctrine of unconscionability as consisting of "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." *Dan Ryan Builders, Inc.*, 230 W. Va. at 290, 737 S.E.2d at 559, quoting Hans Smit, "The Unilateral Arbitration Clause: A Comparative Analysis," 20 *Am.Rev.Int'l Arb.* 391, 404-405 (2009). In the instant case, the Arbitration Clause is neither procedurally nor substantively unconscionable, and the Circuit Court erred to the extent it found otherwise.

1. The Arbitration Clause is not procedurally unconscionable, and the Circuit Court erred to the extent that it found otherwise,

Procedural unconscionability deals with inequities, improprieties, or unfairness in the bargaining process and the formation of the contract, focusing in particular on whether the parties had a meaningful choice, "considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print." *Brown I*, 228 W. Va. at 683, 724 S.E.2d at 287. In determining

whether the Arbitration Clause was procedurally unconscionable, the Circuit Court should have considered factors such as “literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.” *Id.* The evidence below – indeed, the information provided in the Complaint itself -- was that Mr. Sengupta possessed sufficient intellectual capacity and was sufficiently sophisticated to understand the Agreement and to accept the same knowingly and voluntarily. [000452] Whereas the Estate argued below that the circumstances under which Mr. Sengupta was presented with this Agreement did not afford him sufficient time to read or understand the Agreement [000007], the Complaint avers that registration for the Event was completed in advance, also alleging that, prior to and in preparation for the Event itself, Mr. Sengupta and the members of his team “relied, directly or indirectly, on Tough Mudder’s carefully crafted marketing and media materials.” [000452-53] Further, the evidence presented below indicates that Mr. Sengupta had the opportunity to review the Agreement and subject Arbitration Clause at the time of his initial registration, several months prior to the Event. [000452-53] While the parties agree that the document executed by Mr. Sengupta differed slightly in non-substantive ways, mainly in form and name, from the sample agreement available for review at the time Mr. Sengupta registered for the Event, it is undeniable that the subject Arbitration Clause was identical in each document. [000352] Whereas the Circuit Court wholly adopted the Estate’s estimation of the length and complexity of the Agreement (e.g., size of type, number of words, bold type),¹⁰ the truth of the matter is that it is two pages, easily legible, and bolded only to

¹⁰ In its objections filed on November 13, 2014, Airsquid noted in particular, as follows:

Airsquid objects to paragraph 50 of Plaintiff’s Arbitration Order as paragraph 50 is not supported by the record, is factually inaccurate and argumentative. Specifically,

emphasize that the Agreement involves a relinquishment of certain legal rights, including the ability to bring future legal actions. [000315-16] The Circuit Court erred in finding the Agreement procedurally unconscionable, and for that reason, the Order Denying Arbitration cannot stand.

2. The Arbitration Clause is not substantively unconscionable, and the Circuit Court erred to the extent that it found otherwise.

Substantive unconscionability involves unfairness in the contract itself; a contract or contract term that is one-sided and will have an overly harsh effect on the disadvantaged party could be found to be substantively unconscionable, such that the contract or term should not be enforced. *McGinnis v. Clayton*, 173 W. Va. 102, 114, 312 S.E.2d 765, 777 (1984). This Court has explained that the factors to be weighed in assessing substantive unconscionability vary with the content of the agreement but that courts should generally consider the (a) commercial reasonableness of the contract terms, (b) the purpose and effect of the terms, (c) the allocation of the risks between the parties, and (d) public policy concerns. *Syl. pt. 19, Brown I*, 228 W. Va. 646, 724 S.E.2d 250.

Airsquid objects to Plaintiff's allegations that affirmative steps were taken by the drafters of the Agreement to intentionally divert attention from specific section. This allegation is unsupported by the record. Further, Airsquid objects to the fifth sentence which states "[h]owever, such attention, detail and emphasis were avoided with respect to the Mediation and Arbitration clause." See Arbitration Agreement ¶ 50. Airsquid requests that the final three sentences of paragraph 50 be rewritten to read: "The Mediation and Arbitration Clause does not have its own larger-font/underscored heading; and it is placed in seven-point font in the middle of page 2 of the Agreement, under a heading entitled 'Other Agreements,' coming just after legalistic clauses called 'Severability' and 'Integration.'" In contrast to other provisions in the contract, no initials are required to be placed next to the Mediation and Arbitration Clause but are required next to the heading Other Agreements."

[000685]

The costs of arbitration as set forth in the Agreement are commercially reasonable. By the express provision of the Clause, the costs are governed by the Rules of the American Arbitration Association (AAA), which provide for a sliding fee scale based on the amount of the claim. [000318] Evidence adduced below demonstrated fees totaling less than two tenths of one percent of the overall relief plaintiff seeks, shared equally. Airsquid contends that the Circuit Court erred in accepting plaintiff's purely speculative suggestion as to the unreasonably high costs that would be imposed if arbitration was enforced. Further, the location and procedures governing the arbitration are all likewise commercially reasonable. [000318] Tough Mudder has filed for arbitration to take place in Maryland, where it is understood that Mr. Sengupta resided, where the Estate's representative currently resides, and where it is believed that many of the witnesses to this event currently reside as well. [000064] The Arbitration Clause itself and the AAA rules do not limit the Estate's recovery in any way. [000202, 000316, 000318]

This Court has considered the purpose and effect of contract terms in a variety of instances. Specifically, this Court has found that "an analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." Syl. pt. 6, *Pingley v. Perfection Plus Turbo-Dry, LLC*, 231 W. Va. 553, 746 S.E.2d 544 (2013). In *Pingley*, this Court considered the purpose and effect of contract terms between a commercial entity, Perfection Plus Turbo-Dry ("Perfection Plus") and a consumer, Brandy Pingley. 231 W. Va. at 556, 746 S.E.2d at 547. Mrs. Pingley had contracted with Perfection Plus to clean up water/sewage damage to her home, but, when mold formed, she sued Perfection Plus for failure to detect and remediate mold. *Id.* However, the contract included an express "Mold/Mildew/Bacteria Waiver." *Id.* The Pingleys

challenged the waiver as unconscionable and unfair, and Perfection Plus filed a dispositive motion. *Id.* In upholding the dismissal, this Court found that “[h]ere, where Perfection Plus specifically advised the homeowners that it was not making any guarantee with respect to the presence or growth of mold, specifically advised the homeowners of steps to be taken if they had any concerns about mold, and specifically advised the homeowners to take those steps, nothing gives rise to an inference that the Pingleys were unwary and taken advantage of[.]” 231 W. Va. At 561, 746 S.E.2d at 552.

In the instant matter, Avi Sengupta twice reviewed and accepted the Agreement, which began with the following admonition in bold typeface, in all capital letters:

PARTICIPANTS: READ THIS DOCUMENT CAREFULLY BEFORE SIGNING. THIS DOCUMENT HAS LEGAL CONSEQUENCES AND WILL AFFECT YOUR LEGAL RIGHTS AND WILL ELIMINATE YOUR ABILITY TO BRING FUTURE LEGAL ACTIONS.

(emphasis in original). [000315] Beyond that initial notice, the Agreement identifies exactly which legal rights were affected by this Agreement:

In the event of a legal issue, I 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 [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 shall be shared equally by the parties.

(emphasis in original). [000316] Here, Mr. Sengupta was advised by frank disclaimers and plain statements of the rights and options for participants. Unlike the Pingleys who had water and sewage that needed professional treatment, Mr. Sengupta was enrolling to participate voluntarily in a sporting event that identified itself upfront as “an extreme test of toughness, strength, stamina, camaraderie, and mental grit.” [000315] The evidence adduced in this matter indicates

nothing gives rise to an inference that Avi Sengupta was unwary and taken advantage of by any of the terms of the contract nor by their purpose. Conversely, the contract terms are delineated clearly, as is the purpose and effect upon the legal rights of the participants.

