

15-0948

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA**

**TAYLOR BATES, MICHELLE SYLA,  
AMY NORTHROP, CLARISSA HANNAH  
And GENA DELLI-GATTI**  
on behalf of themselves and all others  
similarly situated,

**Plaintiffs,**

v.

**Civil Action No. 13-C-348-3  
(Judge James A. Matish)**

**SALEM INTERNATIONAL UNIVERSITY  
LLC., a foreign limited liability corporation,  
JOHN LUOTTO, President,**

**Defendants.**

**ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING MANDATORY  
ALTERNATIVE DISPUTE RESOLUTION**

**I. Introduction**

On August 19, 2015, came the Plaintiffs, by counsel, and the Defendants, by counsel, pursuant to "Defendants' Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution." Following a prior hearing on April 16, 2015, the Court ordered the parties to brief the following issues relating to the aforementioned motion:

- a. May a Court order arbitration in a putative class action if the arbitration agreement states that class actions cannot be arbitrated;
- b. If the arbitration clause does not indicate that arbitration is mandatory, but is only invoked if one of the parties demands arbitration, may a court order arbitration; and
- c. Are plaintiffs' claims covered by the arbitration agreement?

On May 18, 2015, the Defendant, by counsel, filed its “Supplemental Memorandum in Further Support of Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution,” and on July 27, 2015, the Plaintiffs, by counsel, filed their “Supplemental Memorandum in Further Support of Plaintiffs’ Response to Defendants’ Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution.” Having reviewed the parties’ briefs, the evidence in the record, including testimony of several witnesses, and having heard the arguments of counsel on the above-stated issues the Court has concluded that the Defendants’ motion is hereby **DENIED**.

## **II. Findings of Fact and Conclusions of Law**

### **A. Facts**

1. The plaintiffs each signed enrollment agreements with SIU, attended classes at SIU, and paid tuition to SIU.
2. The enrollment agreements signed by the plaintiffs contained an arbitration clause.
3. The arbitration clause states:

You and SIU agree that any dispute or claim between you and SIU (or any company affiliated with SIU, or any of its officers, directors, trustees, employees or agents) arising out of or relating to this Enrollment Agreement or, your enrollment or attendance at SIU, whether such dispute arises before, during, or after your attendance and whether the dispute is based on contract, tort, statute, or otherwise, shall be, at your or SIU’s elections, submitted to and resolved by individual binding arbitration pursuant to the terms described herein. Arbitration shall be conducted by the American Arbitration Association (“AAA”) pursuant to its rules and procedures. The party electing arbitration shall comply with the AAA notice requirements. Information about AAA is available at 1633 Broadway, 10th Floor, New York, New York 10019; Toll Free: 1-800-778-7879, or the arbitration Website at ACMEADR.com. SIU agrees that it will not elect to arbitrate any individual claim that you bring in a West Virginia magistrate or small claims court (or in a similar court of limited jurisdiction subject to expedited procedures). If that claim is transferred or appealed to a different court, however, or if your claim exceeds the limits of the applicable small claims court, SIU reserves the right to elect arbitration and, if it does so, you agree that the matter will be resolved by binding arbitration pursuant to the terms of this Section. The

arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by or against you may not be joined or consolidated with claims brought by or against any other person. Any arbitration hearing shall take place in the federal judicial district in which you reside or pursuant to AAA rules and procedures. Each party will bear the expense of its own attorneys, experts, and witnesses regardless of which party prevails, unless applicable law or this Agreement gives a right to recover any of those fees from the other party. If the arbitrator determines that any claim or defense is frivolous or wrongfully intended to oppress the other party, the arbitrator may award sanctions in the form of fees and expenses reasonably incurred by the other party (including arbitration administration fees, arbitrator's fees, and attorney, expert, and witness fees), to the extent such fees and expenses could be imposed under Rule 11 of the Federal Rules of Civil Procedure. The Federal Arbitration Act ("FAA") 9 U.S.C. §§ 1, *et seq.*, shall govern this arbitration provision. This arbitration provision shall survive the termination of your relationship with SIU. The above supersedes any inconsistent arbitration provision published in any other document, including, but not limited to, SIU catalogs.

(Plaintiffs' Exhibit 1)

4. Beneath the arbitration clause there is a box titled "NOTICE OF ARBITRATION AGREEMENT:" that contains the following text:

This agreement provides that all disputes between you and SIU will be resolved by BINDING ARBITRATION. You thus GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights under this contract (EXCEPT for matters that may be taken to SMALL CLAIMS COURT). \*Your rights will be determined by a NEUTRAL ARBITRATOR and NOT a judge or jury. \*You are entitled to a FAIR HEARING, BUT the arbitration procedures are SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. FOR MORE DETAILS \*Review the provisions above, or \*Check our Arbitration Website @ ACMEADR.COM, OR \*Call 1-800-000-0000

(Plaintiffs' Exhibit 1) (emphasis in original).

