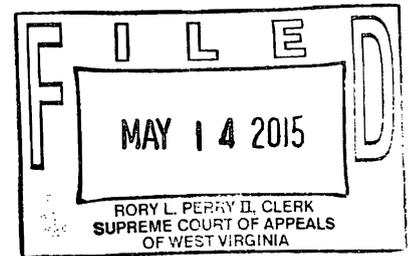


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



Record No. 15-0128
(Putnam County Case No. 13-c-131)

NATIONSTAR MORTGAGE, LLC
f/k/a CENTEX HOME EQUITY COMPANY,

Defendant Below-Petitioner,

v.

ADAM WEST and
BETHANY WEST,

Plaintiffs Below- Respondents.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court Abused its Discretion in Denying Defendant's Motion to Compel Arbitration.
1. The Circuit Court Erred by Holding that the Arbitration Agreement was Procedurally Unconscionable.
 2. The Circuit Court Erred by Holding that the Arbitration Agreement was Substantively Unconscionable.

II. STATEMENT OF THE CASE

In July 2003, Plaintiffs entered into a loan agreement with Defendant-Petitioner, Nationstar Mortgage, LLC ("Nationstar"), in the principal amount of \$76,500.00 (the "Loan").¹ As part of the Loan transaction, both Plaintiffs signed a binding Arbitration Agreement with Nationstar. (App. p. 65). Pursuant to the Arbitration Agreement, Plaintiffs agreed that if any "Dispute" should arise between the parties, either party could elect to have the dispute resolved by binding arbitration. (*Id.*)

The Arbitration Agreement defines "Dispute" as "any case, controversy, dispute, tort, disagreement, lawsuit or claim now or hereafter existing between [Plaintiffs] and [Nationstar]. The Arbitration Agreement further states that a Dispute shall include, but is not limited to, "anything that concerns ... any Credit Transaction including but not limited to, the origination or servicing of such Credit Transaction ..." The Arbitration Agreement defines a Credit Transaction as "any one or more of past, present, or future extensions, application, or inquiry of credit or forbearance of payment such as a loan, retail credit agreement or otherwise from [Nationstar] to [Plaintiffs]." (*Id.*)

On May 2, 2013, Plaintiffs filed a Complaint in the Circuit Court of Putnam County,

¹ As Plaintiffs recognize in their Second Amended Complaint, Nationstar Mortgage, LLC previously operated under the name Centex Home Equity Company, LLC. In 2006, Centex Home Equity Company, LLC filed a Certificate of Amendment which formally changed its name to Nationstar Mortgage, LLC.

West Virginia (“Circuit Court”) alleging a total of eight counts against Nationstar and Defendant Mark Greenlee (“Greenlee”), each of which allegedly arose out of the Defendants’ conduct in the origination and servicing of Plaintiffs’ mortgage loan (“Loan”). (App. p. 1).

On July 25, 2013, Nationstar removed the Complaint to the United States District Court for the Southern District of West Virginia because Plaintiffs fraudulently joined Greenlee to the action and the Court had diversity jurisdiction. After removal, Plaintiffs filed an Amended Complaint which was nearly identical to the original Complaint, however the First Amended Complaint replaced the allegations against Greenlee with nearly identical, and often verbatim, allegations against Defendant Jeffrey Moore (“Moore”) in an attempt to destroy diversity. (App. p. 20). While Defendant Moore is a party to the underlying lawsuit, Moore has no interest in the outcome of this Appeal.

On October 1, 2013, Nationstar filed a Motion to Compel Arbitration in Federal Court, however, Plaintiffs filed a Motion to Remand, and on October 21, 2013, the instant case was remanded to the Circuit Court. (App. p. 54).

On August 1, 2014, Nationstar filed a Motion to Compel Arbitration in Circuit Court. (App. p. 56). On or about October 31, 2014, Plaintiffs filed a Second Amended Complaint. (App. p. 35). The claims in the Second Amended Complaint were substantially similar to those in the First Amended Complaint, however Plaintiffs added two additional counts for “Unconscionable Delegation Provision Within the Arbitration Clause,” and “Unconscionable Arbitration Clause.” (*Id.*).

