

**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 REPLY BRIEF

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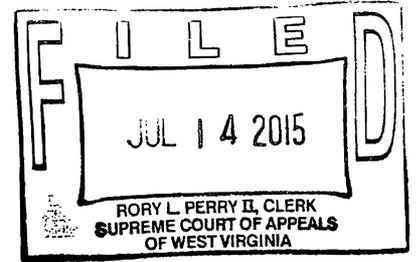


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For purposes of this Reply Brief, Defendant Nationstar Mortgage, LLC f/k/a Centax Home Equity Company (“Nationstar” and/or “Defendant”) incorporates its Assignments of Error, Statement of the Case, Statement Regarding Oral Argument and Decision, and Summary of Argument as if set forth herein. To the extent not addressed herein, Nationstar believes that its arguments set forth in its opening Petitioner’s Brief fully address Respondents’ arguments in their Brief, and no further response is necessary.

I. ARGUMENT

A. **There is a Presumption of Validity for Arbitration Agreements.**

There is 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 (“Arbitration Agreement” or “Agreement”), this case is an example of where arbitration should be compelled.

In attempting to undermine this presumption and shift the burden to Nationstar to prove the validity of the Arbitration Agreement, as the Circuit Court improperly did, Plaintiffs argue that the Supreme Court’s ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) somehow eliminated that presumption. Simply, Plaintiffs are wrong. Nowhere in the Supreme Court’s ruling in *Concepcion* did the Supreme Court invalidate the presumptive legitimacy of arbitration agreements. In fact contrary to the unsupportable position of Plaintiffs, the *Concepcion* Court, in discussing the primary substantive provision of the Federal Arbitration Act, reinforced the liberal federal policy in favor of arbitration:

We have described this provision as reflecting both a “liberal federal policy favoring arbitration,” *Moses H. Cone, supra*, at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765

...

the FAA was designed to promote arbitration. They [the Supreme Court's decisions] have repeatedly described the Act as “embod[y]ing [a] national policy favoring arbitration,” *Buckeye Check Cashing*, 546 U.S., at 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, and “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,” *Moses H. Cone*, 460 U.S., at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765; see also *Hall Street Assocs.*, 552 U.S., at 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254. Thus, in *Preston v. Ferrer*, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results,’ ” which objective would be “frustrated” by requiring a dispute to be heard by an agency first. 552 U.S., at 357-358, 128 S. Ct. 1396, 170 L. Ed. 2d 254. That rule, we said, would “at the least, hinder speedy resolution of the controversy.” *Id.*, at 358, 128 S. Ct. 1396, 170 L. Ed. 2d 254.

Concepcion, 131 S. Ct. at 1747-49.

Again, 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), thus obviating the presumption and improperly placing the burden on Nationstar to prove enforceability.

The Circuit Court’s analysis suggesting 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 is an improper application of law. It is the Plaintiffs’ burden to challenge the presumption. Because no evidence to the contrary was presented (as noted in the opening Brief, 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), the presumption remains that the Arbitration Agreement is valid and should thus have been enforced. To hold otherwise (as the Circuit Court did) would improperly place a requirement on

proponents of arbitration agreements to prove a negative (e.g., that borrowers were not prohibited from reading the documents), a requirement that Nationstar has nowhere found in arbitration enforcement jurisprudence.

B. The Arbitration Agreement is not Procedurally Unconscionable.

In recognizing the failings of a *per se* invalidation of arbitration agreements in adhesion contracts, the *Concepcion* Court noted that “the times in which consumer contracts were anything other than adhesive are long past.” *Concepcion*, 131 S. Ct. at 1747-49 (citing *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)). This is consistent with this Court’s holding in *Brown v. Genesis Healthcare Corp.* (Brown I), 228 W. Va. 646, 724 S.E.2d 250, 286 (2011) (quoting *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 774 (2005)), in which this Court held that “[t]he bulk of the contracts signed in this country are contracts of adhesion,’ and are generally enforceable because it would be impractical to void every agreement merely because of its adhesive nature.” This Court continued that, “[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.* (citations omitted).

“[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 (2009)). Since an adhesion contract is not inherently unconscionable, the Court should analyze Plaintiffs’ purported procedural inadequacies to determine whether the Agreement is unconscionable. When doing so, the inescapable conclusion is that Plaintiffs’ arguments are without merit.

Seemingly conceding that adhesion contracts are not *per se* invalid, Plaintiffs (as did the Circuit Court) argue that the arbitration agreement was procedurally inadequate because: (1) there is no evidence it was not bargained for, and (2) there was a disparity in relative sophistication such that Plaintiffs and Defendant did not occupy positions of equal bargaining power. Plaintiffs' claims, and the Circuit Court's improper findings, are not new legal theories. In fact, they have been heard and rejected by various federal courts throughout West Virginia.

1. *Plaintiffs Lack of Involvement in the Drafting of the Agreement Does not Make it Unconscionable*

Plaintiffs argue, and the Circuit Court found, that the Agreement was drafted by Nationstar, who "routinely drafts contracts relating to mortgage loans" (App. p. 136). This, however, is nothing more than an argument that adhesion contracts are presumptively unconscionable. As noted above, however, adhesion contracts are generally enforceable. *Brown I*, 724 S.E.2d at 286 (quoting *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 774 (2005)). Courts in West Virginia routinely uphold arbitration provisions that are not drafted by the party opposing arbitration. See, e.g., *Baker*, 2010 U.S. Dist. LEXIS, at *2, 15; *Nichols v. Springleaf Home Equity, Inc.*, 2012 U.S. Dist. LEXIS 31402, at *8 – 14 (S.D. W.Va. Mar. 8, 2012) (finding the arbitration provision in a contract for a real estate loan was validly formed); *Montgomery v. Credit One Bank, NA*, No. 5:11cv00714, 2012 U.S. Dist. LEXIS 11283, at *5-15 (S.D. W.Va. Jan. 31, 2012) (finding an arbitration agreement in a credit card contract not unconscionable). Consequently, the fact that Plaintiff did not draft the Agreement does not support a finding of procedural unconscionability.

2. *Plaintiffs' Allegation that the Loan Contract was not Explained to them Does not Make it Procedurally Unconscionable*

Plaintiffs claim that the loan contract was not explained to them is equally unavailing, as it has been rejected by numerous federal courts in West Virginia. For example, in *Nichols*, a

case dealing with a “secured real estate loan,” the plaintiffs advanced, and the Court rejected, a very similar argument. *Nichols*, 2012 U.S. Dist. LEXIS 31402, at *2 (noting that the loan was a secured real estate loan). There, the plaintiffs argued that the arbitration clause was unenforceable because “they were rushed through signing.” *Id.* at *8. In assessing this claim, the court first noted that the plaintiffs “initialed each page of the Contract.” *Id.* at *9. Second, the court found that the plaintiffs “provide[d] no evidence of [] coercion” and “Defendant’s agent did not refuse [plaintiff] an opportunity to read the Contract.” *Id.* To the court, these facts defeated the plaintiffs’ claims that being rushed through signing invalidated the agreement. Similarly, in the present case, the Arbitration Agreement contains both Plaintiffs’ full signatures. Plaintiffs have never pled that they were refused the opportunity to read the contract. Plaintiffs simply allege that they did not understand the Agreement. That, however, in and of itself, cannot form the basis for invalidating an otherwise valid contract. In fact, courts have repeatedly recognized that “there is no requirement that the more sophisticated party to a contract offer the less sophisticated party an oral explanation of the terms of the contract.” *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 638 (S.D. W.Va. 2001), *aff’d* 303 F.3d. 496 (4th Cir. 2002); *see also Miller v. Equifirst*, No. 2:00-0335, 2006 U.S. Dist. LEXIS 63816, at *33 (S.D. W. Va. Sept. 5, 2006) (“Contrary to plaintiffs’ suggestion, [the loan closer] was under no duty to orally explain the terms of the contract.”). As in *Nichols*, such a transaction is not procedurally unconscionable.

3. *Plaintiffs’ Failure to Bargain for Terms in the Agreement Does Not Make it Unconscionable*

Plaintiffs next argue, and the Circuit Court found that they did not bargain for the terms in the Arbitration Agreement and, thus, it was procedurally unconscionable. Once again, however, this argument has been soundly rejected by courts in West Virginia. For example, in

Baker v. Green Tree Servicing, LLC, the court confronted the argument that the terms in the arbitration agreement at issue were not bargained for, rendering the agreement unconscionable. *Baker*, 2010 U.S. Dist. LEXIS 31738 at *11. In response, the court first recognized that “West Virginia law finds a presumption ‘that an arbitration provision in a written contract was bargained for.’” *Id.* (quoting *Bd. of Educ. Of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473 (1977)). To the court, this presumption was bolstered by the fact that loan contract included numbers that, in fact, appeared to be bargained for – such as the annual percentage rate. *Id.* at *13. This was supported by “experience,” which “informs the Court that such figures may be subject to the bargaining of the parties.” *Id.* Moreover, the court noted that in the context of a standard form, there is often “no bargaining by either side.” *Id.* As a result, the court found that allegations of inadequacy of bargaining positions did not support a finding of procedural unconscionability. Similarly, Plaintiffs’ allegations here fail. Plaintiffs have provided no evidence, by affidavit or otherwise, to confront the presumption of bargaining in the *loan contract* or the commonsensical position that some terms of the loan were a result of bargaining. As in *Baker*, the Arbitration Agreement is not procedurally unconscionable.

4. *There was no Disparity in Bargaining Power that Would Render the Agreement Unconscionable*

Plaintiffs’ next claim (and the Circuit Court’s next finding) of procedural unconscionability – that they and Defendant did not occupy equal bargaining power – should also be rejected. As discussed in *Miller*, 2006 U.S. Dist. LEXIS 63816, at *31, often times “bargaining power of consumers and commercial lenders is unequal.” Despite this notion, however, the court in *Miller* did not believe the relationship among such parties was “grossly inadequate” or that it supported a finding of unconscionability. *Id.* Rather, the court found this potentially uneven bargaining power mitigated by the fact that the plaintiff was not “illiterate or

[] unable to read the documents presented [] at closing.” *Id.* Moreover, the court indicated that a plaintiff has less of a claim of unequal bargaining power where the plaintiff has the ability to read the documents, but affirmatively chooses not to seize that opportunity. *Id.* In the present case, while Plaintiffs may claim that they are “unsophisticated in financial matters,” they do not claim that they could not have read the Agreement.

Moreover, like in *Miller*, although Plaintiffs allege that the closing agent did not explain the loan documents, Plaintiffs point to no “specific behavior on the part of the closing agent that interfered with [Plaintiffs’] ability...to inform [themselves] [] of the contents of the documents.”

Importantly, even though Plaintiffs filed a last-ditch Affidavit the day of the hearing before the Circuit Court on this matter, nowhere in that Affidavit did/do Plaintiffs contend that (1) they were prohibited from reviewing the documents they signed, (2) they were unable to understand the terms of the agreements if they read them, (3) they requested to read them and were denied, (4) they requested an explanation of the terms of the documents and were not provided them, or (5) they requested to opt out of any part of the agreements. In the face of the lack of any of this evidence, it was clearly error for the Circuit Court to find that there was such a disparity that the arbitration agreement was invalid.

Consequently, as in *Miller*, Plaintiffs have shown no disparity in bargaining power sufficient to find unconscionability. In fact, courts routinely uphold arbitration provisions in similar contexts. *See, e.g., Nichols*, 2012 U.S. Dist. LEXIS 31402 at *2, 13-14 (enforcing an arbitration provision signed by a borrower related to a secured real estate loan); *Heller v. TriEnergy, Inc.*, No. 5:12cv46, 2012 U.S. Dist. LEXIS 93934, at *2-4, *39 (N.D. W.Va. July, 9, 2012) (enforcing an arbitration provision between an energy company and two laypersons who leased their land for energy exploration); *Baker*, 2010 U.S. Dist. LEXIS 31738 at *2, 15

(enforcing an arbitration provision signed by borrower for the purchase of a manufactured home).

C. The Arbitration Agreement is not Substantively Unconscionable.

In a heretofore advanced argument, Plaintiffs contend in a footnote that since Nationstar will not agree to use the AAA Consumer Rules, which are not provided for under the terms of the Arbitration Agreement, “AAA cannot arbitrate this dispute and there is likely no available forum in which the Wests can bring their claims.” (Brief, p. 19, n.2). Plaintiffs, however, never advanced this argument before the Circuit Court, and cannot now seek to argue this for the first time in a Response Brief on appeal. *Brown v. Rubenstein*, 2013 W. Va. LEXIS 1405 , * 7 (2013) (citing *Whitlow v. Bd. of Educ. Of Kanawha Cnty.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“The record does not indicate that petitioner raised these arguments before the circuit court and, therefore, we decline to analyze and discuss them. We generally do not consider issues that have been raised for the first time on appeal that were not decided in circuit court)); *c.f.*, *Burkhamer v. City of Montgomery*, 2014 W. Va. LEXIS 585, n.4 (2014).

