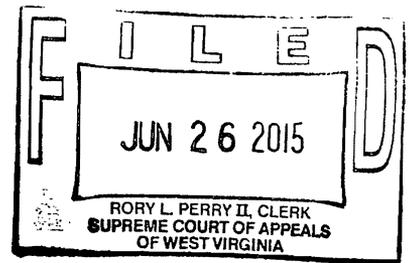


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**



**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.

RESPONDENTS' BRIEF

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This appeal is an attempt by Petitioner Nationstar Mortgage, LLC f/k/a Centex Home Equity Company (Nationstar) to use an arbitration clause as a weapon to deprive Respondents Adam and Bethany West (the Wests) of their right to have their defenses to an illegal foreclosure heard in any forum. Nationstar urges this Court to enforce the clearly improper arbitration rider, thereby allowing it to proceed with the illegal foreclosure.

The instant suit arises out of Nationstar's predatory mortgage lending, wherein it solicited the Wests into an exploitative mortgage loan based on a fraudulent appraisal. Nationstar provided no disclosures prior to closing the loan (including no disclosure of the mandatory form arbitration rider), and rushed the Wests through the closing, so that the Wests had no opportunity to read or understand the documents. Ultimately, the Wests fell behind on their unreasonably high mortgage payments. Determined to save their home, however, they sent the total amount that Nationstar said was needed to bring the loan current, \$1,812.02, to Nationstar. However, despite its receipt of the full reinstatement amount, in clear violation of the contract, Nationstar foreclosed on the Wests' home. The Wests filed this suit to enforce their rights under the contract and West Virginia law to save their family home from the illegal foreclosure.

In response—despite the fact that the arbitration rider permits Nationstar to pursue any remedies it desires in court—Nationstar attempts to force the Wests into high-priced commercial arbitration, knowing that, if successful, this will render it impossible for the Wests to pursue their claims. Carefully reviewing the arbitration rider, the evidence, and the law, the circuit court determined that the arbitration rider was unconscionable and thus could not be enforced. In contrast to Nationstar's attempt to create new per se rules of law, the circuit court's well-reasoned opinion is simply a routine application of the facts of this particular case to the well-settled law of contracts.

Because the circuit court did not err, the ruling should be affirmed, permitting the Wests to reach an ultimate decision on the merits of their claims.

I. STATEMENT OF THE CASE

Respondents Adam and Bethany West offer the following statement of the case as necessary to correct inaccuracies and omissions in the statement of the case provided by the Petitioner Nationstar. See W. Va. R. App. P. 10(d).

This case arises out of a predatory lending scheme in which Nationstar, a large, national lender, aggressively solicited the Wests to refinance their home mortgage. In order to convince them to enter a loan that exceeded the actual value of their home, Nationstar hired Defendant Jeffrey Moore to provide an inflated appraisal to misrepresent the value of the property to the Wests. (App. 38.) Nationstar further forced the Wests into an adjustable rate mortgage, falsely promising that they could later refinance back into a fixed rate. Ultimately, the loan placed the Wests in a worse financial position than their prior financing, including increasing their monthly mortgage payments and transferring them into a higher, adjustable interest rate, without any meaningful benefit to the Wests. (App. 37, 38.) Nationstar did not provide any documents to the Wests prior to their loan closing; as a result many of the ultimate terms were a surprise.

Nationstar rushed the Wests through the loan closing, which took only fifteen to twenty minutes. (App. 130, 131.) At the closing, Wests were simply presented with a large stack of documents and told where to sign. Nationstar did not provide any meaningful explanation of the documents or give the Wests an opportunity to review them. (App. 131.) Unbeknownst to the Wests, a document entitled “Arbitration Agreement” was obscured in the stack of papers. (Id.) No one pointed out this document to the Wests, told the Wests what “arbitration” was, or explained

the import of what they were signing. Indeed, the Wests were entirely unaware that they had signed such a document. (Id.)

Ultimately, faced with the high payment and their inability to refinance the loan, the Wests fell behind on their mortgage. To save their home from foreclosure, the Wests exercised their right to reinstate the mortgage, sending Nationstar the reinstatement amount requested by Western Union. Despite receiving this payment, Nationstar illegally proceeded with foreclosure on the Wests' home. (App. 41.)

On May 2, 2013, in an effort to save their family home, the Wests filed a complaint in the Circuit Court of Putnam County, West Virginia, alleging eight counts against Nationstar and the defendant appraiser arising out of the origination and servicing of the Wests' mortgage loan. (App. 1.) On July 25, 2013, Nationstar removed the complaint to the United States District Court for the Southern District of West Virginia. Thereafter, the Wests filed an amended complaint to correct the inadvertent misidentification of the defendant appraiser. (App. 20.) The case was remanded back to the Circuit Court of Putnam County on October 21, 2013. (App. 54.)

