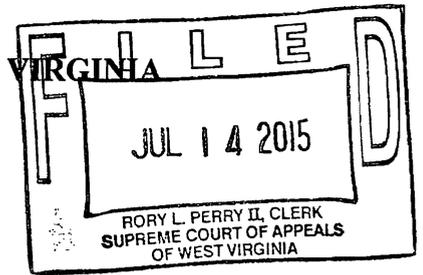


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 15-0123



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.

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PETITIONERS' REPLY BRIEF

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

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## RENEWED ASSIGNMENTS OF ERROR

### First Renewed 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 Renewed 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.**

## **REPLY TO RESPONDENT’S STATEMENT OF THE CASE AND RENEWED SUMMARY OF ARGUMENT**

### **Factual Background.**

As is evident from the briefs filed in this matter, many of the facts are undisputed. No one disputes that Avishek Sengupta, a resident of Maryland, competed in the Tough Mudder Mid-Atlantic Event held in Gerrardstown, Berkeley County, West Virginia, on April 20, 2013 (“the Event”). [000443, 000452] No one disputes that, prior to the Event, on January 11, 2013, Mr. Sengupta visited the Event website and registered to participate in the Gerrardstown event. [000347ff, 000371] The parties largely<sup>1</sup> agree that, while on the website, Mr. Sengupta reviewed and accepted an online version of the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“Agreement”) that is not identical to the Agreement he saw subsequently in West Virginia. [000352, 000360] However, both versions of the Agreement have been placed before

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<sup>1</sup> In Respondent Mita Sengupta’s Consolidated Opposition (“Response”), the Estate initially challenges the affidavits that place Mr. Sengupta at the online waivers. Response at 10. Thereafter, the Estate takes the position that “[i]t would make no difference if he had.” *Id.* The Estate further goes on to challenge Tough Mudder’s affidavits on the subject as “formulaic and demonstrably inaccurate,” failing to note its own repeated reliance on affidavits. [000199, 000232]

this Court, and both are titled “**ASSUMPTION OF RISK, WAIVER OF LIABILITY, AND INDEMNITY AGREEMENT**” (emphasis in original). [000315-316, 000381-382] Further, both documents begin with an admonition to 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, 000381]<sup>2</sup>

No one disputes that, 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] All agree that, once he arrived in West Virginia, Mr. Sengupta was provided with an agreement that was both similar and dissimilar to the agreement he reviewed online. [000315] The parties do not dispute that the Agreement he was provided on April 20, 2013, included the same Arbitration clause, verbatim, that appeared in the online waiver that every applicant had to acknowledge/accept when registering:

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.

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<sup>2</sup> Indeed, the Estate focuses on this same preamble, glossing over its admonitions and warnings, focusing instead on the use of suspect pronouns – “I” and “your.” Response at 35. The Estate argues these issues both ways – that Mr. Sengupta was dashing through the field and could not decipher the 7-point type versus Mr. Sengupta was or should have been forewarned by the use of “I” fifty-seven times. On information and belief, the phrases “TM Event” and “Tough Mudder, LLC” appear at least 40 times, without counting/considering the use of the indefinite pronoun “it.”

(emphasis in the original). [000316] The parties do not dispute that, on April 20, 2013, Mr. Sengupta signed the Agreement and initialed at five designated locations in the Agreement.<sup>3</sup>

[000316] No one disputes that the Agreement contains an “**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]<sup>4</sup>

All parties agree that Mr. Sengupta was not a lawyer, but the parties also agree, based on

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<sup>3</sup> To reiterate, 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 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 Airsquad and Mr. Pittman. Of note, to the extent that the Estate questions whether the Airsquad defendants would be part of any arbitration resolution (Response at 7), this clause joins the Event organizers in the contracted-for resolution.