On November 21, 2014, counsel for Nationstar and Plaintiffs appeared at a hearing on the Motion to Compel Arbitration. During the hearing, Plaintiffs provided for the first time counsel for Nationstar with an affidavit executed by Plaintiffs, stating that Plaintiffs could not pay the

costs of arbitration. (App. p. 130). Neither Nationstar, nor counsel for Nationstar had been made aware of the affidavit prior to the November 21, 2014 hearing.

At the November 21, 2014 hearing, Plaintiffs offered to arbitrate if Nationstar will agree to use AAA consumer rules of arbitration rather than the AAA commercial rules of arbitration. (App. p. 149). Nationstar declined, noting that the consumer rules of arbitration specifically state that the consumer rules are not suggested for disputes involving real estate transactions and the Arbitration Agreement calls for the use of the AAA commercial rules of arbitration, not consumer rules.

On January 13, 2015, the Circuit Court entered a Final Order Denying [Nationstar's] Motion to Compel Arbitration. In its Order, the Circuit Court held that the Arbitration Agreement is both procedurally and substantively unconscionable. (App. p. 132).

It is the January 13, 2015 Order from which Nationstar appeals.

III. SUMMARY OF ARGUMENT

The Circuit Court Relied on Inapplicable Law and Ignored this Court's Precedent in Holding that the Arbitration Agreement is Procedurally Unconscionable.

Defendant-Petitioner Nationstar, appeals the January 13, 2015 Order from the Circuit Court of Putnam County, West Virginia, denying Nationstar's Motion to Compel Arbitration.

From the outset, there is no disagreement that Plaintiffs signed the Arbitration Agreement and that the Arbitration Agreement covers the issues being litigated in this case. That said, in its January 13, 2015 Order, the Circuit Court concluded that the Arbitration Agreement was, nonetheless, procedurally unconscionable and unenforceable because "there is no evidence in the record that the arbitration provision was specifically bargained for or that Plaintiffs had the ability to opt-out of resolving potential disputes through arbitration" and that "there was a significant disparity with respect to the level of sophistication between the two parties." (App.

pp. 135-36).

In reaching its conclusion, the Circuit Court relied upon *State ex rel. Ocwen Loan Servicing v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013) to support the notion that the Arbitration Agreement is a contract of adhesion and thus procedurally unconscionable; a conclusion in direct contradiction with this Court's precedent. Moreover, the Circuit Court failed to recognize critical distinctions between *Webster* and the case at bar which destroy any application to the instant facts.

Further, the Circuit Court failed to recognize that in West Virginia, there is a presumption of validity for arbitration agreements and that Plaintiffs have the burden of rebutting that presumption. Instead the Circuit Court's Order suggested that Nationstar has the burden of proving that the Arbitration Agreement is not unconscionable.

Furthermore, in support of its conclusion that the Arbitration Agreement is procedurally unconscionable, the Circuit Court held that there is no evidence to suggest that the Arbitration Agreement was bargained for. (App. p. 136). West Virginia Law is clear that so long as the contract in its entirety is well supported by an offer, acceptance and sufficient consideration, there is no requirement that the arbitration clause be independently "bargained for" in order for a contract to be formed. *See Kirby v. Lions Enters.*, 233 W. Va. 159, 165, 756 S.E.2d 493, 499 (2014).

The Circuit Court Failed to Recognize West Virginia Precedent and the Plain Terms of the Arbitration Agreement in Holding that the Arbitration Agreement is Substantively Unconscionable.

In its January 13, 2015 Order, the Circuit Court concluded that the arbitration agreement was substantively unconscionable and unenforceable holding that "[a] review of the arbitration agreement between the parties reveals that the agreement itself is one-sided in favor of

Nationstar and places Plaintiffs at a severe disadvantage” and that “the high costs of arbitration could prevent Plaintiffs from effectively vindicating their rights in the arbitral forum.” (App. p. 136).