The Order Denying Arbitration, as prepared by the Estate and entered by the Circuit Court, criticizes the Agreement on the basis that it unfairly allocates the risk between the Event organizers and the participants, that it is an adhesion contract. [000011] This Court has recognized the need for at least a “modicum of bilaterality . . . to avoid substantive unconscionability.” *Brown I*, 228 W. Va. at 683, 724 S.E.2d at 287, quoting *Abramson v. Juniper Networks, Inc.*, 115 Cal. App.4th 638, 664, 9 Cal. Rptr.3d 422, 442 (2004). However, this Court has further recognized the reality that, “[s]ince the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts,” any finding that the Agreement is an adhesion contract “is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.” *Dunlap*, 211 W. Va. at 567, 567 S.E.2d at 273. In distinguishing between good (enforceable) and bad (unenforceable) contracts of adhesion, courts have looked not only to the take-it-or-leave-it nature or the standardized form of the document, but also to the “subject matter of the contract, the parties’ relative bargaining positions, the degree of economic compulsion motivating the ‘adhering’ party, and the public interests affected by the contract.” *Brown I*, 228 W. Va. at 682, 724 S.E.2d at 286. Mr. Sengupta’s interest in participating in what is undisputed to be a purely voluntary recreational event led to his acceptance of the terms of this Agreement, which acceptance involves virtually no economic compulsion – nor has the Estate

alleged any such motivating factor. Applying this analysis to the Agreement at hand demonstrates that it is a good adhesion contract that should be enforced as written, as follows.

Focusing on the subject matter of the Agreement, this Court has recognized that pre-injury releases governing inherently dangerous recreational activities that lack a general public utility are generally enforceable. *See, e.g., Brown I*, 228 W. Va. at 687, 724 S.E.2d at 291 (“[A]greements absolving participants and proprietors from liability during hazardous recreational activities with no general public utility—such as skiing, parachuting, paintball, or horseback trail rides—will tend to be enforceable (but subject to willful misconduct or statutory limitations”) (citing *Schutkowski v. Carey*, 725 P.2d 1057, 1060 (Wyo. 1993) (“Private recreational businesses generally do not qualify as services demanding a special duty to the public, nor are their services of a special, highly necessary nature.”)). No one disputes that Mr. Sengupta enrolled to participate in a wholly voluntary and inherently dangerous recreational activity. [000020] As such, by this Court’s holding in *Brown I*, the agreement absolving liability should be enforceable, absent willful misconduct or statutory limitations. Because no evidence at law nor any fact has been raised of willful misconduct or statutory limitation, this agreement must be enforced as written.

As for the mutuality of the Agreement, the Estate has alleged that the Agreement is not mutual and is therefore unconscionable. Indeed, the Circuit Court adopted the concept wholesale, that the non-mutual nature of the Arbitration Clause renders it unconscionable and thus unenforceable. However, even assuming *arguendo* that the Arbitration Clause could be found to be non-mutual (which Airsquid denies), this Court has held that “a contract with multiple clauses only requires consideration for the entire contract, and not for each individual

clause. So long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract, or of ‘mutuality of obligation,’ in order for a contract to be formed.” *Dan Ryan*, 230 W. Va. at 288-89, 737 S.E.2d at 557-58. Mr. Sengupta had meaningful alternatives to entering into this Agreement. He freely and voluntarily attended the Event. He was not unsophisticated, and the Arbitration Clause was not hidden in a complex or lengthy contract. Mr. Sengupta had a reasonable opportunity to review the short two-page Agreement at least twice prior to signing it and participating on April 20, 2013. [000443ff]