<sup>4</sup> Both the online Agreement and April 20 Agreement include sections termed Acknowledgment of Understanding; while they are not identical, they convey the same meaning relative to the significance of the document and of the participant’s signature thereon. [000316, 000372]

the Estate's representations in the Complaint, that Mr. Sengupta was college educated and a senior account executive at a software engineering company. [000452]<sup>5</sup> No one disputes that Mr. Sengupta executed the Agreement fully, without marking-out provisions or questioning and/or rejecting any of the provisions. [000452] None of the parties has alleged that Mr. Sengupta was uninformed or confused as to the true nature of the contest or its inherent risks, and none of the parties has alleged that Mr. Sengupta was uninformed or confused as to the true nature of the document – a waiver of rights that he and thousands of other participants (including his team members) signed prior to participating. The parties agree that Mr. Sengupta did indeed participate in the Event, including the Walk the Plank obstacle, where Mr. Sengupta suffered injuries that resulted ultimately, directly or indirectly, in his death. [000454-55]

Throughout this litigation, considerable energy has been dedicated to determining whether size of font, bold lettering, designated locations for initialing, prior review of the Agreement or additional time to consider the Agreement would have affected Mr. Sengupta's decision to sign the waiver and participate. Considerable energy has been dedicated to determining whether Mr. Sengupta was unfairly induced or duped into accepting the arbitration agreement, which has been described as being "buried deep" in a "complex set of documents." Response at 1. While Mr. Sengupta is unable to address these issues himself, no evidence exists that suggests that Mr. Sengupta raised or considered these issues at any time. To the extent that the parties place arguments before this Court based upon their conjecture of what Mr. Sengupta knew or thought or might have known or might have thought or where he was standing or what

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<sup>5</sup> Of note, Mr. Sengupta was a member of a team of coworkers and friends who came to West Virginia and participated. [000452-53] On information and belief, each of the team members signed the release prior to participating.

exigencies existed for him, that speculation does nothing to advance the determination before this Court.<sup>6</sup>

Further, contrary to West Virginia law, respondent has raised arguments in its opposition brief that were never argued nor briefed to the Circuit Court before the Court issued its letter ruling, “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]<sup>7</sup> In particular, in the context of the enforceability of the arbitration clause, the Estate now argues the public policy issues related to safety statutes, which were listed only in passing in the order below and not briefed by the parties at any time. [000468, 000001-026, 000616-617] To the extent this Court would address the safety statute arguments for the first time at this juncture, it is important to note the huge difference between, on the one hand, the pre-injury exculpatory clause jurisprudence now referenced by the Estate and, on the other, the pre-injury denials of relief, which are suspect in recreational contexts and beyond.

Airsquid remains firm in its position that the Agreement must be enforced as 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*

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<sup>6</sup> Counsel have attempted to demonstrate the inaccessibility of the Agreement by various means. By example, the Estate’s counsel Edward J. Denn, Esquire, prepared an affidavit of his personal online search for an agreement that was identical to the agreement provided to Mr. Sengupta in West Virginia. [000199] *But see* W. Va. RPC 3.7(a). Other Massachusetts counsel, Christopher M. Reilly, Esquire, provided testimony by affidavit of his count of the words in the Agreement. [000232] Conversely, petitioners posit that the Agreement is a document that speaks for itself and, as such, its enforceability should be determined by an analysis of the document itself and its express terms.

<sup>7</sup> The Supreme Court’s review is limited to reviewing only the evidence and arguments that were before the court below when it made the ruling that is under review. *See, e.g., Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996).

Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). 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).

Whereas the Circuit Court found the arbitration clause to be procedurally and substantively unconscionable, the Estate's own admissions include that Mr. Sengupta possessed sufficient intellectual capacity and was sufficiently sophisticated to understand the Agreement and to accept the same knowingly and voluntarily. [000452] Further, the Agreement itself is commercially reasonable, its purpose and terms were reasonable, and it is a good adhesion contract, especially in light of the voluntary Event in which Mr. Sengupta was a knowing participant. Additionally, because the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (hereinafter "FAA"), applies, 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.

For all of the reasons set forth in Brief of Petitioners and herein, Airsquid Ventures d/b/a Amphibious Medics and Travis Pittman (hereinafter "Airsquid") seek relief from the Order Denying Arbitration because it violates well-settled law and further seek enforcement of the subject Arbitration Clause as valid, irrevocable and enforceable pursuant to West Virginia law.

#### **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. Airsquid does not object to the Estate's request that the matters be "argued together or in rapid succession on such terms as the Court may prescribe." Resp. at 18.

## RENEWED ARGUMENT

### A. Introduction.

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 clause 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] 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] 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 Mr. Sengupta’s death. [000465ff] Mr. Sengupta was twenty-eight years old at the time of his death. [000443] Mita Sengupta, as personal representative of the Estate of her adult son, filed the instant action in the Circuit Court of Marshall County, West Virginia, on April 18, 2014. [000443]

Whereas the Event organizers have denied any and all allegations of wrongdoing in this matter, nonetheless, repeated efforts have been made to resolve this claim. Efforts to arbitrate the claim resulted in the Estate’s filing an *ex parte* Emergency Motion for Temporary Restraining Order, which the Circuit Court granted without notice to nor input or argument from defendants below. [000478, 000523] Thereafter, the defendants below filed motions to stay the civil matter

and to compel arbitration, which were denied by letter order and later confirmed by the Order Denying Arbitration. [000141, 000594, 000596]

### B. Renewed Standard of Review

The parties agree that this appeal arises appropriately at this time pursuant to 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).

### RENEWED ASSIGNMENTS OF ERROR

**First Renewed 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.**

Whereas the Estate argues that petitioners have attempted to elevate arbitration clauses above all other types of contractual agreements, Airsquid actually has argued repeatedly that **general principles of state contract law should prevail** in determining the enforceability of the arbitration clause. *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 34, 717 S.E.2d 909, 917 (2011). 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). Airsquid has argued repeatedly as well that the **terms of the Agreement at issue are clear and unambiguous**, such that they should have been applied and not construed. Conversely, the Estate argues that the clarity of the Agreement and, thereby, its enforceability was adversely affected by what the Estate depicts as Mr. Sengupta’s being herded through a field

on an early Saturday morning, hurrying to participate in an extreme event. [000015] While it is true that nothing Mr. Sengupta did in January, when he enrolled for the Event, nor in April, when he appeared for the Event, could compare to the scrutiny these provisions have received from the armada of attorneys who have parsed this language, considered its nuances, and belabored its import since Mr. Sengupta's death, nonetheless, Mr. Sengupta, as a sentient adult and tech professional, would have had a clear understanding that he was signing a waiver. While the parties will never know whether the particulars or which particulars struck Mr. Sengupta as he twice accepted the Agreement's terms, the fact of the matter is that he could not have registered nor participated if he had not repeatedly acknowledged and/or signed the Agreement, which repeatedly, clearly, in bold type, relies on terms such as mediation, arbitration, legal rights, legal consequences, legal actions.

As it battles against any finding that the contract is clear and unambiguous, the Estate relies upon what it alleges are external and internal inconsistencies that would flummox any layperson (that is, that the agreement includes both an arbitration and a venue clause, and that the venue clause precedes the arbitration clause). Response at 26. Whereas the Estate continues to speculate on what Mr. Sengupta might have made of these clauses, Airsquid has directed this Honorable Court to **jurisdictions that have actually considered agreements that include both arbitration and venue clauses and have found the agreements to be both sensible and necessary**, given that arbitration awards are not self-enforcing. In *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 402 (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. 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 Airsquad seeks relief from the order below.

Airsquad has argued repeatedly that the **Arbitration clause is not unconscionable**, and Airsquad maintains that position at this time. To the extent that the Circuit Court denied Airsquad'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 v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (*Brown I*), cert. granted, judgment vacated sub nom. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012). 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. v. Nelson*, 230 W. Va. 281, 290, 737 S.E.2d 550, 559 (2012), 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.

Once again, in determining procedural unconscionability, the Court needs to focus on any inequities, improprieties, or unfairness in the bargaining process and the formation of the

contract, including 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. This determination is to be made based on 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, far from a bait and switch, 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] Because the Agreement includes no inequities, improprieties, or unfairness, the Circuit Court erred in finding the Agreement procedurally unconscionable, and for that reason, the Order Denying Arbitration cannot stand.

In stark contrast to the instant case, in *Brown I*, this Court focused on any inequities,

improprieties, or unfairness in the bargaining process and the formation of the contract, including whether the parties had a meaningful choice:

Because of illness, incapacitation, or physical or mental impairment, people being admitted to a nursing home are usually quite vulnerable. For many people, the initial acceptance of the need for institutionalization is difficult and stress-inducing. This is particularly the case for older adults, because it underscores their dependency and signals the end of their freedom to make many personal choices. Furthermore, the decision to be admitted to a nursing home, and the choice of a nursing home, often is made in the midst of a crisis brought on by a precipitous deterioration in the person's health. The decision is also often impelled by the loss of, or deterioration in the health of, a spouse or care giver, or when their care-giving family is no longer able to adequately manage the demands of home care.

228 W. Va. at 664-65, 724 S.E.2d at 268-69. This Court further expressly distinguished between nursing home contracts and commercial contracts, finding that “[u]nlike the situation that exists when a consumer signs a contract for a product or service, people entering a nursing home have to sign admissions contracts in the midst of a crisis, without time to comparison shop or to negotiate the best service and price combination.” *Id.* at 665, 724 S.E.2d at 269. The Estate's efforts to portray as emotional or difficult or misguided Mr. Sengupta's decision whether to participate in this voluntary sporting event – which decision he could have re-considered at any time over the intervening months – pale next to the situations this Court has considered unfair, improper, unenforceable. Mr. Sengupta had every opportunity to decline to participate or even to walk around the Walk the Plank obstacle. Thousands of persons participated in the Event, but also, no doubt, thousands of persons visited the website, read the descriptions and the stern language of the waiver, and never enrolled. In sum, the Agreement is not substantively unconscionable in that it is not one-sided and does not have an overly harsh effect on the disadvantaged party. *McGinnis v. Clayton*, 173 W. Va. 102, 114, 312 S.E.2d 765, 777 (1984).

Further, once again, **the contract terms are commercially reasonable; the terms are fair in purpose and effect; the risks are fairly allocated between the parties, and the Agreement comports with this Court’s articulated public policy concerns with pre-injury agreements generally.** *Syl. pt. 19, Brown I*, 228 W. Va. 646, 724 S.E.2d 250. The costs of arbitration as set forth in the Agreement are commercially reasonable and by the express terms of the contract, are to be shared by the parties.<sup>8</sup> 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] The fee referenced in these briefs – \$10,200 – is based upon a claim of \$5-10 million. Proportionately, the fee is arguably one tenth of one percent of the Estate’s hoped for recovery and is a shared amount in any event. The Arbitration Clause itself and the AAA rules do not limit the Estate’s recovery in any way. [000202, 000316, 000318] The costs of arbitration are not prohibitive, are commercially reasonable and are shared between the parties.

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 the instant matter, Mr. Sengupta twice reviewed and accepted the Agreement that included repeated, express, bolded warnings related to waiver of rights, legal actions/claims, potential serious injury and even death. [000315]

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<sup>8</sup> The Estate has acknowledged that Tough Mudder has waived its right to rely upon the Indemnity Clause. Response at 17 n.8. Emblematic of the course of this litigation to date, the Estate cites that waiver as evidence of Tough Mudder’s “cynical conduct” and “imposition of ‘draconian remedies.’” *Id.*

Mr. Sengupta was advised by frank disclaimers and plain statements of the nature of the sporting enterprise and of his rights and options relative thereto.

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). In distinguishing between good (enforceable) and bad (unenforceable) contracts of adhesion, this Court has 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. 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.”)).

As for the mutuality of the Agreement, as 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.<sup>9</sup> 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] Additionally, the Agreement does assign mutual obligations. Event organizers took on the responsibility of providing a challenging and successful Event for thousands of participants, including staffing the Event and constructing the obstacles. Perhaps the clearest understanding of what is involved in that process, what the Event organizers undertook as their part of the bargain, is reflected in the Master Services Agreement (MSA), with express, detailed provisions of the planning and operation of the Event.<sup>10</sup> [000249-000268] Indeed, over time and even until today, TM Events have been challenging and

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<sup>9</sup> Conversely, 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.