On August 1, 2014, Nationstar filed a motion to compel arbitration in the circuit court. (App. 56.) On October 31, 2014, the Wests filed their second amended complaint adding two additional counts challenging the arbitration rider as unconscionable and specifically challenging the delegation provision as unconscionable.¹ (App. 35.) On November 21, 2014, the Wests filed an affidavit with the circuit court, attesting, under oath, that they could not pay the high arbitration

¹ Nationstar does not argue the delegation provision is enforceable or otherwise raise an assignment of error on this issue in the appeal, thereby waiving the issue on this appeal. However, the delegation provision has the same procedural and substantive unconscionability problems as the arbitration rider as a whole. That is, the same circumstances evidencing a lack of meeting of the minds are present, and the terms are substantively unconscionable as they purport to require the Wests to pay a \$3,250 filing fee just to have an arbitrator rule on the enforceability of the arbitration agreement. Regardless, this issue is not before this Court. See Quackenbush v. Quackenbush, 159 W.Va. 351, 222 SE.2d 20 (1976).

costs required by the arbitration rider, that they did not know they signed the arbitration rider, that Nationstar did not provide pre-closing disclosures or any explanation during the closing regarding the documents the Wests were instructed to sign, and that the closing only lasted fifteen to twenty minutes. (App. 130-131.) Nationstar submitted no affidavit or evidence other than the arbitration document itself.

The arbitration document states:

Dispute is any case, controversy, dispute, tort, disagreement, lawsuit or claim now or hereafter existing . . . includ[ing], but not limited to, anything that concerns: this agreement, any Credit Transaction including, but not limited to, the origination or servicing of such Credit Transaction; any past, present, or future insurance, service, or product that is offered in connection with a Credit Transaction; any documents or instruments that contain information about any Credit Transaction, insurance, service, or product; and any act or omission by any of Us regarding any claim. A dispute does not include: any action to effect a foreclosure; 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 We seek damages or other relief because of Your default under the terms of the Credit Transaction The arbitration shall be administered by the American Arbitration Association under the Commercial Arbitration rules then in effect.

(App. 65.) However, the American Arbitration Association (AAA) Consumer Arbitration Rules (Consumer Rules) explain:

[A] consumer agreement [is] an agreement between an individual consumer and a business where the business has a standardized, systemic application of arbitration clauses with customers and where the terms and conditions . . . are non-negotiable or primarily non-negotiable in most or all of its terms, conditions features or choices.

American Arbitration Association, Consumer Arbitration Rules 9 (2014), available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&>. The AAA Consumer Rules go on to specifically cite finance agreements, including mortgages, as an example of a contract that meets the consumer definition and is thus covered by the Consumer Rules. Id.

On November 21, 2014, a hearing was held on Nationstar's motion to compel arbitration. At the hearing, the Wests offered to arbitrate their claims if Nationstar would agree to use the AAA Consumer Rules, rather than the AAA Commercial Arbitration Rules (Commercial Rules), which cover disputes regarding business transactions. (App. 149.) The Consumer Rules were designed, in part, to remove cost barriers and protect against other inequities present when consumers are forced to arbitrate under Commercial Rules, including a lack of ability for discovery. In response to this offer, Nationstar incorrectly asserted the Consumer Rules would not encompass the instant dispute. Nationstar additionally insisted on the use of the much more expensive Commercial Rules, even though the Wests are admittedly consumers, because "[f]irst, the plain text of the arbitration agreement obviously states that it should be arbitrated under the commercial rules Second, the consumer rules place nearly the entire cost on [Nationstar]," thus admitting that the agreement, as it stands, would place considerable costs on the Wests. (App. 152, 153.)

On January 15, 2015, the circuit court entered the Final Order Denying Motion to Compel Arbitration (the Order), which is currently on appeal. The Order held that the arbitration rider is both procedurally and substantively unconscionable and thus unenforceable. (App. 132-137.) In the six page Order, the circuit court found that the "loan agreement between Plaintiffs and Nationstar is a form contract drafted by Nationstar and a rider attached to the loan agreement includes an arbitration clause" that requires arbitration before the AAA under the Commercial Rules. (Id.) The circuit court further found that the arbitration rider was not specifically negotiated for, in light of the evidence presented by the parties. The circuit court went on to find that the costs of commercial arbitration place the Wests at a "severe disadvantage, which could prevent the Wests from vindicating their rights in the arbitral forum." (Id. at 136.) Additionally, the circuit court found the "arbitration agreement lacks mutual, reciprocal obligations among the parties and

that the agreement is unduly favorable to Nationstar.” (Id.) The circuit court, correctly applying the law, found that arbitration riders may be “declared unenforceable upon the same grounds at law or equity for the revocation of any contract.” (Id. (quoting AT&T Mobility v. Concepcion, 131 S.Ct. 1740, 1746 (2011).) The circuit court further correctly instructed that the unconscionability analysis in West Virginia must take into consideration the totality of the circumstances of any given case and find both procedural and substantive unconscionability, using a sliding scale. (Id.) The circuit court then applied the facts of the instant case to the law and found the arbitration rider to be unconscionable and unenforceable in the circumstances before it. (Id.)

In a final attempt to evade any liability for its clear legal violations, Nationstar now appeals the Order of January 15, 2015, to seek this Court’s assistance in enforcing the unconscionable arbitration clause.

II. SUMMARY OF THE ARGUMENT

This appeal does not involve any novel questions of law. Rather, the appeal simply concerns the circuit court’s straightforward application of principles of well-settled law to the specific facts of this case. Petitioner Nationstar’s arguments ignore the totality of the circumstances analysis required by an inquiry into unconscionability and instead asks this Court to parse the circuit court’s Order into a series of per se legal rules. A basic review of the circuit court’s Order demonstrates that the circuit court did not make any such rulings, and instead appropriately applied West Virginia’s law of contracts.

Nationstar advances two assignments of error in response to the circuit court’s Order denying the motion to compel arbitration. Nationstar argues, first, that the circuit court erred in finding the arbitration rider at issue procedurally unconscionable and, second, that the circuit court erred in finding the arbitration rider substantively unconscionable. There is no disagreement that

the arbitration rider may be declared unenforceable upon common law grounds for the revocation of any contract, including unconscionability. See Concepcion, 131 S.Ct. 1740.

Although, under common law, both procedural and substantive unconscionability are required for a court to invalidate and refuse to enforce a contract, both need not be present to the same degree. Rather, a “sliding scale” is employed in determining unconscionability: “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required . . . and vice versa.” Syl. Pt. 9, Brown v. Genesis Healthcare Corp. (Brown II), 229 W.Va. 382, 729 S.E.2d 217 (2012). Accordingly, procedural and substantive unconscionability analyses cannot be viewed in separate vacuums, but must be analyzed together.

When this appropriate analysis is undertaken, it is clear that the circuit court’s Order should be affirmed. First, the circuit court appropriately examined the procedural aspects of the transaction. This Court has noted that “[p]rocedural unconscionability often begins with a contract of adhesion.” Brown II, 229 W.Va. at 393, 729 S.E.2d at 228. Analyzing the contract at issue here, the circuit court found that the form contract was not formed by a meeting of the minds because the arbitration rider was not bargained for by the Wests, and instead unilaterally drafted and imposed by Nationstar without explanation. Further, the circuit court found that the clause contained no opt-out provision, conspicuous or otherwise. The circuit court also properly found the disparity of the parties’ sophistication levels in financial transactions supported a finding of procedural unconscionability. (App. 135-136.) In light of these facts, the circuit court did not err in finding the arbitration agreement procedurally unconscionable.

Second, the circuit court appropriately found the element of substantive unconscionability to be met. Substantive unconscionability involves unfairness in the contract itself; the analysis requires consideration of “whether a contract term is one-sided and will have an overly harsh effect

on the disadvantaged party.” State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders, 228 W.Va. 125, 137, 717 S.E.2d 909, 921 (2010) (quoting Brown ex rel. Brown v. Genesis Healthcare Corp. (Brown I), 228 W. Va. 646, 684, 724 S.E.2d 250, 288 (2011), cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012)). The circuit court found the arbitration rider to be substantively unconscionable largely on two grounds: a complete lack of mutuality and the threat of oppressive cost to the Wests that would bar them from vindicating their rights in any forum. The plain language of the arbitration rider states that, although the Wests are required to bring any claim whatsoever in an arbitral forum, Nationstar is exempted from the requirement to arbitrate any of its potential claims including, “any claim where [Nationstar] seek[s] damages or other relief because of [the Wests’] default under the terms of the Credit Transaction.” (App. 65.) The circuit court properly found that this complete lack of mutuality supports a finding of substantively unconscionability. (App. 136.) The circuit court also properly found that the threat of oppressive costs associated with arbitration supported a finding that the arbitration rider was substantively unconscionable. The mere potential of being liable for these costs has a chilling effect on the Wests’ pursuit of their claims to save their home. As this Court has articulated, it is not only high costs that are problematic, but also the threat of such costs, which could deter consumers from vindicating their rights. State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002). Relying on a record replete with evidence of the high costs of commercial arbitration required by the arbitration rider, and in light of Nationstar’s refusal to agree to arbitrate under the Consumer Rules or other agreed upon terms to protect the Wests from excessive costs, the circuit court rightly found that the remote possibility the arbitrator might order the costs be paid by Nationstar was not enough to prevent the threat and real possibility that the Wests would be subjected to oppressive costs that would bar them from pursuing their claims. Accordingly, the

circuit court appropriately found the arbitration rider to be one-sided in favor of Nationstar, placing the Wests at a severe disadvantage, and, thus, substantively unconscionable. (App. 136.)