The Circuit Court’s analysis that the Arbitration Agreement is “one-sided” and thus substantively unconscionable has been soundly rejected by this Court. In *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012), this Court rejected the notion that lack of equivalent promises is inherently unconscionable, recognizing that the majority of courts conclude that parties need not have reciprocal duties to arbitrate. *Id.* at 288, 737 S.E.2d at 557.

Moreover, in reaching its conclusion that arbitration is cost prohibitive, the Circuit Court relied on *Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002). The facts in *Dunlap* and those in the case at hand are entirely distinguishable as there is no evidence to suggest that Plaintiffs were not given the opportunity to examine the Arbitration Agreement or that Plaintiffs were under duress when they both signed and dated the Arbitration Agreement. In short, the Plaintiffs have simply not shown that arbitration would be prohibitively expensive.

Further, the Circuit Court failed to consider three dispositive factors. First, the plain terms of the Arbitration Agreement states that Nationstar will advance the first \$250 of arbitration and that the arbitrator will decide who is ultimately responsible for paying the fees associated with the arbitration. (App. p. 65). In short, the Plaintiffs may not be responsible for any fees of arbitration. Second, the Circuit Court failed to consider Nationstar’s offer to arbitrate outside of the American Arbitration Association, thereby significantly reducing the potential costs of arbitration. Third, the Circuit Court failed to recognize West Virginia courts that have upheld nearly identical arbitration provisions.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 19 and 20 of the West Virginia Rules of Appellate Procedure, Nationstar respectfully requests oral argument before the Court because this matter involves both (1) assignments of error in the application of settled law, and (2) issues of fundamental public importance. Specifically, the ability to enforce arbitration provisions in mortgage loan documents affects the mortgage financing industry statewide, and the misapplication of precedent of this Court by the Circuit Court in reaching a conclusion that invalidated an arbitration agreement that, in nearly identical terms, has been upheld in a prior decision of a federal court in West Virginia presents compelling legal issues of statewide significance. Nationstar submits that a memorandum decision would be warranted in this instance.

V. ARGUMENT

A. Standard of Review

This Court recently held that “[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.” Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013). When an appeal from an order denying a motion to compel arbitration is properly before this Court, review is *de novo*. *See Id.*

Typically, interlocutory orders are not subject to this Court’s appellate jurisdiction. *See Coleman v. Sopher*, 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995) (“The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case.”). This “rule of finality” is not an absolute rule. Rather, there is a “narrow category of orders that are subject to permissible interlocutory appeal.” *Robinson v. Pack*, 223 W. Va. 828, 831, 679 S.E.2d 660, 663 (2009). The *Robinson* Court explained that, “[o]bjections to allowing an appeal from an interlocutory order are typically rooted in the need for finality. The provisions of West Virginia

Code § 58-5-1 (2005) establish that appeals may be taken in civil actions from “a final judgment of any circuit court or from an order of any circuit court constituting a final judgment.” *Id.*

Justice Cleckley elucidated in *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995) that “[t]his rule, commonly referred to as the ‘rule of finality,’ is designed to prohibit ‘piecemeal appellate review of trial court decisions which do not terminate the litigation[.]’” 193 W. Va. at 292, 456 S.E.2d at 19 (*quoting U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263, 265, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982)). Exceptions to the rule of finality include “interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or . . . [which] fall within a jurisprudential exception” such as the “collateral order” doctrine. *James M.B.*, 193 W. Va. at 292-93, 456 S.E.2d at 19-20 (1995); *accord Adkins v. Capehart*, 202 W. Va. 460, 463, 504 S.E.2d 923, 926 (1998) (recognizing prohibition matters, certified questions, Rule 54(b) judgment orders, and “collateral order” doctrine as exceptions to rule of finality). 223 W. Va. at 832, 679 S.E.2d at 664 (footnote omitted); *see also C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W. Va. 469, 475, 677 S.E.2d 905, 911 (2009) (In addition to the ‘ministerial’ acts exception, this Court has recognized a limited number of other exceptions to the rule of finality).