At issue in *Dan Ryan Builders* (DRB) was a 56-page contract, governing the sale and purchase of a home in Berkeley County, West Virginia, for \$385,000.00. 230 W. Va. at 284, 737 S.E.2d at 553. Included in the contract was an arbitration provision that gave DRB the right “to seek arbitration *or* to file an action for damages, if Mr. Nelson [the buyer] ‘default[ed] by failing to settle on the Property within the time required under [the] Agreement.’” *Id.* After purchasing the home, the Nelsons found numerous, substantial defects in the house’s construction and septic system, and filed suit in the Circuit Court of Berkeley County. *Id.* DRB filed a petition in federal court pursuant to FAA, seeking to compel arbitration and to stay the Berkeley County action until the petition was resolved. 230 W. Va. at 284-85, 737 S.E.2d at 553-54. The district court found the arbitration clause unenforceable for lack of mutual consideration, and DRB appealed that ruling to the appeals court. 230 W. Va. at 285, 737 S.E.2d at 554. The Fourth Circuit found West Virginia’s law unclear on these issues and certified the question to this Court. *Id.*

On the issue of mutuality of consideration,¹¹ this Court relied upon principles generally applicable to all contracts and joined “the majority of courts [in concluding] that the parties need not have separate consideration for the arbitration clause, or equivalent, reciprocal duties to arbitrate, so long as the underlying contract as a whole is supported by valuable consideration.” 230 W. Va. at 288, 737 S.E.2d at 557. In a contract with multiple clauses, consideration is required only for the entire contract, not for each clause. 230 W. Va. at 289, 737 S.E.2d at 558. If consideration is defined as “some right, interest, profit or benefit accruing to one party,” then, by example, Mr. Sengupta’s participation in the Event is consideration for the duties imposed upon him or his agents/assigns to mediate or arbitrate claims. 230 W. Va. at 287, 737 S.E.2d at 556, quoting *First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967). Therefore, because the Agreement offers valuable consideration generally, the Estate’s arguments relative to any one clause must fail.

Also similarly to *Dan Ryan Builders*, in the present case, the FAA governs the interpretation of the Agreement and its “Mediation and Arbitration” clause because the Agreement evidenced a transaction that affected interstate commerce. In enacting the FAA, Congress demonstrated a “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S. Ct. 1647, 1651 (1991). The United States Supreme Court has declared that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). The West Virginia Supreme Court of Appeals has stated “[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, a written

¹¹ This Court provided a two-part answer; the second part (unconscionability) is addressed elsewhere in this brief, *infra*.

provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syl. pt. 1, *Johnson Controls*, 229, W. Va. 486, 729 S.E.2d 808.

The Agreement entered into by Avi Sengupta and the Event organizers was a written contract that affected interstate commerce. Mr. Sengupta entered the Agreement for the purpose of competing, for a fee, in the Event. He was a resident of the State of Maryland, and the Event was scheduled and took place in Berkeley County, West Virginia. Therefore, the arbitration provision is entitled to the presumption of enforceability established by the FAA and United States Supreme Court case law. The Estate has raised no salient arguments in law or equity for revocation of the Agreement, as demonstrated below and herein, as discussed below.

The Estate must arbitrate all of its claims against Airsquid because the parties agreed that all disputes arising from Mr. Sengupta’s participation in the Event would be submitted to binding arbitration. Specifically, the Agreement provides that “all disputes, controversies, or claims arising out of my participation in the [Tough Mudder] event **shall be submitted to binding arbitration** in accordance with the applicable rules of the American Arbitration Association then in effect.” [000316] Clearly, the scope of this clause was intended to be very broad and was meant to cover the claims asserted in this lawsuit.

“In determining whether the language of an agreement to arbitrate covers a particular controversy, the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the

language and to resolve doubts in favor of arbitration.” *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004) (citing 9 U.S.C. § 1, *et seq.*) (citations omitted); *see also Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25 (holding that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”). A claim falls within the scope of an extremely broad arbitration clause if the allegations underlying the claim “touch” matters covered by the agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n. 13, 105 S. Ct. 3346, 3353 n.13 (1985). The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651 (1991). *See also Gilmer*, 500 U.S. at 21, 111 S. Ct. at 1650, declining to indulge plaintiff’s speculation that arbitration/the arbiters will be anything but “competent, conscientious, and impartial.”

Based on the allegations in the Complaint, it is clear that all of the Estate’s claims and allegations relate to Avi Sengupta’s participation in the Event. Because the Agreement covers all claims arising out of that participation, the Estate’s claims must be arbitrated. To the extent that the Order Denying Arbitration holds otherwise, it must not be upheld nor enforced.

Second Assignment of Error:

The Circuit Court of Marshall County erred in failing to enforce the Arbitration Clause because it is enforceable under the Federal Arbitration Act as recognized and adopted by this Court.

Because Avishek Sengupta traveled interstate to participate in this Event, his registration and participation constitute a transaction that affects interstate commerce. Therefore, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (hereinafter “FAA”), applies. The FAA requires that agreements to arbitrate be enforced except “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In this case, no such grounds exist.

In West Virginia, “[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract.” *Smithson v. United States Fidelity & Guar. Co.*, 186 W. Va. 195, 201 n.8, 411 S.E.2d 850, 856 n. 8 (1991) (citations omitted). While arbitration clauses are generally presumed to be enforceable under the FAA, it envisions that state substantive contract law will apply in any determination of enforceability of the agreement. To this end, the West Virginia Supreme Court of Appeals has stated “[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses — such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.” *Syl. pt. 2, Johnson Controls*, 229 W. Va. 486, 729 S.E.2d 808. Additionally, when a trial court is required to rule upon a motion to compel arbitration pursuant to the FAA, as is the case here, the trial court’s authority 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 the plaintiff fall within the substantive scope of that arbitration

agreement. Syl. pt. 2, *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 293.

In the Complaint, the Estate asserts a plethora of contract defenses in an attempt to invalidate the Arbitration Clause of the Agreement voluntarily entered by Mr. Sengupta, who actually sought out the Event and who individually and of his free will found the website and enrolled. In determining whether a contract, or provision thereof, is unconscionable, the West Virginia Supreme Court of Appeals has stated “[t]he doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lopsidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.” Syl. pt. 3, *Johnson Controls*, 229 W. Va. 486, 729 S.E.2d 808. In order to prove that a contract provision is unconscionable, a party must prove that there was a “gross inadequacy in bargaining power” combined with “terms unreasonably favorable to the stronger party.” *State ex. re. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005).

The Agreement that Mr. Sengupta reviewed and acknowledged did not present a “gross inadequacy in bargaining power.” He was provided the opportunity to have an attorney of his choosing review the Agreement prior to signing – both in January 2013 (well ahead of the Event) and on the day of the Event itself. Furthermore, the Agreement was appropriate to the inherently dangerous nature of the Event, in which Mr. Sengupta knowingly and willingly chose to participate. [000448, 000452] Mr. Sengupta was not required to compete in the Event but voluntarily chose to participate, joining his teammates/co-workers and thousands of other individuals in challenging themselves mentally and physically. Inherent in Mr. Sengupta’s voluntary participation is the knowledge that the Event posed challenging obstacles. The

evidence below has been that, prior to entering the event, Avi Sengupta reviewed the Agreement and acknowledged the meaning and contents thereof by signing the Agreement twice, months apart, and initialing multiple times each separate and distinct section so indicating. Moreover, as alleged in the Complaint, Avi Sengupta made the voluntary decision to participate in the Event “several months” prior to the actual event. [000452] He had ample opportunity to read and to have an attorney review the Agreement prior to signing it and participating in the Event. Moreover, the terms of the arbitration agreement are not unreasonably favorable to the Event organizers. The Agreement specifically states that arbitration will be conducted in accordance with the rules of the American Arbitration Association and that costs shall be *shared equally* by the parties. Importantly, the Agreement provided Mr. Sengupta with “the opportunity to take this waiver to an attorney of [his] choosing for his or her review prior to the signing of the same and [Mr. Sengupta] has chosen not to do so.” Mr. Sengupta did not mark-out provisions, seek counsel, or question and/or reject any of the provisions. As an educated, sophisticated adult, Mr. Sengupta sought out this challenge, enrolled himself and considered and executed *twice* the knowing waiver, which included the Arbitration Clause.