<sup>10</sup> Any suggestion that the Agreement should provide for arbitration between/among the Event organizers is undercut by the terms of the Master Services Agreement (MSA). The Agreement signed by Mr. Sengupta sets out the relationship between the Event organizers (including Tough Mudder and the Airsquid defendants) and the participants. The relationship between Tough Mudder and the Airsquid defendants themselves is governed instead by the MSA, which is exponentially longer than the Agreement and includes a varieties of remedies (waivers, releases, covenants not to sue, multiple insurance provisions, venue/jurisdiction clauses) that are outside the scope of this Court’s purview at this time. [000255-000257]

successful for thousands of individuals. The Event organizers provide that experience in return for the participants' enrolling and signing the Agreement.<sup>11</sup>

Additionally, the Estate relies heavily on *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4<sup>th</sup> Cir. 2013), which the Estate cites as emblematic of non-mutuality and the need to strike down this arbitration provision. Response at 36. In point of fact, however, the *Noohi* decision has been found inapposite by subsequent courts on the basis that *Noohi* relies upon a fine point of Maryland law that requires separate consideration for an arbitration provision than for the overall agreement. 708 F.3d at 609. West Virginia law does not require separate consideration for the arbitration provision; as 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.<sup>12</sup> Pursuant to the jurisprudence of this Court, the test is not whether there is mutual consideration/obligation for the arbitration clause alone. The test is whether the agreement as a whole obligates the persons/entities mutually. Whereas Mr. Sengupta considered a two-page

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<sup>11</sup> The Estate has questioned why the Event organizers have not arbitrated their cross claims. In response, when the Court denied the motion to compel arbitration, the defendants had to file answers and preserve their cross claims through that pleading. Also, the relationship between and among Event organizers is not governed by the Agreement but rather by the Master Service Agreement (MSA). [000249-000268]

<sup>12</sup> Among the decisions that have rejected *Noohi* based upon the Maryland law on *inter alia* separate consideration for an arbitration clause are *Boatright v. Aegis Defense Services, LLC*, 938 F. Supp.2d 602 (E. D. Va. 2013); *King v. Hausfeld*, 91 Fed. R. Evid. Serv. 84, \*6 (2013 WL 1435288) (2013). Further, the United States District Court for the Southern District of West Virginia has considered West Virginia law on the enforcement of arbitration provisions. *See Brown v. CMH Manufacturing, Inc.*, \_\_\_ F. Supp.3d \_\_\_ (2014 WL 4298332) (S.D. W. Va. 2014), which relies on the law particular to arbitration of security interests in finance agreements. The District Court in *CMH* upheld the arbitration provision for the buyer's claims even when another provision expressly allowed the seller to file suit in court directly. \_\_\_ F. Supp.3d at \*11.

document relative to his participation, the Event organizers considered nearly twenty pages of protocols, licensure, recruitments, training, assessments, designs, construction, communication – all to bring the experience to thousands of participants. [000249-000268] The Agreement may have 50+ “I” and “you” combinations, but it also has 40+ “Tough Mudder” and “TM Event” references – exclusive of pronouns – and it is not even the operable agreement for the undertaking that is a Tough Mudder Event. [000249-000268] The Event organizers are obligated to each and every participant to make the Event challenging, professional, rewarding.

Finally, to the extent this Court would address the Estate’s new safety statute arguments, it is important to note the huge difference between, on the one hand, the pre-injury exculpatory clause jurisprudence now referenced by the Estate and, on the other, the pre-injury denials of relief, which are suspect in recreational contexts and beyond. Repeatedly in the instance of voluntary recreational activities, this Court has discussed pre-injury exculpatory clauses that deprive participants fully their rights, which clauses this Court has declined to enforce where the defendant is alleged to have violated safety statutes enacted to protect the public.<sup>13</sup> By example,