After undertaking this analysis and applying the sliding scale approach, the circuit court appropriately held that the arbitration rider, in light of all of the circumstances and evidence, was unconscionable and unenforceable. Because the circuit court appropriately and carefully applied this Court's jurisprudence, the circuit court's Order should be affirmed, allowing the Wests to proceed toward a decision on the merits of their claims.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Wests do not believe oral argument is necessary in this matter as the circuit court's decision is well supported by the record and consistent with this Court's jurisprudence on the subject of unconscionability. To the extent the Court would find oral argument helpful, the Wests believe oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate as this case concerns an issue of settled law. W. Va. R. App. P. 19.

IV. ARGUMENT

A. Standard of Review

The appellate standard of review for an appeal of an order denying a motion to compel arbitration is de novo. See Credit Acceptance Corp. v. Front, 231 W.Va. 518, 525, 745 S.E.2d 556, 563 (2013); Syl. Pt. 1, Ewing v. Bd. of Educ. of the Cnty. of Summers, 202 W.Va. 228, 503 S.E.2d 541 (1999).

B. There Is No Special Presumption of Validity for Arbitration Agreements.

As a preliminary matter, Nationstar incorrectly contends that there is a presumption of validity for arbitration agreements. (Pet'r's Br. 11.) As support for this contention, Nationstar cites State ex rel. Clites v. Clawges, 224 W.Va. 299, 685 S.E.2d 693 (2009), and two unpublished federal court decisions that are not binding, precedential, or even instructive. As the Supreme Court

of the United States explicitly held just one year after Clites, “courts must place arbitration on an **equal footing** with other contracts.” Concepcion, 131 S. Ct. at 1745 (emphasis added). In accordance with the principal that arbitration agreements are worthy of the same weight as any contract, the Court went on to say the Federal Arbitration Act “permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract.” Id. at 1746 (internal quotations omitted). In short, there is no more presumption for the validity of arbitration agreements than for any other contract. For Nationstar to imply there is a presumption of validity for arbitration agreements above and beyond the presumption afforded any contract is misleading and legally incorrect. Instead, as this Court has repeatedly held, courts are to “treat arbitration agreements like any other contract” and not to “favor or elevate arbitration agreements to a level of importance above all other contracts.” Syl. Pt. 1, State ex rel. Ocwen Loan Servicing, LLC v. Webster, 232 W.Va. 341, 752 S.E.2d 372 (2013).

C. The Record Demonstrates Both Procedural And Substantive Unconscionability in the Arbitration Rider, And the Circuit Court Properly Held the Arbitration Rider Invalid.

This Court has defined the contract defense of unconscionability as an “overall and gross imbalance, one-sidedness or lop-sidedness in a contract” that justifies a court’s refusal to enforce a contract as written. Syl. Pt. 4, Brown II, 229 W. Va. 382, 729 S.E.2d 217. “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” Brown II, 229 W. Va. at 391, 729 S.E.2d at 226(quoting Williams v. Walker–Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). “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. 3, Troy Min. Corp. v. Itmann Coal Co., 176 W. Va. 599, 346 S.E.2d 749 (1986).

Thus, in considering whether the arbitration rider at issue is unconscionable, the Court considers both the substantive terms of the arbitration rider and the procedural fairness surrounding the circumstances under which the Wests entered into it. See Richmond Am. Homes, 228 W. Va. at 136, 717 S.E.2d at 920.

A contract 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. 3, Webster, 232 W.Va. 341, 752 S.E.2d 372. In applying this doctrine to arbitration clauses, this Court has explained:

The doctrine of unconscionability . . . fits the unilateral arbitration clause wonderfully well. Its essential elements have been held to be 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. Both elements are present in the case of unilateral arbitration clause. First, its very nature is such that a person who is not its beneficiary will not agree to it, except when forced to accept it or ignorant of its true purpose and effect. Second, the advantage the clause gives to its beneficiary is most unreasonable.

Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 290, 737 S.E.2d 550, 559 (2012) (internal quotations omitted). The circuit court’s Order denying Nationstar’s motion to compel arbitration is clearly reasoned and fits well within this Court’s jurisprudence. Accordingly, this Court should affirm the Order of the circuit court.

1. The Circuit Court Did Not Err in Holding the Arbitration Rider Procedurally Unconscionable.

In considering procedural unconscionability, this Court has directed that the focus should be on:

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.

Syl. Pt. 10, Brown II, 229 W.Va. 382, 729 S.E.2d 217.

Further, this Court has noted that “courts are more likely to find unconscionability in consumer transactions” and particularly noted that “[p]rocedural unconscionability often begins with a contract of adhesion.” Brown II, 229 W. Va. at 393, 729 S.E.2d at 228. While not every contract of adhesion is unconscionable, if the contract of adhesion is coupled with “an imbalance in bargaining power, absence of meaningful choice, unfair surprise, or sharp or deceptive practices,” a court may find procedural unconscionability. Brown I, 228 W. Va. at 682-83, 724 S.E.2d at 286-87.

Nationstar, again, attempts to take a broad holding discussing several distinct factors and break them into individual grounds for the circuit court’s holding in an attempt to invalidate each reason. In this case, however, the whole is greater than the sum of its parts. In the circuit court’s analysis, each factor for or against a holding of unconscionability must be considered within the full facts and circumstances of the contract formation process.

It is uncontested that the arbitration rider at issue is a contract of adhesion drafted by Nationstar. (Pet’r’s Br. 10.) Nationstar claims, without citation to any evidence whatsoever, that “[a]lthough the contract was prepared by Nationstar, it is clear that the terms were negotiated.” (Pet’r’s Br. 18.) There is no factual basis for this assertion in the record. In contrast, the Wests have presented uncontested evidence that they had no opportunity to review the arbitration rider prior to the closing; that the arbitration rider was contained in a stack of papers prepared by and

provided by Nationstar; that they were unaware they signed an arbitration rider; that the closing was conducted in a hurried manner with the entire process lasting about fifteen to twenty minutes; and that the person conducting the closing simply instructed them on where to sign the documents without explaining or discussing the terms with them. (App. 130-131.)

In addition to analyzing the circumstances of the execution, the circuit court also looked at the agreement itself as part of its procedural unconscionability analysis. The circuit court compared the agreement at hand to the agreement in Webster. The agreement in Webster conspicuously stated the consumer could opt out of arbitration, and the lender would still make the loan. Webster, 232 W.Va. 341, 752 S.E.2d 372. The circuit court acknowledged that the arbitration agreement here did not have language, conspicuous or otherwise, that the Wests “could reject the arbitration agreement and the lender would not refuse to complete their loan due to such refusal.” Id. at 358, 752 S.E.2d at 389. This is important because it supports the conclusion that the agreement was a true contract of adhesion; that is, that this arbitration rider was clearly a take-it-or-leave-it proposition. The circuit court went on to find a “significant disparity with respect to the level of sophistication in financial matters” between the parties, explaining that “[w]hile the Plaintiffs/debtors in this case are unsophisticated in financial matters, Nationstar is a national corporation that routinely drafts contracts relating to mortgage loans.” (App. 136.) Ultimately, after reviewing the record, it was clear that that “[the Wests] were simply not in a position to fully understand the fact that they were relinquishing the right to utilize the court system in signing the arbitration agreement.” (App. 136.) Simply put, the circuit court found, and the record supports, that there was no “real and voluntary meeting of the minds’ of the parties at the time that the contract was executed.” Brown I, 228 W.Va. at 681, 724 S.E.2d at 285. Accordingly, the

circumstances of the contract formation, taken in total, support the circuit court's finding that there was no meeting of the minds between Nationstar and the Wests.

In response to this considerable evidence, Nationstar makes a straw-man argument out of both the circuit court's "reliance" on Webster and the nature of contracts of adhesion. (Pet'r's Br. 10.) The Wests do not dispute that a contract of adhesion is not, in-and-of-itself, unconscionable. Brown II, 229 W.Va. 382, 729 S.E.2d 217. However, as this Court has repeatedly held, a contract of adhesion is much more likely to be found unconscionable in the consumer context. See, e.g., id., at 393, 729 S.E.2d at 228. Further, Nationstar fails to acknowledge the evidence in the record of significant additional circumstances surrounding the execution of the agreement, including the imbalance in bargaining power, unfair surprise, and absence of meaningful choice. The circuit court, considering all of these factors together, properly found the agreement at issue procedurally unconscionable. Accordingly, the circuit court's decision should be affirmed.

Nationstar goes on to argue that "there is no requirement an arbitration clause be independently bargained for," and that the circuit court erred by considering that the Wests did not bargain for the clause in its analysis, relying on Dan Ryan Builders. (Pet'r's Br. 13-14.) Nationstar's argument is misplaced. This Court held in Dan Ryan Builders that although an arbitration agreement does not require separate consideration, an arbitration agreement is still subject to a defense of unconscionability, and the Court must still conduct the totality of the circumstances analysis. Dan Ryan Builders, 230 W.Va. 281, 737 S.E.2d 550.

Nationstar's arguments against a finding of procedural unconscionability are not supported by the law or the record. Indeed, Nationstar's only rebuttal to the evidence supporting procedural unconscionability is that the arbitration agreement is "duly signed." (Pet'r's Br. 8.) This argument holds little weight, as it almost always does in the unconscionability analysis. As articulated by

this Court almost thirty years ago, the analysis “necessarily involves an inquiry into the circumstances surrounding the execution of the contract.” Syl. Pt. 3, Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749. Accordingly, Nationstar’s arguments that the arbitration agreement was signed and did not require separate consideration have no bearing on the procedural unconscionability analysis. This is yet another attempt by Nationstar to distract from the proper analysis, and instead examine each circumstance of the execution in a vacuum and try to make a per se rule that each circumstance on its own would not be procedurally unconscionable.

In sum, Nationstar has presented no meaningful basis to reverse the circuit court’s Order. Instead, the circuit court’s finding that the agreement was procedurally unconscionable is supported by the evidence presented regarding the circumstances of the contract’s execution and by the language of the contract itself. As a result, the Order should be affirmed.

2. The Circuit Court Did Not Err in Holding the Arbitration Rider 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.” Richmond Am. Homes, 228 W.Va. at 137, 717 S.E.2d at 921. The arbitration rider here is substantively unconscionable as a whole because its terms, taken together in light of the circumstances of its execution, are one-sided, overly-harsh, and unfair. First, the contract lacks mutuality. Second, the steep costs associated with AAA commercial arbitration and Nationstar’s refusal to abide by the AAA Consumer Rules render it impossible for the Wests to pursue their claims in any forum.

i. The Arbitration Rider Lacks Mutuality.

In regard to substantive unconscionability, the circuit court first found that the extreme one-sidedness of the arbitration rider supported a finding of substantive unconscionability. In

response, Nationstar confuses contract formation with contract defenses and misrepresents this Court's jurisprudence in regard to an arbitration rider that lacks mutuality. (Pet'r's Br. 15-17.)

This Court has explicitly considered mutuality, or "one-sidedness" of a contract as a central element of substantive unconscionability. "In assessing substantive unconscionability, the paramount consideration is mutuality." Richmond Am. Homes, 228 W.Va. 125, 717 S.E.2d 909; see also Arnold v. United Companies Lending Corp., 204 W.Va. 229, 511 S.E.2d 854 (1998) (holding an arbitration agreement unconscionable where it required borrower to resolve all legal controversies in arbitration while preserving the lender's right to pursue actions against the borrowers in court). As this Court explained in Dan Ryan Builders, "[s]uch unilateral arbitration clauses lend themselves extremely well to the application of the doctrine of unconscionability because the right the clause bestows upon its beneficiary is so wholly one-sided and unfair that the courts should feel no reluctance in finding it unacceptable." Dan Ryan Builders, 230 W.Va. at 290, 737 S.E.2d at 559 (internal quotations omitted). Indeed, "[a]greements to arbitrate must contain at least a 'modicum of bilaterality' to avoid unconscionability." Brown II, 229 W.Va. at 393, 729 S.E.2d at 228 (quoting Mercurio v. Superior Court, 96 Cal. App. 4th 167, 176 (2002)).

As the circuit found, the subject contract is markedly one-sided, favoring Nationstar. The arbitration rider permits Nationstar to seek any remedies, including enforcement of the contract or recovery of damages for a breach of the contract, in the judicial system. On the other hand, the arbitration rider bars the Wests from the judicial system, instead requiring them to seek any remedies, including enforcement of the contract or recovery of damages for a breach, in an expensive, secret, and limited arbitral forum. The arbitration rider states:

A dispute **does not** include: any action to effect a foreclosure; 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

We seek damages or other relief because of **Your** default under the terms of the Credit Transaction.

(App. 65 (emphasis added).) In short, it excludes all actions that Nationstar might wish to bring against the Wests. In contrast, the arbitration rider requires the Wests to initiate arbitration, and denies Court process to the Wests:

[A]ny case, controversy, dispute, tort, disagreement, lawsuit or claim now or hereafter existing . . . includ[ing], but not limited to, anything that concerns: this agreement, any Credit Transaction including, but not limited to, the origination or servicing of such Credit Transaction; any past, present, or future insurance, service, or product that is offered in connection with a Credit Transaction; any documents or instruments that contain information about any Credit Transaction, insurance, service, or product; and any act or omission **by any of Us** regarding any claim.

(Id. (emphasis added).) So, pursuant to the arbitration rider's terms, Nationstar can employ the court system not only for judicial remedies such as foreclosure and eviction, but also for actions for monetary damages or any other relief to enforce its rights under the contract. Simply, Nationstar can avail itself of a West Virginia court to sue the Wests upon the loan contract or to enforce its security instrument; the agreement places no restraint upon it. In contrast, pursuant to the arbitration rider, the Wests are required to file a prohibitively expensive commercial arbitration action to defend against foreclosure or otherwise enforce their rights under the contract. Notably, Nationstar does not even attempt to defend the one-sided nature of the damages provision, apparently conceding that this provision does not "make[] sense." (Pet'r's Br. 15 n.2.)

Indeed, Nationstar's only argument in support of excluding all of its remedies from arbitration is predicated on its basic misunderstanding of the law and its resulting misplaced reliance on Dan Ryan Builders. In Dan Ryan Builders, this Court held:

The formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause. So long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract, or of 'mutuality of obligation,' in order for a contract to be formed.

Syl. Pt. 6, Dan Ryan Builders, 230 W.Va. 281, 737 S.E.2d 550. This holding, however, applies to the question of whether a contract was *formed*, not whether a defense exists to its *enforcement*, which is a different question altogether. An otherwise valid contract, including an arbitration agreement, may always be invalidated by “generally applicable contract defenses.” Concepcion, 131 S.Ct. at 1742. In other words, just because a contract is properly formed (i.e., there has been offer, acceptance, consideration, and performance), it may still be declared unenforceable through a defense such as fraud, duress, or unconscionability. Here, the Wests do not argue—and the circuit court did not hold—that a contract was not formed; rather, the Wests claim, and the circuit court held consistent with another holding in Dan Ryan Builders, that the contract is unenforceable because, in part, of its extreme one-sided terms. See Syl. Pt. 10, Dan Ryan Builders, 230 W. Va. 281, 737 S.E.2d 550 (“We conclude that in assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable.”) As a result, Nationstar’s argument is both incorrect and inapplicable.

This Court’s precedent makes clear that “[i]f a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable.” Syl. Pt. 10, Dan Ryan Builders, 230 W.Va. 281, 737 S.E.2d 550. The contract term is completely one-sided. Accordingly, the circuit court did not err in finding that the lack of mutuality or bilaterality supports a finding of substantive unconscionability.

ii. The Arbitration Rider Subjects Respondents to Unreasonable Costs.

The arbitration agreement at issue also requires use of the AAA Commercial Rules.² “The arbitration shall be administered by the American Arbitration Association under the Commercial Arbitration rules then in effect.” (App. 65.) Under the Commercial Rules, to initiate arbitration in this case, the Wests are required to pay an initial filing fee of \$3,250.00, the filing fee for “non-monetary claims,” or potentially a filing fee of \$7,000 because the exact monetary amount of their claim is unknown.³ American Arbitration Association, Commercial Arbitration and Mediation Procedures 38-39 (2014), available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased. In addition, a “final fee” of \$2,500.00 (or \$7,700) is payable “in advance of when the first hearing is scheduled” Id. At the hearing, each party is responsible for its own witness expenses, and “[a]ll other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties” Id. at 28. The arbitrator “shall be compensated at a rate consistent with the arbitrator’s stated rate of compensation,” an amount that would not be known until after the

² The AAA requires that the Consumer Rules apply to any agreement in which the parties have provided for arbitration by AAA and the “arbitration agreement contained within a consumer agreement . . . specifies a particular set of rules other than the Consumer Arbitration Rules.” American Arbitration Association, Consumer Arbitration Rules 9 (2014). However, Nationstar refuses to arbitrate under Consumer Rules. As a result, AAA cannot arbitrate this dispute and there is likely no available forum in which the Wests can bring their claims. If there is no forum available in which a consumer may bring an arbitration action, federal courts have routinely held such agreements to be unenforceable. See, e.g., Jackson v. Payday Financial, LLC, 764 F.3d 765 (7th Cir. 2014) (voiding arbitration which required decision to be made in a “sham” process); Inetianbor v. Cashcall, Inc., 768 F.3d 1346 (11th Cir. 2014) (similar holding as in Jackson); Heldt v. Payday Financial, LLC, 12 F.Supp.3d 1170 (D.S.D. 2014) (voiding arbitration where unique facts could give rise to a “procedural nightmare” and lack “orderly administration of justice”).

³ The Wests seek declaratory relief in multiple counts of their Amended Complaint, as well as an unknown amount of punitive damages. (App. 35-52.)

arbitration is filed and the initial fee is paid, but that typically amounts to thousands of dollars. Id. at 28. Moreover, the parties must share the expense of renting a hearing room, and are directed to “[c]heck with the AAA for availability and rates.” Id. at 43. Finally, “[t]he AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator’s fee. . . .” Id. at 29. Accordingly, the Wests are facing far more than \$5,750.00 (and possibly well over \$14,700) to simply file an arbitration in accordance with the arbitration rider. They could easily face thousands more in shared expenses for the arbitrator and other costs of the hearing. As the Wests attested, if faced with paying these substantial fees to challenge the origination and servicing of their home loan, they will “have to abandon [their] claims [and] will not be able to challenge [the] loan and will lose [their] home to foreclosure.” (App. 130.)