### **B. Conclusions of Law**

1. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid,

revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, — U.S. —, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012).

2. “[O]nly if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause.” Syllabus Point 4, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011). “However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.” *Id.*

3. “When a trial court is required to rule upon a motion to compel arbitration . . . the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syllabus Point 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

4. “Nothing in the Federal Arbitration Act . . . overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.” Syl. Pt. 9, *Brown*, 724 S.E.2d at 261.

5. “Under the Federal Arbitration Act . . . parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.” Syl. Pt. 10, *Brown*, 724 S.E.2d at 261.

6. “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. pt. 1, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1963).

7. “The term “ambiguity” is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.” Syllabus Point 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006).

8. “The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syllabus Point 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

9. “Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” Syllabus Point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002).

10. “Uncertainties in an intricate and involved contract should be resolved against the party who prepared it.” Syllabus Point 1, *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934).

11. “A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only

the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.” Syl. Pt. 18, *Brown*, 724 S.E.2d at 261–62.

### III. Analysis

The primary issue the Court must decide in this case is whether this otherwise valid arbitration agreement acts as a class action waiver, barring the plaintiffs from seeking judicial relief as a class. In other words, does the plaintiffs’ purported class action fall within the scope of the arbitration provision at issue?

Although it is clear from the arbitration provision that the arbitrator is not authorized to hear claims on a class action basis, it is not clear that the plaintiffs affirmatively waived their right to bring a class action. The language indicating that “any dispute or claim between you and SIU . . . shall be . . . submitted to and resolved by individual binding arbitration . . . ,” seems to imply an intent to foreclose claims other than those by individual plaintiffs, and the language prohibiting other parties from joining claims or the consolidation of multiple claims also seems to imply such an intent. The agreement also provides that “[t]he arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by or against you may not be joined or consolidated with claims brought by or against any other person.” Indeed, if claims between the plaintiffs and the defendants “shall” be submitted to arbitration and the arbitrator is not authorized to hear claims on a class action basis, then the implication is that this language must serve as a class action waiver.

However, “[u]nder the Federal Arbitration Act . . . parties are only bound to arbitrate those issues that by *clear and unmistakable writing* they have agreed to arbitrate. An agreement

to arbitrate will not be extended by construction or implication.” Syl. Pt. 10, *Brown*, 724 S.E.2d at 261 (emphasis added). The agreement does not, at any point, state that the plaintiffs agree not to act as class representatives or participate in a class-action. Furthermore, the prohibition of joining and consolidating claims cannot be read as a class actions waiver. Joinder and consolidation are distinct from class action. *See* Fed. R. Civ. P. 18–20, 23, 42; *see also* W. Va. R. Civ. P 18–21, 23, 42. The fact that parties may not join claims and the Court or arbitrator may not consolidate claims does not necessarily mean parties may not bring class actions. The only mention of “class action” in the agreement prohibits the arbitrator from hearing claims on a class action basis. This says nothing of the ability of plaintiffs to bring a class action against SIU. Thus, the language of the agreement creates ambiguity as to whether there is a class-action waiver.

The defendants cite *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2012), for the assertion that an implicit agreement to authorize class-action arbitration may not be inferred from an agreement to arbitrate, and that when an arbitration agreement is silent on whether class arbitration is authorized, then the parties have only agreed to individual arbitration. The defendants are correct in their assertions, but the *AnimalFeeds* case is distinguishable from the current case in at least two key aspects.

First, the Court in the *AnimalFeeds* was dealing specifically with class arbitration as opposed to class action. The Court applied “the basic precept that arbitration ‘is a matter of consent, not coercion.’” *AnimalFeeds*, 559 U.S. at 681. Because the parties in *AnimalFeeds* did not agree to authorize class arbitration—the parties stipulated there was no agreement whatsoever regarding class arbitration—the Court could not compel the parties to do so. *Id.* at 684. This comports with the principle that an agreement to arbitrate will not be extended by

construction or implication. In the instant case, the plaintiffs do not seek to compel class arbitration; they seek to have their class action heard in a court of law. There does not need to be an explicit agreement authorizing the parties to do so, as there would be for class arbitration.

Second, the parties in the *AnimalFeeds* case were “sophisticated business entities,” and the party seeking to compel class arbitration had in fact selected the shipping agreement at issue. *Id.* at 684. The instant case involves a contract of adhesion between parties with different levels of sophistication, meriting greater judicial scrutiny of the terms, and it is the defendants who drafted the agreement at issue. For these reasons the *AnimalFeeds* case is clearly distinguishable from the instant case, and it cannot be read to imply a class-action waiver in the enrollment agreement.