As for whether the Estate’s claims fall within the substantive scope of the Agreement, the Arbitration Clause by its express terms applies “in the event of a legal issue,” which is the case herein. Further, as this Court has stated, “[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syl. pt. 1, *Johnson Controls*, 229, W. Va. 486, 729

S.E.2d 808. As demonstrated herein, contractual defenses do not disturb nor undo Avi Sengupta's knowing assent to the terms of the Agreement, both as that assent was provided on January 11, 2013, and on April 20, 2013.

For these reasons, because the Order Denying Arbitration fails to reflect the law and evidence before the Circuit Court and fails to reflect accurately the law of West Virginia, it cannot stand and must not be enforced.

Conclusion.

For all of the reasons set forth herein, Airsquid Ventures, Inc. d/b/a Amphibious Medics and Travis Pittman this Honorable Court for relief from "Order Denying Defendants' Motions to Compel Arbitration and Granting Plaintiff's Motion to Declare Arbitration Clause Unenforceable," entered by the Circuit Court of Marshall County on January 9, 2015. These petitioners seeks the relief this Court deems just.



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AMPHIBIOUS MEDICS and
TRAVIS PITTMAN,
By counsel.**

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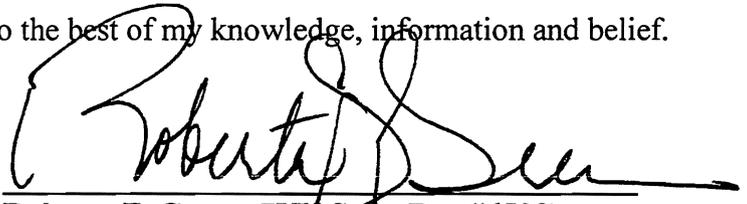
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VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, Roberta F. Green, counsel for Airsquid Ventures, Inc. d/b/a Amphibious Medics, being first duly sworn, state and say that the facts and documents contained in the foregoing “**Brief of Petitioners**” are true and correct according to the best of my knowledge, information and belief.

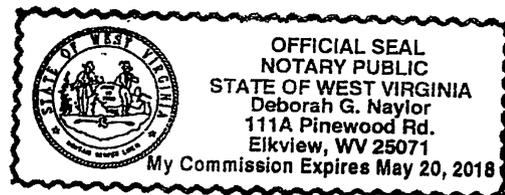

Roberta F. Green (WV State Bar #6598)

Taken, subscribed and sworn to before me this the 11th day of May, 2015.

My commission expires: May 20, 2018

[Notary Seal]


Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0123

STATE OF WEST VIRGINIA EX REL. AIRSQUID
VENTURES, INC. (DBA AMPHIBIOUS MEDICS),
Defendant Below, Petitioners,

v.

MITA SENGUPTA, as Personal Representative of the
ESTATE OF AVISHEK SENGUPTA,
Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, David L. Shuman / David L. Shuman, Jr./Roberta F. Green do hereby certify that I served this 11th day of May, 2015, the foregoing “*Brief of Petitioners*” and “*Joint Appendix*” upon the below listed counsel of record, by depositing true copies thereof in the United States mail, postage prepaid, in an envelope addressed to them, which address is their last known address:

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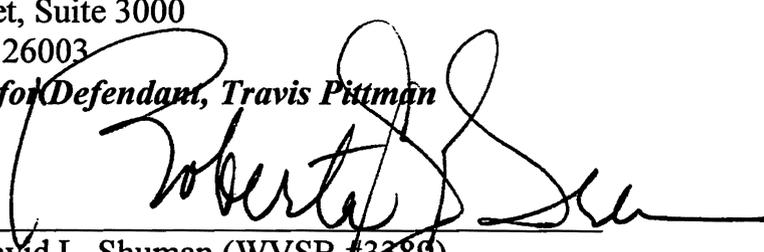
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