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<sup>13</sup> See *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991), declining to enforce pre-injury exculpatory clauses in the instance of gross negligence or violations of safety statutes enacted to protect the public. For instance, this Court declined to uphold the pre-injury exculpatory clause in *River Runners*, finding that “[a] clause in an agreement exempting a party from tort liability is . . . unenforceable on grounds of public policy if, for example, (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs.” *Id.* at 315, 412 S.E.2d at 509. The *River Runners* clause reads as follows:

In consideration of the right to participate in such river trip, including transportation, meals, and other activities and services arranged for me by North American River Runners, Inc., or West Virginia River Adventures, Inc., or both, their agents, and employees, **I UNDERSTAND AND DO HEREBY AGREE TO ASSUME ALL OF THE ABOVE RISKS AND OTHER RELATED RISKS WHICH MAY BE ENCOUNTERED ON SAID RAFT TRIP, INCLUDING ACTIVITIES PRELIMINARY AND SUBSEQUENT THERETO.** I do hereby agree to hold

conversely to the release in *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991), the Agreement at issue here recognizes and provides remedies for the possibility of future legal issues. Rather than having participants waive fully their rights relative to any potential issues/actions in return for participating, this agreement places participants' legal issues into arbitration and participants' legal actions into the appropriate state or federal court. Far from precluding or eliminating participants' rights or shielding the Event organizers' conduct from public scrutiny, this agreement provides express multiple avenues for participants to raise both legal issues and legal actions.

The Circuit Court erred in failing to enforce the Agreement as written, and Airsquid seeks the relief this Court deems just.

**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.**

As Airsquid has argued previously, because Avishek Sengupta traveled from Maryland to West Virginia 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. This Court 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, *State ex rel. Johnson Controls, Inc.*

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North American River Runners, Inc., and West Virginia River Adventures, Inc., their agents and employees, harmless from any and all liability, actions, causes of actions, claims, expenses, and damages on account of injury to my person or property, even injury resulting in death, which I now have or which may arise in the future in connection with my trip or participation in any other associated activities....

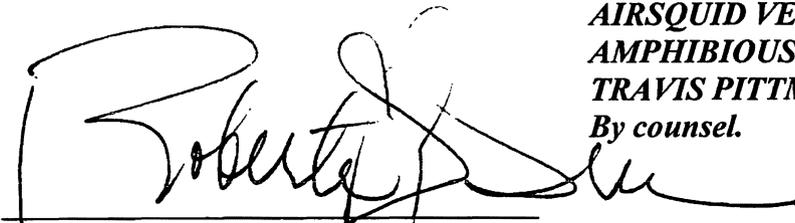
*v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808 (2012). Additionally, when a trial court is required to rule upon a motion to compel arbitration pursuant to the FAA, as is the case here, the trial court's authority is limited to determining the threshold issues of (1) whether a valid arbitration agreement 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, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). As demonstrated above, the arbitration clause is a clear and unambiguous statement of the agreement of the parties. It is not unconscionable, is commercially reasonable and fairly allocates the risk between the parties. 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.

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.

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 in Brief of Petitioners and herein, Airsquid Ventures, Inc. d/b/a Amphibious Medics and Travis Pittman move 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 seek the relief this Court deems just.



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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 “Petitioners’ Reply Brief” are true and correct according to the best of my knowledge, information and belief.

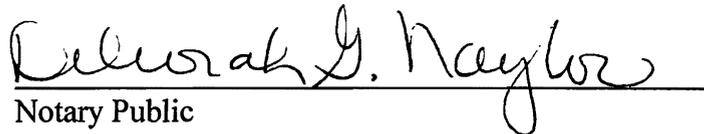
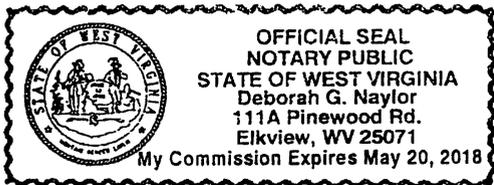


**Roberta F. Green (WV State Bar #6598)**

Taken, subscribed and sworn to before me this the 14<sup>th</sup> day of July, 2015.

My commission expires:

[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 14<sup>th</sup> day of July, 2015, the foregoing **“PETITIONERS’ REPLY BRIEF** 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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