



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

**DOCKET NO.: 15-0948**

**SALEM INTERNATIONAL UNIVERSITY, LLC**  
a foreign limited liability corporation,  
and **JOHN LUOTTO, PRESIDENT,**

**Defendants Below, Petitioners,**

**v.**

**Appeal from the Order of the  
Circuit Court of Raleigh County  
(13-C-348-3)**

**TAYLOR BATES, MICHELLE SYLVA,  
AMY NORTHROP, CLARISSA HANNAH  
and GENA DELLI-GATTI ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,**

**Plaintiffs Below, Respondents.**

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**REPLY BRIEF OF PETITIONERS, SALEM INTERNATIONAL  
UNIVERSITY, LLC AND JOHN LUOTTO, PRESIDENT**

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## **I. SUMMARY OF ARGUMENT**

The issue before this Court is whether the Circuit Court of Harrison County erred in refusing to compel Respondents, former nursing students enrolled at Salem International University (“SIU”), to arbitrate their claims based upon the court’s finding that the otherwise valid and enforceable arbitration agreement is ambiguous as it relates to the waiver of class action claims.

The lower court’s denial of Petitioners’ motion to stay the putative class action proceedings pending mandatory arbitration was based solely on perceived ambiguity in the class action waiver language contained in the otherwise valid and enforceable arbitration clause. It is not questioned in this appeal that the clause is in all respects valid and enforceable. The only assignment of error identified on appeal is the lower court’s ruling that the language of the clause did not effectively operate as a waiver or forfeiture of the right of Respondents to bring class action claims.

Respondents seek to introduce challenges to the lower court’s finding that the Arbitration Agreement at issue is valid and to the finding that Respondents’ claims are within the scope of said Agreement. Those issues are not properly before this Court on appeal. Nonetheless, the validity and enforceability of the arbitration agreement was correctly determined by the lower court, and the Respondents’ claims contained in their Complaint are clearly within the purview of the matters subject to arbitration.

Respondents also challenge whether this Court may review of the court’s order in this matter, given that the class certification has not yet been granted. Respondents claim that the issue is not yet ripe for appeal. However, certification of the class is not necessary in order to render the lower court’s order denying arbitration immediately appealable under this Court’s

well-established interpretation and application of the collateral order doctrine, which mandates review in this instance.

## II. ARGUMENT

### A. **THE LOWER COURT’S ORDER IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.**

The lower court’s refusal to refer the parties’ dispute to arbitration is an immediately appealable order, as held by this Court in *Credit Acceptance Corp v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). Petitioners’ appeal is based on their assertion that the contract at issue mandates arbitration of any claims arising out of the Respondents’ enrollment in or attendance at SIU. The lower court’s order denied SIU the right to have the Respondents’ claims submitted to arbitration, thereby compelling Petitioners to submit to litigation of the matter.

While it is true that “ordinarily the denial of a motion to dismiss is an interlocutory order and, therefore, is not immediately appealable,” *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995), this Court explained in *Front* that “[t]his ‘rule of finality’ is not an absolute rule. Rather, there is a ‘narrow category of orders that are subject to permissible interlocutory appeal.’” *Id.*, 231 W. Va. at 522, 745 S.E.2d at 560, citing *Robinson v. Pack*, 223 W.Va. 828, 831, 679 S.E.2d 660, 663 (2009). *Front*, like the matter currently before this Court, dealt with the reviewability of an order denying arbitration. This Court spent a great deal of time discussing exceptions to the “finality rule” which provides that as a general rule orders are not reviewable unless they are final judgments. The Front Court relied heavily upon the earlier *Robinson* opinion in its analysis.

As explained in *Robinson*:

[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; *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).

*Robinson*, 223 W.Va. at 832, 679 S.E.2d at 664 (footnote omitted).

Under the “collateral order” doctrine, an appeal of an interlocutory order is appropriate when three factors are met.