Both the Supreme Court of the United States and this Court have recognized that “[t]he existence of large arbitration costs could preclude a litigant . . . from effectively vindicating . . . her rights in the arbitral forum.” Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000); Dunlap, 211 W. Va. at 565, 567 S.E.2d at 281. Consequently, this Court has stated that a pre-dispute agreement to arbitrate is only binding if it permits a party to “fully and effectively vindicate their rights.” Dunlap, 211 W. Va. at 556 n. 3, 567 S.E.2d at 272 n. 3. Furthermore, this Court noted that it is not just the high costs themselves that are problematic, but that the threat of such costs could deter consumers from even considering vindicating their rights. Id. at 565, 567 S.E.2d at 281 (quoting Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal.2000)).

Nationstar argues that because the arbitration rider states Nationstar will pay the first \$250.00 of the arbitration cost, and the arbitrator can decide how the additional costs are split, this

somehow saves the admittedly high costs of commercial arbitration from being substantively unconscionable.⁴ (Pet’r’s Br. 18, 19.) This argument is not only patently wrong, it is belied by the arguments Nationstar advanced at the hearing in the circuit court on the motion to compel arbitration. There, Nationstar argued against permitting arbitration to proceed under the Consumer Rules because, “the consumer rules place nearly the entire cost on [Nationstar] . . . the consumer rule states the business, in this case Nationstar, shall pay the arbitrator’s compensation” (App. 152, 153.) Likewise, Nationstar’s “offer” to conduct arbitration outside of AAA is a red-herring as it has consistently argued the costs should be decided by the arbitrator and has refused to agree to pay anything more than the required \$250.00. (App 144, 149.) Nationstar has consistently sought to avoid paying the costs of arbitration, and to force those costs on the Wests, in order to prevent them from pursuing their claims. This issue has been well-settled by this Court:

[P]rovisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the Court determines that exceptional circumstances exist that make the provisions conscionable.

Dunlap, 211 W.Va. at 566, 567 S.E.2d at 282 (emphasis added).

Accordingly, the substantial costs (\$5,750.00 minimum fees, plus their share of other costs of arbitration) required of the consumer Wests to save their home by seeking redress under the

⁴ Nationstar also makes the somewhat incredulous claim that the arbitration rider should be enforced because a federal court in the Southern District of West Virginia upheld a ‘similar’ arbitration provision. However, the arbitration provision at issue in the cited case of Miller v. Equifirst, No. 2:00-0335, 2006 WL 2571634 (S.D.W.Va. Sept. 5, 2006), contains mutuality and does not require arbitration under the commercial rules. Indeed, the district court’s opinion that the arbitration rider at issue was not procedurally unconscionable was based on that court’s finding of sufficient mutuality. Id. Of course, this case is neither binding, precedential, nor instructive, but the advancement of fees was not even a ground upon which the court based its decision.

AAA Commercial Rules provide additional grounds to find the arbitration rider substantively unconscionable. When these costs are coupled with the complete lack of mutuality, the substantive unconscionability prong of the analysis is not only satisfied, the sliding scale is tipped heavily in favor of substantive unconscionability. Because the terms of the arbitration rider, taken together, reveals the arbitration rider is completely one-sided in favor of Nationstar and places the Wests at a severe disadvantage, the circuit court's Order should be affirmed.

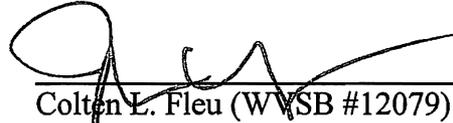
V. CONCLUSION

For the reasons explained above, the circuit court did not err in finding the arbitration rider to be procedurally unconscionable, and the circuit court did not err in finding the arbitration rider substantively unconscionable. The lack of pre-closing disclosures or explanation of the documents, coupled with the rushed and hurried nature of the closing, evidences that the arbitration rider was not bargained for and that there was no meeting of the minds. Likewise, the terms of the arbitration rider are markedly one-sided and disadvantageous to the Wests, with the ultimate effect of making it impossible for the Wests to pursue their claims and save their home from an improper foreclosure. Accordingly, the Wests respectfully request that this Court affirm the Order of the circuit court and allow the Wests to continue to pursue their claims in the Circuit Court of Putnam County, West Virginia.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted this 25th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2015, a true and correct copy of the foregoing Respondents' Brief was sent via first class mail, postage pre-paid, to the following counsel of record:

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