This Court’s “cases have pointed out that it may address specific issues decided by an interlocutory order under the collateral order doctrine or ‘by writs of prohibition, certified questions, or by judgments rendered under Rule 54(b) of the West Virginia Rules of Civil Procedure.’” *Id.* (*quoting James M.B.*, 193 W. Va. at 292 n.3, 456 S.E.2d at 19 n.3)).

The exception referred to as the “collateral order” doctrine, which was established by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), may be applied to allow appeal of an interlocutory order when

three factors are met: “An interlocutory order would be subject to appeal under [the collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.” *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566 n.2, 401 S.E.2d 908, 912 n.2 (1991) (internal quotations and citation omitted); *see also Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (applying three-part collateral order doctrine to circuit court's denial of summary judgment on issue of qualified immunity and finding order immediately appealable).

In *Credit Acceptance*, this Court held that an order denying a Motion to Compel Arbitration is an interlocutory ruling that is subject to the collateral order doctrine and thus *de novo* review is proper. *Credit Acceptance*, 231 W. Va. at 525, 745 S.E.2d at 563.

B. The Circuit Court abused its Discretion in Denying Defendant's Motion to Compel Arbitration.

As noted, there is no disagreement that Plaintiffs signed the Arbitration Agreement and that the Arbitration Agreement covers the issues being litigated in this case. The fundamental issue presented by this appeal is whether a duly signed arbitration agreement that encompasses the issues presented in the case at bar can, nonetheless, be avoided by inferences of illegitimacy that are devoid of factual support and seek to undermine and reverse the presumptive legitimacy of arbitration agreements themselves.

In its January 13, 2015 Order, the Circuit Court denied Defendant's Motion to Compel Arbitration, holding that the Arbitration Agreement was Procedurally and Substantively Unconscionable. (App. p. 136). It is well established that contract formation is a question of state law. *Nichols v. Springleaf Home Equity, Inc.* No. 3:11cv535, 2012 U.S. Dist. LEXIS 31402 *8 (S.D. W. Va. Mar. 8, 2012). “In West Virginia, ‘a contract is formed when the minds of the

parties meet. The writing, if unambiguous, is the indisputable evidence of the agreement.” *Id.* (quoting *Brown v. Woody*, 98 W.Va. 512, 127 S.E. 325, 326-27 (1925)).

On the topic of contractual unconscionability, this Court previously has held that:

[a] contractual term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.

Syl. Pt. 20, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), overruled in part on other grounds by *Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam).

Here, the reasons relied upon by the Circuit Court in denying Defendant’s Motion to Compel Arbitration are in direct contradiction with this Court’s precedent, seeks to cast upon Nationstar a burden unrecognized by this Court, and fails to recognize the presumptive validity for Nationstar of the enforceability of the Arbitration Agreement. Accordingly, as the following points demonstrate, the Circuit Court erred in denying Defendant’s Motion to Compel Arbitration in its January 13, 2015 Order, and this Court should reverse that Order and allow arbitration to proceed in the case.

1. The Circuit Court Erred by Holding that the Arbitration Agreement was procedurally unconscionable.

With respect to procedural unconscionability, this Court has held that “procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex

contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.” *Toney v. EQT Corp.*, 2014 W. Va. LEXIS 757 (W. Va. June 13, 2014) (citing Syl. Pt. 17, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011)).

i. An Adhesion Contract is not inherently Unconscionable.

In holding that the Arbitration Agreement is procedurally unconscionable, the Circuit Court relied on *State ex rel. Ocwen Loan Servicing v. Webster*, 232 W. Va. 341, 752 S.E. 2d 372 (2013), in which this Court held that an arbitration provision was not unconscionable where Plaintiffs could freely reject the arbitration agreement and the lender would not refuse to complete the loan based on such refusal. (App. p. 136). The facts in *Webster* and those in the case at bar, however, are entirely distinguishable. First, there is no evidence to suggest that Plaintiffs were not able to reject the arbitration agreement. Plaintiffs did not contend that they tried to reject the Arbitration Agreement and were refused. Second, Plaintiffs nowhere contend that they did not or could not understand the Arbitration Agreement—even in their Affidavit filed in opposition to the Motion to Compel, Plaintiffs do not contend that they were prohibited from reading the documents they freely signed, or that even now they do not understand the terms of the Arbitration Agreement. (*See generally*, App. pp. 130-31, 139-60). This omission from the Affidavit is telling in so much as it implicitly, if not explicitly, admits that Plaintiffs could have read the agreement, though either choose not to do so or failed to ask to do so, and do/did understand the terms of the Arbitration Agreement, lest they would have affirmatively said in their Affidavit that they did/do not. That said, to the extent that the Circuit Court’s reliance on *Webster* was to support the proposition that the Arbitration Agreement was a contract of adhesion and thus inherently unconscionable, that notion has been soundly rejected by this

Court.