That said, with regard to the applicability of the Consumer Rules, “AAA has the discretion to apply or not to apply the *Consumer Arbitration Rule*, and the parties are able to bring any disputes concerning the application or non-application of the Rules to the attention of the arbitrator.” American Arbitration Consumer Rules, July 9, 2015, available at https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTAGE2021424&_afLoop=1167159718078894&_afWindowMode=0&_afWindowId=dzmupie7d_52#%40%3F_afWindowId%3Ddzmupie7d_52%26_afLoop%3D1167159718078894%26doc%3DADRSTAGE2021424%26_afWindowMode%3D0%26_adf.ctrl-state%3Df5evtgps2_4. That, of course, presupposes that the parties submit the matter to AAA for arbitration as Nationstar has attempted to do here. As the AAA provides, under the specific Rules advocated for by Plaintiffs, it is up to

AAA and the arbitrator to determine the applicability, or not, of the Consumer Rules. Plaintiffs, however, refuse to proceed in any fashion other than applying the Consumer Rules (and, in that light, seemingly would not agree to proceed with arbitration should AAA or the arbitrator decide that the Consumer Rules do not apply). Frankly, a simple resolution of this matter could/can be to compel arbitration and allow AAA or the arbitrator to decide, as the Rules provide, whether the Commercial Rules, as provided for in the Arbitration Agreement, or the Consumer Rules, as advocated by Plaintiffs, should apply. Nationstar would agree to abide by the decision of AAA in such an instance.

In addition, while Plaintiffs profess that the filings fees of AAA presumptively prohibit them from advancing their claims, Plaintiffs (and the Circuit Court) wholly fail to address that Nationstar offered to arbitrate outside the forum of the American Arbitration Association (App. p. 144), thereby significantly reducing any costs or fees associated with Arbitration. Plaintiffs, however, will not agree to any arbitration unless all fees and costs are borne by Nationstar – in fact, Plaintiffs criticize Nationstar for objecting to a *per se* requirement that it be required to pay all fees and costs, even in a situation wherein Plaintiffs’ claims are found meritless. Plaintiffs’ position is inherently inequitable, and finds no support in the law. Plaintiffs have offered no caselaw to suggest this as the standard.

In fact, Plaintiffs do not state anywhere that they cannot pay any arbitration fees or costs. Plaintiffs only state in an unsubstantiated and conclusory fashion in the Affidavit filed the day of the hearing that they “cannot afford substantial arbitration costs” and “if forced to pay them [they] will likely have to abandon their claims.” (App. p. 130) (emphasis added). These conclusory eleventh hour statements are an admission that arbitration will not, presumptively, prohibit prosecution of Plaintiffs’ claims, and an admission that Plaintiffs can pay arbitration

costs and fees, just not “substantial fees.” Of course, what is substantial varies from individual to individual and Plaintiffs provide no evidence of what fees and costs they may be able to afford. This is particularly significant given the offer of Nationstar to proceed outside the forum of the American Arbitration Association, thus eliminating the filing fees of which Plaintiffs primarily complain in their Brief, and “substantially” reducing any costs of arbitration. *See Heller*, 2012 U.S. Dist. LEXIS 93934 at *34 (rejecting a litigant’s argument that arbitration should be not be compelled on the ground that arbitration “‘might force [him] to pay thousands of dollars in up-front fees and costs before the start of litigation, effectively precluding him from vindicating his rights or pursuing claims in arbitration given his financial situation.’” According to the Court, even if the allegation was true, the plaintiff “failed to provide any *evidence* that would lead this Court to find that the costs would impose upon him an unconscionably impermissible burden or deterrent.” *Id.* (emphasis added). Similarly, in the present case, while the Plaintiffs have *argued* that costs (which may ultimately be wholly or substantially borne by Nationstar) serve as a barrier to the vindication of their rights, as noted above Plaintiffs have failed to produce *evidence* on inability to pay at all, or inability to vindicate their rights if made to pay).

In short, Plaintiffs have not shown that the allegedly high cost of arbitration creates substantive unconscionability, and the Circuit Court erred in finding as such.

II. CONCLUSION

For all of the reasons described above, as well as those set forth in Nationstar's opening Brief, Nationstar 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 for 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: July 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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