- (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.”

*Front*, 231 W. Va. at 522, 745 S.E.2d at 560, quoting *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).

In *Robinson*, the Court was presented with deciding the appealability of an order denying summary judgment, and the Court held that “[a] circuit court’s denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the ‘collateral order’ doctrine.” Syl. pt. 2, *Id.* The *Robinson* Court found that the first factor of the 3-part test (conclusiveness) was met because the trial court’s denial of summary judgment on the issue of qualified immunity finally and conclusively determined the defendant’s claim of right not to stand trial on the plaintiff’s allegations. The Court held that “[b]ecause a ruling denying the availability of immunity fully resolves the issue of a litigant’s obligation to

participate in the litigation, the first factor... is easily met.” *Robinson*, 223 W.Va. at 832, 679 S.E.2d at 664 (emphasis added). The order appealed from in this case has the identical conclusive effect as the one in *Robinson*. Here, the lower court’s denial of SIU’s motion to compel arbitration conclusively determined SIU’s right not to have the dispute litigated in circuit court.

With respect to the second factor (whether the immunity ruling resolves significant issues separate from the merits) the *Robinson* Court held that “there is little question that the ‘claim of immunity is conceptually distinct from the merits of the plaintiff’s claim that his [or her] rights have been violated.’” 223 W.Va. at 832–33, 679 S.E.2d at 664–65, citing *Mitchell v. Forsyth*, 472 U.S. 511 at 527–28, 105 S.Ct. 2806, 86 L.Ed. 411 (1985) (emphasis added). Here too, there is little question that Petitioners’ argument for mandatory arbitration is completely distinct from the claims made in Respondents’ Complaint, which include alleged violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 et seq., negligence, breach of contract, breach of duty of good faith and fair dealing, and conversion of personal property.

Finally, the third prong of the collateral order doctrine analysis (unreviewable on appeal from a final judgment) is as easily satisfied in this case as it was in *Robinson*. In *Robinson*, the Court found that “review of a ruling denying immunity to the post-trial stage would be fruitless... because the underlying objective in any immunity determination... is immunity from suit.” *Id.*, 223 W.Va. at 833, 679 S.E.2d at 665 (internal citations omitted). As with the immunity issue presented in *Robinson*, arbitration in the instant matter would operate to eliminate the burden of litigation. Such benefit, as reasoned in *Robinson*, is effectively lost if a case is erroneously permitted to go to trial.” *Id.*, citing *Jenkins v. Medford*, 119 F.3d 1156, 1159

(4th Cir.1997) (observing that denial of qualified immunity defense “subjects the [government] official to the burdens of pretrial matters” and opining that “some of the rights inherent in a qualified immunity defense are [consequently] lost”).

While *Robinson* dealt with qualified immunity as opposed to mandatory arbitration, the reasoning employed by the Court in its analysis of the immediate appealability of the lower court’s order in that case is directly in line with the lower court’s order in the case at bar as to all three factors to be considered. Moreover, this Court discussed *Robinson* at length and applied its reasoning in *Front*, which dealt with an order denying a motion to arbitrate. The *Front* Court, in applying the analysis set forth in *Robinson*, held with respect to the first (conclusiveness) prong of the test that:

[A] circuit court's ruling that refuses to compel arbitration is conclusive as to the disputed controversy of whether the parties are required to arbitrate. By denying such a motion, the circuit court thereby concludes that a case will proceed to trial. Such a ruling forecloses arbitration of the underlying claims asserted and, therefore, conclusively resolves the issue of arbitration.

*Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013). With respect to the second prong, the Court found there to be “little doubt that the issue of arbitration is completely separate from the merits of the underlying claims in a given action. Furthermore, resolution of the arbitration question is important in that it resolves the foundational question of the manner in which the parties will resolve their dispute, either by arbitration or through the courts.” *Id.*

Finally, with respect to the third prong (unreviewable from a final order), the *Front* Court held that “an order refusing to compel arbitration is effectively unreviewable on appeal. The result of such an order is litigation. The purpose of arbitration is to avoid litigation in favor of a quicker and less costly method of dispute resolution.” *Id.*

It is important to note that, as pointed out in *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir.1997), the collateral order doctrine operates to eliminate even the burdens of pre-trial litigation, not merely the burdens of a trial on the merits. This principle would be defeated if Respondents were to prevail on their argument that the case should proceed in litigation until and unless class certification is granted. If this Court were to decline review of the order at issue, Petitioners would be put to the burden of indefinite pre-trial litigation. The collateral order doctrine as interpreted and applied by this Court clearly dictates against such a result. In fact, the litigation surrounding certification of the class alone would thwart the purpose of the doctrine. Accordingly, review of the lower court's order denying Petitioners' motion to compel arbitration is properly before this Court.

**B. THE ARBITRATION AGREEMENT IS CLEAR AND UNAMBIGUOUS AND EFFECTIVELY MANDATES ARBITRATION IN THIS MATTER.**

As fully addressed in Petitioner's Brief filed in this matter, the Arbitration Agreement at issue was clear and unambiguous and effectively operated as a waiver of any class action claims. While Respondents make a blatant attempt to suggest that Petitioner's former counsel conceded, to some degree, the issue of ambiguity (by selectively quoting from counsel's oral argument at the August 19, 2015 hearing), such is a mischaracterization of the facts. A reading of the hearing transcript reveals that while remaining respectful in answering the court's questions, Petitioner's counsel held firm in the position that the class action waiver language is clear and that similar class action waivers have been upheld by other courts.

THE COURT: Well, let me ask you, okay, if there's language in the arbitration clause that's susceptible to a reasonable interpretation one side, and if it's susceptible to reasonable interpretation by the other side, then isn't that sufficient for the Court to make a finding that the arbitration language is ambiguous .and it gets resolved against the drafter of the agreement?

MR. YURKO: Your Honor, I understand what you're saying. I don't disagree. I think that if reasonable minds can differ, and I understand what you're saying, but this is these are the clauses that have been approved by courts...

(A.R. 302) (emphasis added). In fact, Respondents' counsel's representations in the referenced hearing support the inescapable conclusion that the Arbitration Agreement includes a clear class action waiver:

THE COURT: Well, let me ask you, though, with respect to the language that's in there, I mean, did not your clients agree to submit all individual claims to binding arbitration when you simply look at what the terms are? In other words, they're agreeing that the only claims that they may have are individual claims, no class action claims?

MR. WEBB: ... Shall be at you or SIU's submitted to and resolved by individual binding arbitration. I mean that's what it -- that's what the document says. I can't argue with the terminology.

(A.R. 300-301).

Regardless of what counsels' responses to questions posed to them in the Circuit Court hearing of this matter, the issue of ambiguity is currently before this Court, and a reading of the language itself is all that is needed to conclude that there is no ambiguity. The Arbitration Agreement clearly and unequivocally requires that any claims must be submitted to **individual** binding arbitration. Black's Law Dictionary defines "individual" as "[e]xisting as an indivisible entity... [o]f, relating to, or involving a single person or thing, as opposed to a group." *Black's Law Dictionary* (10th ed. 2014). There can be no question as to the meaning or intent of the Arbitration Agreement, reading it in its entirety, including the class action waiver. By making clear that the arbitrator is not authorized to consider class-action claims, the language reinforces the requirement that claims be brought only on an individual basis, and not consolidated or joined with any other claims. No reasonable reading of the Agreement can lead to a different result.

**C. THE VALIDITY AND ENFORCEABILITY OF THE ARBITRATION AGREEMENT, WHILE NOT PROPERLY BEFORE THIS COURT, WAS CORRECTLY DETERMINED BY THE LOWER COURT IN FAVOR OF ENFORCEABILITY.**

Respondents Brief spends a good deal of time recounting factual assertions and legal arguments that they advanced in the proceedings below to challenge the validity and enforceability of the arbitration agreement based on purported substantive and procedural unconscionability. Since the lower court held that the clause was generally valid and **only** questionable as to its applicability to class action claims, (A.R. 227) (emphasis added), and since Respondents have not filed a cross-appeal challenging that holding, the issue of the clause's validity is not properly before this Court. See, e.g., *Helvering v. Pfeiffer*, 302 U.S. 247, 250-51, 58 S. Ct. 159, 160, 82 L. Ed. 231 (1937) (holding that appellate court properly refused to consider appellee's arguments with respect to portions of the order that were adverse to him because he did not seek review). An appellee cannot without a cross-appeal challenge an order below. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937).

While not subject to this Court's review, there is no question that the validity of the mandatory arbitration clause was correctly decided by the lower court, which summarily concluded that the arbitration agreement was valid and enforceable. Petitioners address the validity and enforceability as to the class action waiver provision in their Brief previously submitted to this Court, but will provide a brief discussion herein to address any claims that the entirety of the Arbitration agreement was procedurally or substantively unconscionable.

In West Virginia, "[t]he doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written." *Brown v. Genesis Healthcare Corp.*, 228 W. Va.

646, 680, 724 S.E.2d 250, 284 (2011) ("*Brown I*"), *overruled in part on other grounds, Marmet Health Care Ctr., Inc. v. Brown*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1201 (2012). "The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." *Brown I*, 228 W. Va. at 680, 724 S.E.2d at 284. To be held unconscionable, a contract must be both procedurally and substantively unconscionable. Syl. Pt. 9, *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217, 221 (2012) ("*Brown II*"). "Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract." Syl. Pt. 10, *Id.* "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." Syl. Pt. 12, *Id.*

The burden of proving that a contract term is unconscionable rests with the party attacking the contract. Syl. Pt. 9, *Id.* "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. 9, *Brown II*, 229 W. Va. at 386, 729 S.E.2d at 221.

**1. The Arbitration Clause is Not Procedurally Unconscionable.**

The record presents no evidence that would support a finding that the arbitration agreement at issue was procedurally unconscionable. Respondents' own affidavits, while clearly designed to support an argument for unconscionability, fall far short. The affidavits state that at the time they signed the Enrollment Agreements, Respondent Delli-Gatti had an Associates Degree (A.R. 092), Respondent Sylva had six months of college educational experience (A.R. 094), Respondent Hannah and Respondent Bates had a high school education (A.R. 090, 111). Each of the Respondents acknowledges that she is literate. (A.R. 090-095, 111-112).

Respondents thus admit that they were competent, literate, reasonably educated adults, and were obviously capable of reading the contract and of consulting with someone if they did not understand it. Although they state in their affidavits that they were "not given a reasonable opportunity to consider and understand the terms of the contract" (A.R. 090-095, 111-112), Respondents offer no support for this statement. They do not assert that they were forced to sign the contract, that they were prevented or discouraged from taking it home with them to review it, or even that they were hurried while reviewing it before they signed it.

Respondents assert that the terms of the Enrollment Agreement were not explained to them, that they were not directed to page two, and that they did not even realize that there was a page two (which contains the arbitration clause). (A.R. 090-095, 111-112). Respondents thus admit that they did not fully read the Enrollment Agreements, and they are apparently blaming Petitioners for Respondents' failure to do so. An argument for unconscionability under the circumstances is unsupportable. Respondents were enrolling college students. They are competent adults, fully capable of examining the entire contents of a plainly-worded, two-page agreement and asking SIU representatives or others outside of the university to explain contractual terms that they did not understand. There is nothing in the record to suggest that SIU representatives refused to answer questions about the Enrollment Agreement or the Arbitration Agreement specifically. Further, the Enrollment Agreement itself indicated that a page two existed by stating, on the bottom of page one in bold font, "[b]oth pages of this agreement constitute the Enrollment Agreement" and, immediately above the signatures on page one, "I have read and understand **both** pages of this Enrollment Agreement . . ." (emphasis added). There is nothing to explain why Respondents did not see page two of the Enrollment Agreements except that they simply did not turn to it.

Importantly, the fact that the contract was one of adhesion does not render it in any way improper or even suspect.

[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. "There 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[.]"

*Brown I*, 228 W. Va. at 682, 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) and J. Calamari and J. Perillo, *Hornbook on Contracts* § 9.43 (6th Ed. 2009). "Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what the courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *State ex. Rel. Dunlap v. Berger*, 211 W. Va. 549, 557, 567 S.E.2d 265, 273 (2000); accord, *Brown I*, 228 W. Va. at 682, 724 S.E.2d at 286.

Thus, whether the Enrollment Agreements were contracts of adhesion is of little probative value if the circumstances do not otherwise reflect absence of meaningful choice and other circumstances indicating procedural unconscionability. See *Brown I*, 228 W. Va. at 646, 724 S.E.2d at 250. Here, it was reasonable for SIU to require that its students enter into a standard Enrollment Agreement containing an Arbitration Agreement given the large number of students who pass through its system, university budgetary constraints for legal expenses, and similar legitimate business reasons. Arbitration offers a method to resolve disputes in a speedy, and cost effective manner.

Respondents have not demonstrated that they were under any undue influence, stress, or duress at the time they signed the Enrollment Agreements. They were all reasonably educated and literate. See *Montgomery v. Credit One Bank*, 848 F. Supp. 2d 601, 606-07 (2012) (credit

card purchaser failed to prove procedural unconscionability due to lack of emergency or pressing need, contrasting *Brown I*, holding procedural unconscionability existed where plaintiffs were in a medical emergency situation and their representatives accepted the terms of the agreement in order to obtain necessary medical care); *Shorts v. AT&T Mobility*, No. 11-1649, 2013 WL 2995944 (W. Va. June 17, 2013) (upholding trial court's rejection of challenge to arbitration clause in case involving telecommunications contract). The circumstances surrounding Respondents' execution of the Enrollment Agreements are devoid of any facts that would support unconscionability.

It should also be noted that the "NOTICE OF ARBITRATION AGREEMENT" set forth immediately below the arbitration clause and enclosed in a box for additional emphasis provides the fundamentals of the arbitration process in plain language, with important points in all capitalization and set off with empty line spaces between points. The arbitration language was not hidden or buried in fine print. Moreover, the Notice invites enrollees to inquire if wish to have additional information about the arbitration process. Respondents did not seek such information.

While Respondents' assert in their Response to this Court that a magnifying glass is needed to read the Arbitration Agreement, that statement is grossly and intentionally misleading. As the Circuit Court was aware, the print to which Respondents refer is contained in reduced copies of Enrollment Agreements attached as exhibits to court filings in the proceedings below. The original contracts were clearly legible and printed on 8 ½" by 14", legal-size paper, as opposed to the 8 ½" by 11" copies with the resulting smaller and less legible type. (See, A.R. 104).

## 2. The Arbitration Agreements Are Not Substantively Unconscionable

There are a number of factors that courts consider when considering whether a contract is substantively unconscionable. Those factors include "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," as well as mutuality of obligation and whether the agreement "imposes high costs that might deter a litigant from pursuing a claim." *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 137, 717 S.E.2d 909, 921 (2011). When assessing mutuality of obligation, the court may consider whether the contract limits the types of damages one party may seek. *Id.* at 138, 717 S.E.2d at 922. Likewise, limitations on discovery do not render an arbitration agreement unconscionable, at least where any limits apply to both parties. *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 366-67, 752 S.E.2d 372, 397-98.

Plaintiffs suggest that the high cost of arbitration prohibits them from access to a forum to obtain relief because of the small amount of money in controversy relative to the cost of arbitration. Such an argument has been flatly rejected by this Court in *Ocwen* where the Court, granting a writ of prohibition, reversed the circuit court's decision that an arbitration clause containing a class action waiver was unconscionable because it deterred litigants from pursuing claims due to the high costs of obtaining a relatively small recovery., *Id.*, 232 W. Va. 341, 359, 752 S.E.2d 372, 390 (2013). *See also State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 579, 703 S.E.2d 543, 550 (2010) ("Standing alone, the lack of class action relief does not render an arbitration agreement unenforceable . . . "); *Am. Express Co. v. Italian Colors Rest.*, U.S. , 133 S. Ct. 2304, 2309-10 (2013) (upholding class action waiver in arbitration agreement).<sup>1</sup>

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<sup>1</sup> In *Italian Colors*, the U.S. Supreme Court declared:

It must also be noted that under the Arbitration Agreement in question, Respondents are not required to arbitrate small claims, as the Agreement provides that "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)." (A.R. 219, 224).

Neither can it be argued that there was no mutuality of obligation. The Arbitration Agreement is not one-sided and does not put either party at a disadvantage. The plain language of the Agreement provides in pertinent part: "You and SIU agree that any dispute or claim between you and SIU. . . shall be, **at your or SIU's election**, submitted to and resolved by individual binding arbitration pursuant to the terms described herein." (A.R. 219, 223) (emphasis added). Either party may submit any dispute within the scope of the Arbitration Agreement to arbitration, and Respondents have the additional option of bringing a claim in magistrate, small claims, or a similar court. This is not a case such as *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998), in which a lender preserved the right to pursue actions in court (including foreclosure) while forcing mortgagors to file all claims in arbitration. Contrary to the argument raised by Respondents, the Arbitration Agreement at issue is mutual in both the rights and obligations of the parties, and it requires that all claims by either party be arbitrated on an individual (rather than joint or consolidated) basis. In short, there is no disparity in the rights afforded the parties under the Agreement, as urged by Respondents.

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[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. . . The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. . . . Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.

*Italian Colors*, \_\_ U.S. at \_\_, 133 S.Ct. at 2311.

Additionally, the terms of the arbitration clause in the Enrollment Agreement are commercially reasonable. They provide that claims not brought in or appropriate for small claims or similar courts must be pursued through individual arbitration, with each party paying its own expenses (attorney, expert, and witnesses), unless either party has a right to recover those fees. The arbitrator may award sanctions, as under Rule 11 of the Federal Rules of Civil Procedure, if a claim or defense is frivolous or wrongly intended to oppress the other party. The rules and procedures of the American Arbitration Association ("AAA") govern the arbitration. Rule R-54 of the AAA's Commercial Arbitration Rules and Mediation Procedures provides that arbitration expenses shall be borne equally by the parties unless the parties agree otherwise or unless the arbitrator assesses expenses against one of the parties. (A.R. 167). Nothing about these terms is commercially unreasonable unusual as related to acceptable arbitration clauses.

The purpose and effect of the terms in the Enrollment Agreement's arbitration clause is simply to provide that claims must be brought individually, and that claims exceeding a particular amount must be submitted to arbitration. This is significantly different from any cases where substantive unconscionability has been found. The Arbitration Agreement at issue is devoid of any terms that would operate to shield one party from liability for misconduct, including by prohibiting certain claims and damages.

In sum, the Arbitration Agreement at issue is neither procedurally nor substantively unconscionable. Numerous similar arbitration clauses with class action waivers have been found to be enforceable. As such, individual arbitration of Plaintiffs' claims is proper and should be compelled in order to effect the terms of the parties' agreement.

**D. THE LOWER COURT'S CONCLUSION THAT RESPONDENTS' CLAIMS ARE WITHIN THE SCOPE OF THE MATTERS COVERED BY THE ARBITRATION CLAUSE, WHILE NOT AN ISSUE PROPERLY UNDER THE REVIEW OF THIS COURT, WAS CORRECT.**

Like the issue of the arbitrations agreement's validity, Respondent's argument that their claims fall outside the scope of the subject arbitration clause is not properly before this Court. The lower court made clear that the only basis for declining to compel arbitration was the singular issue of perceived ambiguity within the class action waiver language. Respondents' claims would have, absent the class action waive issue, been sent to arbitration, with all other challenges having been fully briefed and decided in favor of arbitration as reflected in the order. Had Respondents wished to challenge the lower court's findings regarding the scope or validity/enforceability of the Arbitration Agreement, the appropriate means to do so would have been to file a cross-appeal, which Respondents did not do. As such, any issues other than those raised by Petitioner in its appeal are not properly before this Court. See, e.g., *Helvering v. Pfeiffer*, 302 U.S. 247, 250-51, 58 S. Ct. 159, 160, 82 L. Ed. 231 (1937) (holding that appellate court properly refused to consider appellee's arguments with respect to portions of the order that were adverse to him because he did not seek review). An appellee cannot without a cross-appeal challenge an order below. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937).

Even if properly raised on appeal, any argument that Respondents' claims are outside the scope of arbitrable disputes does not warrant serious consideration. The clause provides that "any dispute or claim between you [each Plaintiff] and SIU. . . 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 election, submitted to and resolved by individual binding arbitration." (A.R. 223). All of Respondents' claims arise out of or relate to the Enrollment Agreement and/or their enrollment or attendance at SIU. The Complaint itself states, "This Class

Action Complaint brought by the named Plaintiffs is typical of the claims of the Class in that the named Plaintiffs and Class members were all students enrolled at SIU during the relevant period of time and did not have the opportunity to complete their coursework toward an SIU degree." (A.R. 005).

The FAA embodies a clear federal policy in favor of arbitration. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Volt Info. Sciences, Inc. v. Bd. Of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 475-76 (1989). In the instant case, there is no question that Respondents' claims fall within the purview of the broad scope of the arbitration clause.

## II. CONCLUSION

The Circuit Court erroneously refused to require Respondents' claims to be submitted to arbitration based on the singular issue of perceived ambiguity in the language dealing with class action claims. The Circuit Court determined that the Arbitration Agreement was generally valid and enforceable in summary fashion, presumably because the facts of this case do not present any serious question as to those issues and no in depth analysis was warranted. In any event, the record is clear that the Arbitration Agreement at issue is valid and enforceable, that the Respondents' claims are within its purview, and that such claims must be submitted to arbitration per the terms of the Agreement.

Based upon all of the foregoing, as well as Petitioners' Brief and the entire record of this matter, this Court should reverse the decision of the Circuit Court, dismiss the Respondents' lawsuit, and compel arbitration of the claims brought in the Complaint on an individual basis.

**SALEM INTERNATIONAL UNIVERISITY,  
LLC AND JOHN LUOTTO, PRESIDENT**

**BY: SPILMAN THOMAS & BATTLE, PLLC**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 15-0948

SALEM INTERNATIONAL UNIVERSITY, LLC  
a foreign limited liability corporation,  
and JOHN LUOTTO, PRESIDENT,

Defendants Below, Petitioners,

v.

Appeal from the Order of the  
Circuit Court of Harrison County  
(13-C-348-3)

TAYLOR BATES, MICHELLE SYLVA,  
AMY NORTHROP, CLARISSA HANNAH  
and GENA DELLI-GATTI ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,

Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Eric W. Iskra, counsel for Salem International University, LLC and John Luotto, do hereby certify that the foregoing "*Reply Brief of Petitioners, Salem International University, LLC and John Luotto, President*", was served by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail this the 2nd day of March, 2016, addressed as follows:

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