Even if the loan contract at issue in the present case was a contract of adhesion, this Court has recognized that “the bulk of the contracts signed in the country are contracts of adhesion’, and are generally enforceable because it would be impractical to void every agreement merely because of its adhesive nature.” *Brown*, 724 S.E.2d at 286 (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005)). Moreover, “ [t]here is nothing inherently wrong with a contract of adhesion. Most of the transactions of daily life involve such contracts that are drafted by one party and presented on a take it or leave it basis. They simplify standard transactions.” *Id.* (quoting John D. Calamari, Joseph M. Perillio, *Hornbook on Contracts* § 9.43 (6th Ed. 2009)). “[A]n adhesion contract can contain an arbitration provision **without being unconscionable.**” *Baker v. Green Tree Servicing, LLC*, No. 5:09:-cv-00332, 2010 U.S. Dist. LEXIS 31738 at *11 (S.D. W.Va. Mar. 31, 2010)(citing *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693 (2009)) (emphasis added).

It is clear West Virginia law that an adhesion contract is not inherently unconscionable. Accordingly, the Circuit Court’s conclusion that the Arbitration Agreement was an adhesion contract and that fact *ipso facto* renders the Arbitration Agreement unconscionable is faulty and was is in error.

ii. There is a Presumption of Validity for Arbitration Agreements.

This Court has held:

It 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[.]

State ex rel. Clites v. Clawges, 224 W. Va. 299, 685 S.E.2d 693, 700 (W. Va. 2009) (citing *Bd. of Educ. Of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439, Syl. Pt. 3 (1977)). “This language creates a presumption of validity for arbitration agreements.”

Taylor v. Capital One Bank (USA) N.A., No 5:09-cv-00576, 2010 U.S. Dist. LEXIS 11693 at *7 (S.D. W. Va. Feb. 10, 2010).

Given this presumption, and the broad and unambiguous arbitration agreement here, this is a clear example where arbitration should be compelled. The distinction between “presumption” and an “inference,” while technical, is important in this context in order to prevent the Court from being misled as to the effect of nonproduction of particular evidence. A cogent explanation of the distinction between a “presumption” and an “inference” is set forth in F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 12.4(B)7., at 682 (2d ed. 1986):

A presumption is a deduction which the law requires a trier of fact to make: it is mandatory. An inference is a deduction which, based upon circumstantial evidence, the trier may or may not make, according to his own conscience: it is permissive. The term presumption correctly refers to a presumption of law; the term inference correctly refers to a presumption of fact. Permissible inferences, while closely associated with the concept of presumption, have a different concept than presumptions and have a different application. Presumptions vary from inferences in that if the basic fact giving rise to the presumed fact is established, there is a compulsory finding of the presumed fact in the absence of rebuttal. A permissible inference which rests upon a logical deduction from established facts provides a conclusion which the triers of fact may or may not find along with the other evidence in a case.

Cf. W. Va. R. Evid. 301 (“[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption,”); *see generally* Alexander, *Presumptions: Their Use and Abuse*, 17 Miss. L.J. 1 (1945) (lucid analysis by an associate justice of the Supreme Court of Mississippi distinguishing a presumption as a form of judicial notice, from an inference, such as the inference that testimony of a “missing” witness would have been adverse to the party failing to call the witness, as a less definite logical deduction which the jury may consider).

The distinction is of particular significance here as the Circuit Court held that the

Arbitration Agreement is procedurally unconscionable because “there is no evidence in the record that the arbitration provision was specifically bargained for or that Plaintiffs had the ability to opt-out of resolving potential disputes through arbitration.” (App. pp. 135-36). But, importantly, even though they could have Plaintiffs nowhere contended that they tried to opt-out of the Arbitration Agreement, or were prohibited from reading and asking questions regarding the Arbitration Agreement. (App. pp. 130-31, 139-60). Plaintiffs’ self-serving allusions to a hurried closing do not equate to an inability to review the documents they signed, and they have not professed that they were unable to understand the terms of the agreements they signed despite having the ability to do so in the eleventh hour Affidavit that they signed and filed. The Circuit Court’s analysis, however, suggests that Nationstar has the burden of proving that the Arbitration agreement was specifically bargained for or that Plaintiffs did have the ability to opt-out of arbitration. Under West Virginia law, the correct conclusion is just the opposite. It is the Plaintiffs’ burden to challenge the presumption. Because no evidence to the contrary was presented, the presumption remains that the arbitration agreement is valid and should thus be enforced.

iii. There is No Requirement that an Arbitration Clause be independently bargained for.

In reaching its conclusion, the Circuit Court held that “there is no evidence in the record that the arbitration provision was specifically bargained for . . .” (App. pp. 135-36). Even if there was evidence to suggest that the Arbitration Agreement was not bargained for (which Nationstar continues to deny), this Court has recognized that there is no requirement that an arbitration clause be independently bargained for.

Since recognizing the interplay of the Federal Arbitration Act with arbitration agreements in West Virginia, this Court was presented in *Dan Ryan* with a certified question from the United

States Court of Appeals for the Fourth Circuit, which resolves the issue of whether an arbitration agreement must be independently bargained for. In *Dan Ryan*, the Fourth Circuit posed the following question: ‘Does West Virginia Law require that an arbitration provision which appears as a single clause in a multi-clause contract, itself supported by mutual consideration when the contract as a whole is supported by adequate consideration?’” 230 W. Va. at 283, 737 S.E.2d at 552.

In answering this question, this Court first recognized that “the elements of a contract are an offer and acceptance supported by consideration.” *Id.* at 287, 737 S.E.2d at 556 (citations omitted). This Court then held that “the formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause.” *Id.* at 283, 737 S.E.2d at 552. As reiterated in *Kirby*, this Court held that when challenging the enforceability because the arbitration clause was not supported by consideration, was not bargained for, or was not negotiated for, the focus is not upon consideration or bargain for the singular arbitration clause. *Kirby*, 233 W. Va. at 165, 756 S.E.2d 493 at 499. This Court further held that “so long as the [] contract in its entirety is well supported by an offer, acceptance, and sufficient consideration, there is no requirement that an arbitration clause be independently bargained for in order for a contract to be formed.” *Id.*

As in *Kirby*, there is no question here that that the entire contract was derived from an offer, acceptance, and sufficient consideration. Every page of the Deed of Trust was initialed by both Plaintiffs, the Arbitration Agreement was separately signed and dated by both Plaintiffs and the Loan was supported by sufficient consideration by Nationstar in the amount of financing. As such, the Circuit Court’s reliance on independent consideration as a reason to deny the enforceability of the Arbitration Agreement was in error and should be reserved.

2. The Circuit Court Erred by Holding that the Arbitration Agreement was substantively unconscionable.

This Court's precedent soundly rejects the Circuit Court's holding that the Arbitration Agreement is substantively unconscionable. Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. "The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." *Toney v. EQT Corp.*, 2014 W. Va. LEXIS 757 (W. Va. June 13, 2014) (citing Syl. Pt. 19, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011)).

i. This Court has rejected the Notion that Lack of Equivalent Promises is inherently Unconscionable.

In concluding that the Arbitration Agreement is substantively unconscionable, the Circuit Court relied on a provision of the arbitration agreement that excludes "any action to affect a foreclosure; any action to obtain possession of any property securing the Credit Transaction; any action to obtain possession of any property securing the Credit Transaction; any action for prejudgment injunctive relief or appointment of receiver(s); and any claim where [Nationstar] seeks damages or other relief because of [Plaintiffs] default under the terms of the Credit Transaction." (App. p. 136).² In light of this provision, the Circuit Court held that "the Arbitration Agreement lacks mutual, reciprocal obligations among the parties . . ." *Id.* The notion that lack of equivalent promises deems a contract inherently unconscionable has been soundly rejected by this Court.

² From a practical standpoint, excluding foreclosure and receivership matters from arbitration makes sense, as those creatures of state law need enforcement by Order of the Court and law enforcement to be able to effectuate the remedies provided for therein.

A leading treatise on contract law, *Corbin on Contracts*, acknowledges that when examining whether a contract has been formed, the “concept of ‘mutuality’ is an appealing one. It seems to connote equality, fairness, justice[.]” Joseph M. Perillo, et al., 2 *Corbin on Contracts* § 6.1 at 196-97 (Rev. Ed. 1995). The treatise states:

It was once common for courts to state that mutuality of obligation is necessary for a valid contract; that both parties to a contract be bound or neither is bound; that a contract is void for lack of mutuality.

Id. However the treatise goes on to state that the modern rule of contracts rejects any notion that mutuality is necessary to *form* a contract:

But symmetry is not justice and the so-called requirement of mutuality of obligation is now widely discredited. It is consideration (or some other basis for enforcement) that is necessary, not mutuality of obligation.

Id.

In *Dan Ryan*, this Court incorporated the above treatise and others into West Virginia law, holding:

Our examination of treatises and journals, and of cases from other jurisdictions suggest that . . . parties to contracts frequently challenge the enforceability of arbitration clauses -- clauses which do not impose parallel duties to arbitrate on both parties -- on the grounds that the clauses lack consideration or lack equivalent promises (that is lack mutuality of obligation). However the majority of courts conclude that the parties need not have separate consideration for the arbitration clause, or 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. Thus this Court concluded that the formation of a contract with multiple clauses only requires consideration for the entire contract and not for each individual clause, holding “[s]o 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.” *Id.* at 289, 737 S.E.2d at 558.

Here, the contract was supported by consideration from Nationstar in the amount of the

Loan financed, and the Circuit Court's reliance on this factor contravenes precedent of this Court. Accordingly mutuality of obligation is not required, and the Circuit Court's Order should be reversed and arbitration enforced.

ii. The Circuit Court's Reliance on *State ex rel. Dunlap v. Berger* is misplaced.

In reaching its conclusion, the Circuit Court held that "While Nationstar, as a national corporation, is well suited to absorb the costs associated with resolving a dispute through arbitration, the high costs of arbitration could prevent Plaintiffs from effectively vindicating their rights in the arbitral forum." (App. p. 136). In support of its position, the Circuit Court relied on *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567, S.E.2d 265 (2002), in which this Court held that a trial court should consider whether the unreasonably burdensome costs of arbitration could deter a person from vindicating their rights in assessing unconscionability.

The Court's reliance on *Dunlap*, however, is misplaced. *Dunlap* involved a consumer, James Dunlap, who filed suit against a jewelry retailer alleging that the store engaged in an unconscionable scheme to charge customers for credit life insurance, credit disability insurance, and property insurance when they financed their purchases. Mr. Dunlap claimed that when he purchased and financed a ring from the store, he was not told that he was being charged for the different types of insurances, but instead was instructed to sign a two-page purchasing and financing agreement. Once he discovered the extra charges, he filed suit. Subsequently, the circuit court stayed the proceedings and required the parties to submit to arbitration pursuant to the arbitration clause which was included in the purchasing and financing agreement signed by Mr. Dunlap. *Dunlap* 211 W. Va. 549, 567 S.E.2d 265 *passim*.

As an initial matter, this Court observed in *Dunlap* that the financing agreement was a "contract of adhesion" - in other words, a pre-printed form contract prepared by one of the

parties, in this case, the jewelry retailer. This Court noted that the form was difficult to comprehend and that “the pre-printed parts of the document would probably be seen by the average person as legal gobbledygook.” 211 W.Va. at 554 n.2, 567 S.E.2d at 270 n.2. Ultimately, this Court determined in *Dunlap* that the language in the financing agreement which prohibited punitive damages and class action relief was unconscionable, and therefore, the arbitration clause was unenforceable. *Id.*

The contract involved in the case at bar is substantially different. Although the contract was prepared by Nationstar, it is clear that the terms were negotiated. Furthermore, there is no evidence to suggest that Plaintiffs were not given the opportunity to examine the Arbitration Agreement or that Plaintiffs were under duress when they both signed and dated the Arbitration Agreement. Moreover, Plaintiffs have simply not shown that arbitration would be prohibitively expensive as the plain terms of the Arbitration Agreement suggest that Plaintiffs could ultimately pay **no** costs associated with the arbitration, and no evidence was presented that Plaintiffs could not understand the terms of the Arbitration Agreement. In short, the factors in *Dunlap* are not shown in this case and the Circuit Court erred in denying arbitration and its Order should be reversed.

iii. The Circuit Court Failed To Consider the Plain Terms of the Arbitration Agreement.

In holding that the costs of arbitration could prevent Plaintiffs from vindicating their rights in the arbitral forum, the Circuit Court failed to consider the plain terms of the Arbitration Agreement. As to the text, the Agreement states that Nationstar will “advance the first \$250 of the filing and hearing fees for any claim which [Plaintiff] may file against Nationstar.” That is to say, Nationstar will pay \$250 towards Plaintiffs’ filing of a claim against Nationstar which Nationstar believes is entirely without merit. What’s more, the Agreement states “the arbitrator

will decide whether [Plaintiffs] or [Nationstar] will ultimately be responsible for paying any fees in connection with arbitration.” (App. p. 65). In short, Plaintiffs may ultimately not be responsible for paying *any* fees upon which they base their unconscionability claim. Further, Nationstar has agreed to arbitrate outside the forum of the American Arbitration Association, thereby significantly reducing any costs or fees associated with Arbitration. (App. p. 144). The Circuit Court’s reliance on this factor ignores the plain terms of the Arbitration Agreement, fails to recognize the authority of the arbitrator, and is in error. The Circuit Court’s decision, accordingly, should be reversed.

iv. The Circuit Court Failed to consider that a nearly identical Arbitration Agreement has already been upheld by a West Virginia Court.

A federal Court in West Virginia has enforced a nearly identical arbitration provision, applying West Virginia law to do so. In *Miller v. Equifirst*, No. 2:00-0335, 2006 U.S. Dist. LEXIS 63816 (S.D. W. Va. Sep. 5, 2006), the Court, dispensing with similar claims made as in this case, enforced an arbitration provision that stated:

“At Borrower’s request, Lender will advance the first \$150 of the filing and hearing fees for any claim which the Borrower may file against Lender. The arbitrator will decide which party will ultimately be responsible for paying these fees.”

Id. at *14. This clause closely mirrors the Arbitration Agreement in the case at bar, which reads:

“At Plaintiff’s request [Nationstar] will advance the first \$250 of the filing and hearing fees for any claim which [Plaintiff] may file against [Nationstar]. The arbitrator will decide whether [Nationstar] or [Plaintiff] will ultimately be responsible for paying any fees in connection with arbitration.”

A conclusion that arbitration is cost prohibitive is simply too speculative in light of the fact that Plaintiffs may not be responsible for any costs or fees. Consequently, as in *Miller*, the Arbitration Agreement should be enforced.

VI. CONCLUSION

For all of the reasons described above, Defendant respectfully requests this Court to (1) reverse the decision of the Circuit Court that denied Nationstar's Motion to Compel Arbitration, (2) refer this action to arbitration in accordance with the terms of the Arbitration Agreement, (3) alternatively, refer this matter to arbitration in accordance with the agreement Nationstar has provided at the hearing of this matter before the Circuit Court and as shown on the transcript of that hearing included herewith in the Appendix, and (4) stay this action pending the resolution of arbitration.

Dated: May 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2015, a true and correct copy of the foregoing Petitioner's Brief was sent via first class mail, postage prepaid, to the following counsel of record:

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