The defendants also cite several cases dealing with class-action waivers for the contention that similar class-action waivers have been enforced. *See American Exp. Co. v. Italian Colors Restaurant*, \_\_ U.S. \_\_, 133 S. Ct. 2304 (2013); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372 (2013); *Shorts v. AT&T Mobility*, No. 11-1649, 2013 WL 2995944 (W. Va. June 17, 2013) (unpublished opinion); *Khanna v. American Exp. Co.*, No. 11 Civ. 6245(JSR), 2011 WL 6382603 (S.D.N.Y. Dec. 14, 2011). In *Italian Colors*, *Ocwen*, and *Shorts* the class-action waiver was clear and unequivocal<sup>1</sup>: “FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.” *See In re American Exp. Merchants’ Litigations*, 667 F.3d 204, 209 (2nd Cir. 2012) (overruled by *Italian Colors*, 133 S. Ct. 2304). “All disputes subject to arbitration shall be

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<sup>1</sup> In *Khanna*, the language quoted by the Court is more like the purported waiver at issue in this case: “If either party elects to resolve a claim by arbitration, that claim shall be arbitrated on an individual basis.” *Khanna* at \*2. However, the *Khanna* case is an unreported memorandum decision by a federal court in New York applying Utah law, and its persuasive effect is limited by its brevity.

arbitrated individually, and shall not be subject to being joined or combined in any proceeding with any claims of any persons or *class of persons* other than the borrower or lender.” (Def. Exhibit 5 at p. A.60) (emphasis added) (Defendant’s Exhibit 5 contains the “Arbitration Rider” at issue in *Ocwen*). “You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding.” (Def. Exhibit 2 at p. A-468) (emphasis in original) (Defendant’s Exhibit 2 contains the arbitration clause at issue in *Shorts*). “Any arbitration under this agreement shall take place on an individual basis; *class arbitrations* and *class actions* are not permitted.” (Def. Exhibit 4 at p. A-474) (emphasis added).

These waivers are unlike the purported waiver in the current case because they contain clear unambiguous language requiring claimants to bring claims individually and specifically prohibiting participation in class actions—as representatives or class members. The use of the word “class” in these waivers is important because, as previously stated, joinder and consolidation are not synonymous with class action. Therefore, SIU’s failure to include clear language prohibiting the parties from engaging in class-action litigation—in the arbitration provision it drafted—creates an ambiguity as to whether the arbitration provision constitutes a class-action waiver.

When ambiguity exists in a contract and the intent of the parties cannot be determined, the ambiguous terms will be construed against the party that drafted the agreement. *See Sanders*, 717 S.E.2d at 924. In this case it is clear that individual claims by parties must be submitted to binding arbitration, and it is clear that claims may not be joined by other parties or consolidated. It is not clear that the plaintiffs waived their right to bring a class action in a court of law. At best, the arbitration provision allows for multiple reasonable interpretations regarding the

availability of class action, because the language implies a waiver of class action rights but does not explicitly waive those rights. At worst it directly contradicts itself by requiring all claims to be subject to arbitration and removing class actions from the jurisdiction of the arbitrator. *See* Syllabus Point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002).

Simply put, there is no clear and unmistakable language in the arbitration provision at issue waiving the right to bring a class action, and the Court will not extend the agreement, by construction or implication, to act as a class-action waiver. Therefore, the contract will be construed against SIU, the drafting party, and the Court will allow the plaintiffs to bring their claim in court, pending class certification.

#### **IV. Order**

For the foregoing reasons, it is hereby **ORDERED** that the defendants' "Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution is **DENIED**, because the arbitration clause is not valid and enforceable under State contract law as it is ambiguous and should be construed against the drafter, SIU, and the dispute between the parties is a putative class action which is excluded from the arbitration clause because of the ambiguity.

The Court further **ORDERS** the parties to proceed pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, pending the Court's decision regarding class certification, and with a status conference set for October 19, 2015, at 1:00 p.m. or as soon thereafter as the matter may be heard in the event no Notice of Intent to Appeal has been filed with the West Virginia Supreme Court of Appeals.

The Court **DIRECTS** the Clerk of this Court to send certified copies of this Order to the following:

Charles R. "Rusty" Webb  
The Webb Law Firm, PLLC  
108 ½ Capitol Street, Suite 201  
Charleston, WV 25301

Richard M. Yurko, Jr.  
STEPTOE & JOHNSON, PLLC  
400 White Oaks Boulevard  
Bridgeport, WV 26330

ENTER: 08/27/2015

  
\_\_\_\_\_  
James A. Matish, Circuit Court Judge

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 27 day of August, 2015

IN TESTIMONY WHEREOF, I hereunto set my hand and affix  
the Seal of the Court this 27 day of August, 2015.

*Donald L Kopp II*  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia