

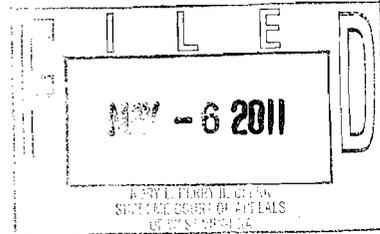
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0770

ON PETITION FOR WRIT OF PROHIBITION TO THE
CIRCUIT COURT OF JEFFERSON COUNTY

STATE OF WEST VIRGINIA ex rel.
RICHMOND AMERICAN HOMES
OF WEST VIRGINIA, INC., M.D.C.
HOLDINGS, INC., *et al.*,

Petitioners,



v.

Civil Action Nos. 10-C-152 – 10-C-162

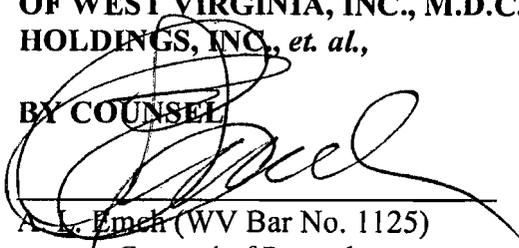
HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT
OF JEFFERSON COUNTY, WEST
VIRGINIA,

Respondent.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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HOLDINGS, INC., *et al.*,

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I. QUESTIONS PRESENTED

1. Is the Circuit Court's holding that the arbitration provision at issue here is substantively unconscionable because it does not authorize class actions (even though Plaintiffs do not seek to proceed as a class) and does not incorporate the same civil discovery rules used in courts clear error under West Virginia law; alternatively, is that holding, as well as West Virginia law to the extent it may be construed to support that holding, preempted by the Federal Arbitration Act and the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 563 U.S. ____ (April 27, 2011) (slip copy) ("*Concepcion*")?

2. Does a West Virginia circuit court violate substantive federal law by holding that the severability doctrine is inapplicable to its consideration of the threshold question of arbitrability?

3. In deciding "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," may a circuit court consider the entire contract or any provisions of that contract other than the arbitration provision being challenged? See Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010); Syl. Pt. 4, *Ruckdeschel v. Falcon Drilling Co., LLC*, 225 W. Va. 450, 693 S.E.2d 815 (2010).

4. May a circuit court determine that an arbitration provision is procedurally unconscionable without taking or considering any evidence relating to the controlling factors set out in *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of W. Va., Inc.*, 186 W. Va. 613, 413 S.E.2d 670 (1992) and *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), and making findings relating to them that are supported by the record?

5. Is a nonsignatory who relies upon a contract as the basis for his claims also equitably bound by an agreement in that contract to arbitrate all disputes arising under it?

II. STATEMENT OF THE CASE

Petitioners Richmond American Homes of West Virginia, Inc. (“Richmond”), M.D.C. Holdings, Inc. (“MDC”), John Hime, Wilbert Jones, Walter Kidwell, William Trainor, Robert Trimbach-Rios, and Jason Wilkins¹ are Defendants in 11 civil actions pending in the Circuit Court of Jefferson County. Those cases, bearing Civil Action Nos. 10-C-152 through 162, were filed on 12 May 2010 and are generally referred to collectively by the last name of the Plaintiffs in the first of them, *Thorin*. The 11 *Thorin* cases are the latest in a series of lawsuits brought against Richmond and MDC in the Circuit Court of Jefferson County regarding the allegedly improper or incomplete installation of passive radon mitigation systems in the Plaintiffs’ homes. Plaintiffs allege that this caused them to be exposed to higher levels of radon gas than they otherwise might have been, and that this entitles them to lifetime medical monitoring and other damages.²

Richmond is a residential homebuilder and a wholly-owned subsidiary of MDC. Richmond’s Purchase Agreements with all 11 of the *Thorin* homebuyers include an alternative dispute resolution provision set forth in Paragraph 21 under the heading “MEDIATION AND ARBITRATION.” Paragraph 21(a) requires the Purchaser and Seller to initially mediate any claims between them arising out of, related to, or in any way connected with the houses.

¹ The individual people were employees of Richmond and are named as defendants in the cases because they are alleged to have worked as construction superintendents for Richmond during construction of the houses at issue. They were not individually named in the case style for this writ, but are included as *et al.*

² The other pending cases are *Kevin Joy, et al. v. Richmond American Homes of West Virginia, Inc., et al.*, Civil Action No. 08-C-204; *Charles Bauer, et al. v. Richmond American Homes of West Virginia, Inc., et al.*, Civil Action No. 08-C-431; and *Michael Saliba, et al. v. Richmond American Homes of West Virginia, Inc., et al.*, Civil Action No. 08-C-447. These have been consolidated for pre-trial proceedings.

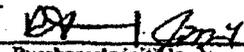
Paragraph 21(b) requires that any and all disputes that are not settled through mediation are to be decided by neutral, binding arbitration.³ At the end of Paragraph 21 is a "Notice," printed in all capital letters, which explains that by initialing in the space below the Purchaser is acknowledging that he has read Paragraph 21 and that he is voluntarily agreeing to resolve through arbitration any dispute between Purchaser and Seller that is in any way connected with the Purchase Agreement. Reproduced immediately below is Paragraph 21 as it appears in the Thorin Purchase Agreement⁴:

21. MEDIATION AND ARBITRATION:

- (a) **Mediation of Disputes.** Purchaser and Seller agree to mediate any disputes, claims and/or controversies in law or equity between Purchaser and Seller arising out of, related to or in any way connected with the Property, this Agreement, or any resulting transaction, before resorting to arbitration or court action. Mediation is a process in which parties attempt to resolve a dispute by submitting it to an impartial, neutral mediator who is authorized to facilitate the resolution of the dispute but who is not empowered to impose a settlement on the parties. Mediation fees, if any, shall be divided equally among the parties involved. Before the mediation begins, the parties agree to sign a document limiting the admissibility in arbitration or any civil action of anything said, any admission made, and any documents prepared, in the course of the mediation, consistent with West Virginia law. Seller shall submit to Purchaser the names of three (3) certified mediators and Purchaser shall designate one (1) to be the mediator. If Purchaser fails to designate a mediator within five (5) days after notice to do so, Seller may designate the mediator. If any party commences an arbitration or court action based on a dispute or claim to which this paragraph applies without first attempting to resolve the matter through mediation, then in the discretion of the arbitrator(s) or judge, the party shall not be entitled to recover attorney's fees even if they would otherwise be available to that party in any such arbitration or court action.
- (b) **Arbitration of Disputes.** Purchaser and Seller agree that any and all disputes, claims and/or controversies in law or equity between Purchaser and Seller arising out of, related to or in any way connected with the Property, this Agreement, or any resulting transaction which are not settled through mediation shall be decided by neutral, binding arbitration and not by court action. Purchaser and Seller further agree that any action brought by Purchaser against Seller shall be brought by independent action and that Purchaser shall neither serve as a class representative nor become a class member to pursue such action. Except as otherwise expressly stated herein, the arbitration shall be conducted in accordance with the rules of the American Arbitration Association ("AAA"). In all cases involving \$10,000 or more in dispute, the arbitrator shall establish a discovery schedule allowing, at a minimum, depositions of the parties and their expert witnesses, if any. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction hereof.
- (c) **Warranty Claims or Dispute.** Any claims or disputes that arise from matters covered by the residential construction warranty provided by Seller to Purchaser shall be resolved in accordance with the terms of this warranty agreement rather than the provisions of Paragraphs (a) and (b) above of this Agreement.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISIONS DECIDED BY NEUTRAL ARBITRATION AS PROVIDED AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT BY JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF WEST VIRGINIA LAW. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND HAVE HAD THE OPPORTUNITY TO DISCUSS THE FOREGOING WITH COUNSEL OF OUR CHOICE. WE AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.


Purchaser's initials

³ Paragraph 21(c), which is not at issue in this case, requires that any claims or disputes that arise from matters covered by a residential construction warranty provided by Seller to Purchaser shall be resolved in accordance with the terms of the warranty agreement.

⁴ See Thorin Purchase Agreement, Appendix at Ex. 7 App0183; see also remaining Purchase Agreements, Appendix at Ex. 7 App0178-0253. Plaintiffs in the 11 Thorin cases who signed the Purchase Agreements are "Signatory Plaintiffs." All other Plaintiffs are "Nonsignatory Plaintiffs." While there are minor differences between the 11 Purchase Agreements, none of those differences is material to the instant Petition.

Each *Thorin* Purchaser initialed below the Notice.

Notwithstanding these clear agreements to arbitrate and without first seeking mediation, the *Thorin* Plaintiffs brought 11 separate lawsuits against Petitioners in the Circuit Court of Jefferson County. Richmond filed motions to compel arbitration in all 11 civil actions on 22 June 2010. MDC and certain individual Defendants joined Richmond's motions on 28 July 2010.⁵ The day before Richmond filed its motions, on 21 June 2010, the Supreme Court of the United States decided *Rent-A-Center v. Jackson*, 130 S. Ct. 2772 (2010). That case strongly reaffirmed the United States Supreme Court's prior holdings that under the Federal Arbitration Act ("FAA") (i) the trial court may decide only the validity of the precise arbitration provision at issue and any challenges to the remainder of the contract are for the arbitrator and, as a result, (ii) only the terms of the challenged arbitration provision itself are relevant to the determination of whether the motion to compel arbitration should be granted. *Rent-A-Center*, 130 S. Ct. at 2778-79. Any issues regarding the unconscionability or enforceability of provisions outside the precise arbitration provision being challenged are to be resolved by the arbitrator in accordance with the parties' agreement.

The *Thorin* Plaintiffs opposed Petitioners' motions, and on 1 September 2010 they submitted a proposed order denying all 11 of them. On 3 September 2010, the Circuit Court entered its Order Denying Richmond American's Motion to Compel Mediation and Arbitration and Dismiss this Litigation ("Order"). See Order, Appendix Ex. 1 at App0001-0036. The Circuit

⁵ Still pending before the Circuit Court are MDC's motion to dismiss for lack of personal jurisdiction, filed on 22 June 2010, and Messrs. Hime, Kidwell, Trainor, and Wilkins' motion for a more definite statement, filed on 2 July 2010. Those defendants do not waive any of their defenses asserted in those pending motions by joining in this Petition.

Court's Order is virtually identical to the one Plaintiffs proposed, and it is from this Order, entered in civil actions Nos. 10-C-152 through 162, that Petitioners seek relief.⁶

III. SUMMARY OF ARGUMENT

The Circuit Court declined to enforce the arbitration clause in the Purchase Agreements on several grounds. Its refusal to do so is the product of clear legal errors, each worthy of this Court's review.

First, in assessing the enforceability of the precise arbitration provision being challenged, Paragraph 21(b), the Circuit Court considered several contractual provisions outside of 21(b) and, based on those separate provisions, concluded that 21(b) was unconscionable and hence unenforceable. The Circuit Court's analysis thus violated the FAA's severability doctrine.

Under the FAA, courts determine the enforceability of a challenged contractual arbitration provision unless the contract clearly states otherwise. In doing so, the severability doctrine provides that (i) a court may decide only the enforceability of the arbitration clause, leaving to arbitrators challenges to the enforceability of the contract as a whole or other provisions in it, and (ii) in considering an arbitration clause's enforceability, the court must confine its assessment to the precise arbitration provision being challenged and may not consider other provisions. *See, e.g., Rent-A-Center*, 130 S. Ct. 2772; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). The Circuit Court correctly held that the Plaintiffs' challenge to the arbitration provision of the Purchase Agreements gave it (rather than the arbitrator) the power to determine whether that provision is valid, but ignored the severability doctrine and the FAA

⁶ There is no scheduling order in any of the 11 *Thorin* cases; no deadlines are set in any; and there are no trial dates. Some initial written discovery is in progress, but no depositions have been taken and none are scheduled.

requirement that any federal or state court assessing the validity of an arbitration provision may consider only the arbitration provision being challenged and not the whole contract or any other parts of it.

The Circuit Court held that once it determined that it had jurisdiction to decide the enforceability of the arbitration provision, it was empowered to consider all provisions of the contract in determining whether that arbitration provision was unconscionable. This is clear legal error. Although the issue of whether a valid arbitration agreement exists may include a challenge to that provision based upon unconscionability, that challenge “must relate specifically to the arbitration clause and not to the contract as a whole.” *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 686 (N.D. W. Va. 2010).⁷ For example, in *Wince*, as here, the plaintiffs argued that the arbitration provisions were unconscionable due to the limits that the whole contract placed on defendant AT&T’s liability. The district court held that these other provisions were “irrelevan[t]” to it’s consideration of the enforceability of the arbitration clause, explaining “that, ‘if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision on any grounds that ‘exist at law or in equity for the revocation of any contract,’ 9 U.S.C. § 2, the grounds ‘must relate specifically to the arbitration clause and not just to the contract as a whole.’” *Id.* (quoting *Snowden*, 290 F.3d at 636; *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)); *see also Rent-A-Center*, 130 S. Ct. at 2779 (“section 2 [of the

⁷ Indeed, this Court has held that a trial court may address the validity of the contract as a whole only when the issue is whether there was assent to the underlying agreement in which the arbitration language is contained. *See TD Ameritrade*, 225 W.Va. at 255, 692 S.E.2d at 298 fn. 9 (citing *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002)). No such claim has been made in these cases.

FAA] states that a ‘written provision’ to settle by arbitration a controversy is ‘valid, irrevocable, and enforceable’ without mention of the validity of the contract in which it is contained.”).

Accordingly, while the Circuit Court correctly observed that Plaintiffs had challenged the validity of the arbitration clause (as they were required to do for the court to have jurisdiction to decide its validity), it failed to understand that, under the severability doctrine, it could not usurp the authority of the arbitrator by looking outside the challenged arbitration provision in its analysis. Thus, the Circuit Court committed clear error when it held that the severability doctrine as set forth in *Prima Paint*, 388 U.S. at 402-404, and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006) “has absolutely no application to the case at bar” and that “The Severability Doctrine is Inapplicable to This Case.” Order, Appendix Ex. 1 at App0014.

Because of this fundamental error as to the applicability and effect of the severability doctrine, the Circuit Court erroneously considered and relied on other provisions of the contract in analyzing the question of whether the arbitration provision being challenged was unconscionable. The Order states:

there is no federal precedent that precludes a Court from evaluating a disputed arbitration provision in the context of a greater contract to determine validity, as long as the same occurs in non-arbitration cases.

Order, Appendix Ex. 1 at App0017. This assertion is entirely inconsistent with the binding United States Supreme Court precedent on the severability doctrine described above, which provides that “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract,” and that this rule “applies in state as well as federal courts.” *Buckeye Check Cashing*, 546 U.S. at 445-46. Further, the Circuit Court’s holdings and analytical approach in the Order cannot be reconciled with this Court’s decisions in

TD Ameritrade, supra, Ruckdeschel v. Falcon Drilling Co., LLC, 225 W. Va. 450, 693 S.E.2d 815 (2010), and *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010) (*per curiam*), or with *Wince, supra*, and the Fourth Circuit cases that *Wince* relies on, including *Snowden* and *Hooter's, supra*, as explained above and *infra*. The Circuit Court's errors are clear.

The Circuit Court also erroneously held that West Virginia law *requires* it to consider the contract as a whole in determining whether an arbitration provision is enforceable. Order, Appendix Ex. 1 at App0027. In fact, the question of what a court may consider under the FAA is a federal question which must be resolved under federal law. See *Southland Corp. v. Keating*, 465 U.S.1, 10-14 (1984). In any event, the West Virginia cases that the Order cites do not hold that West Virginia Courts may ignore binding federal law and decide the unconscionability of an arbitration provision by considering the contract as a whole. *Ruckdeschel*, which is cited extensively in the Order, does not so hold. *Ruckdeschel* did not even address unconscionability; it concerned the question of whether a claim for indemnification was within the scope of an arbitration provision in a commercial contract. 225 W. Va. at 455-456, 694 S.E.2d at 820-821. The validity of the arbitration provision itself was not challenged. *Id.* 225 W. Va. at 455, 694 S.E.2d at 820 fn. 3. And *Dunlap* involved an analysis of exculpatory provisions contained within the arbitration provision being challenged (*e.g.*, a provision forbidding the arbitrator to award punitive damages and a prohibition of class actions). 211 W. Va. at 561, 567 S.E.2d at 278. Moreover, in *AT&T Mobility* (Oct. 2010), this Court limited and clarified its decision in *Dunlap* so that it is clearly in accord with *Buckeye* (2009) and *Rent-A-Center* (June 2010), which were handed down long after *Dunlap* (2002). *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at

550. Thus, West Virginia law did not and does not dictate or approve the Circuit Court's analysis here.

The Circuit Court's consideration of contract provisions outside of the challenged arbitration clause in assessing the validity of that arbitration clause was clearly contrary to controlling federal law and precedent, and should be overturned.

Second, the Circuit Court's finding of unconscionability cannot be sustained under West Virginia law. The arbitration provisions at issue here are neither procedurally nor substantively unconscionable. Under West Virginia law a "bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party." *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 604, 346 S.E.2d 749, 753 (1986) (citing Restatement *Second* of Contracts § 234 comment d a 111 (Tent. Draft. No. 5, 1970 (emphasis added), quoted with approval in *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 608 n. 2, 245 S.E.2d 157, 160, n.2 (1978)). Instead, unconscionability is based on "gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, [which] may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms." *Troy Mining Corp.*, 346 S.E.2d at 753.

In this case, there is no gross inadequacy of bargaining power, no indication or allegation of deception or compulsion, and nothing at all unfair about an agreement, binding on both parties, that their claims should be resolved in a particular neutral forum. Nor does the conclusion or holding that a contract is one of "adhesion" render that contract unenforceable. *See Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273 (quoting *Am. Food Mgmt. Inc., v. Henson*, 434

N.E.2d 59, 62 (Ill. App. 1982) (quoting Professor Corbin)) (“[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it; . . . [a trial court must] distinguish[] good adhesion contracts which should be enforced from bad adhesion contracts which should not.”) [internal quotation marks omitted]; *accord Concepcion*, 563 U.S. ___, No. 09-893, slip op. at 12 (“the times in which consumer contracts were anything other than adhesive are long past”) (footnote omitted); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (“A ruling of unconscionability based on [a gross disparity in bargaining power and a take-it-or-leave it contract] alone could apply to every contract of employment in our contemporary economy.”); *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 549 (“the fact that the Agreement is a contract of adhesion does not necessarily mean that it is also invalid. Because there are adhesion contracts that deserve to be enforced and others that do not, this Court looks at a host of factors to determine whether the terms at issue qualify as unconscionable.”) (citations omitted)).

The 11 transactions in this case involved the sale of real estate—specifically homes costing more than two hundred thousand dollars each—and the Purchase Agreements at issue contained terms particular to each home. The Circuit Court failed to identify any evidentiary support for its conclusion that there was a gross disparity in bargaining power as to any Signatory Plaintiff and Richmond, much less all of them. Moreover, all Plaintiffs were required to show that they lacked “meaningful alternatives” to buying a Richmond home; this is a burden which none of the Plaintiffs have even tried to meet, let alone actually carried. *See State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005) (quoting Syl. Pt. 4, *Art’s Flower Shop*, 186 W. Va. 613, 413 S.E.2d 670)).

In finding Paragraph 21(b) substantively unconscionable, the Order relies upon two of its elements—a class action waiver⁸ and a choice of discovery under AAA rules, with certain minimum discovery guaranteed. Order, Appendix Ex. 1 at App0031-0032. Neither of these elements demonstrates substantive unconscionability. That the FAA preempts any effort by a state court to invalidate an arbitration provision that contains a class action waiver or a choice of discovery other than what might be had in litigation was firmly established by the United States Supreme Court’s recent decision in *Concepcion*. This Court had already essentially foreseen and accepted the *Concepcion* holding, however, in its recent holding in *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 550, explaining and limiting *Dunlap* and holding that a class-action waiver alone is an insufficient basis for refusing to enforce an arbitration provision. And, the class action waiver has no bearing on the unconscionability analysis in this case anyway because the plaintiffs have not sought to bring a class action; it thus cannot be essential to vindication of their rights. The AAA’s discovery rules, too, are far from unconscionable; they represent standard arbitral conventions. In arbitration, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *Concepcion*, 563 U.S. ____, slip op. at 10.

Finally, the Order erroneously relies on alleged ambiguity in provisions other than 21(b) to hold that 21(b) is unconscionable. But there are no ambiguities in 21(b). Moreover, even if the trial court had correctly believed that there was ambiguity in the arbitration provision being challenged, state and federal law mandate that such ambiguity be resolved in favor of arbitration. “In applying general state-law principles of contract interpretation to the interpretation of an

⁸ The sentence in Paragraph 21(b) that sets forth this waiver is in nine of the Purchase Agreements; two do not include it.

arbitration agreement within the scope of the Act . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475 (1989). This Court has arrived at the same conclusion: “[t]he [Federal] Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *State ex rel. Wells v. Matish*, 215 W. Va. 686, 694, 600 S.E.2d 583, 590 (2004) (*per curiam*). Thus, the FAA would preclude a court from refusing to enforce an arbitration provision on grounds of ambiguity that could and must be resolved in favor of enforceability.

The Circuit Court’s holding is also contrary to the FAA because courts may not rely on the “uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987). Plaintiffs presented no evidence that arbitration under AAA procedures would preclude the effective vindication of their substantive rights, as was their burden. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000). Even leaving these points aside, the Circuit Court’s approach is contrary to binding federal law because states may not employ unconscionability principles to require arbitration to mirror litigation. *See, e.g., Concepcion*, 563 U.S. ___, slip op. at 18; *Wince.*, 681 F. Supp. 2d at 686. Arbitration by definition does not mirror litigation, and recognition of that fact may not be used to defeat the very goal it embodies.

Third, the Circuit Court erred when it held that non-signatories who are seeking to enforce the terms of the Purchase Agreements are not bound by the arbitration provisions of those Purchase Agreements. In fact, there are well recognized exceptions to the general rule that persons are not bound by arbitration provisions in contracts they have not signed. As this Court

has stated, “there are instances, and cases, where nonsignatories to arbitration clauses may be equitably compelled to pursue their claims against a defendant in arbitration.” *State ex rel. United Asphalt Supplies, Inc. v. Sanders*, 204 W. Va. 23, 27, 511 S.E.2d 134, 138 (1998) (citing *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1534 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997)). Where, as here, plaintiffs seek to enforce the terms of a contract or a duty allegedly derived from a contract, those plaintiffs are bound by the contract’s other terms and may be compelled under the doctrine of equitable estoppel to comply with a contractual arbitration provision. *See Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-418 (4th Cir. 2000). The Circuit Court erred both in failing to recognize that the general rule has well-established exceptions and in failing to apply a plainly applicable exception here.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument under Rule of Appellate Procedure 19(a) (1) and (4), as well as under Rule 20(a)(1), (2), and (3), and submit that the answers to the Questions Presented by this Petition would crystallize West Virginia law on the “‘juxtaposition of state and federal law’ as to arbitration agreements.” *See Schultz v. AT&T Wireless Services, Inc.*, 376 F. Supp.2d 685, 691 (2005).

V. ARGUMENT

A. Standard of Review - All Five Factors Affecting Whether a Writ of Prohibition lies as a Matter of Right are Established by this Petition

“The Writ of Prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or,

having such jurisdiction, exceeds its legitimate powers.”⁹ W. Va. Code § 53-1-1 (2010); see Syl. Pt. 1, *State ex rel. Charleston Mail Ass’n v. Ranson*, 200 W.Va. 5, 488 S.E.2d 5 (1997). Moreover, “a petition for a writ of prohibition is an appropriate method by which to obtain review by this Court of a circuit court’s decision to compel arbitration.” *McGraw v. American Tobacco Co.*, 224 W. Va. 211, 221, 681 S.E.2d 96, 106 (2009). “A party seeking this Court’s review of a circuit court order compelling arbitration prior to entry of a final order which compiles with the requirements of West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure must do so in an original jurisdiction proceeding seeking a writ of prohibition.” *Id.*

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

TD Ameritrade, 225 W. Va. at 254, 692 S.E.2d at 297.

All five factors are present here.

The existence of the first two (whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; and whether the petitioner will be

⁹ This Court reviews the legal determinations of the Circuit Court *de novo*. *McGraw v. American Tobacco Co.*, 224 W. Va. 211, 222, 681 S.E.2d 96, 107 (2009) (“our review of whether an arbitration clause represents a valid and enforceable contract is *de novo*”) (citing *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)).

damaged or prejudiced in a way that is not correctable on appeal) are self-evident. If a matter that should be arbitrated is instead litigated in 11 cases in circuit court, then Richmond will have been deprived of its contractual right to the arbitral forum and irreparably injured by proceeding through one or more trials before appeal can be taken from the wrongful denial of the arbitral forum. More importantly, that outcome would be in derogation of the clear mandate of federal law:

. . . we not only honor the plain meaning of the statute [referring to the Federal Arbitration Act] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Prima Paint, 388 U.S. at 404 (discussing Section 4 of the Federal Arbitration Act, *i.e.*, 9 U.S.C. § 4.)

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.

Southland Corp., 465 U.S. at 7.

For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.

Id. at 7-8.

The third factor, whether the lower tribunal's order is clearly erroneous as a matter of law, is demonstrated by the arguments in this Petition.

The fourth factor favoring the granting of the writ, "whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law," also exists here. The 11 *Thorin* cases are the fourth group of cases making identical allegations against Petitioners Richmond and MDC, all relying upon Purchase Agreements including

essentially the identical arbitration provision at issue here. In those previous three groups¹⁰ (each case included multiple households/plaintiffs in a single complaint, thus constituting *de facto* pre-Rule 3 amendment consolidations by Plaintiffs' counsel, and all three complaints were later consolidated by order for discovery),¹¹ Petitioners Richmond and MDC filed motions to enforce the same arbitration provision; in each instance the Circuit Court denied those motions. Richmond and MDC then filed a motion to reconsider on 17 July 2009, which pended (including a lengthy stay during prosecution of a writ to overturn a default in those three consolidated cases) until about the time that the *Thorin* motions to compel arbitration were filed in the latter part of 2010, at which time a renewed motion for reconsideration was filed in light of this Court's decisions in *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 293 and *Ruckdeschel*, 225 W. Va. at 451, 693 S.E.2d at 816, and the United States Supreme Court's decision in *Rent-A-Center*, 130 S. Ct. 2772. That motion for reconsideration was summarily denied without discussion or consideration. This history was briefly recited in the opening of the Circuit Court's Order that is here challenged. Order, Appendix Ex. 1 at App0011-0012. There is thus no doubt that the Circuit Court's Order contains an "oft repeated error" that "manifests persistent disregard for [both] procedural [and] substantive law." Syl. Pt. 1, *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 293.

Finally, the fifth factor is "whether the lower tribunal's Order raises new and important problems or issues of law of first impression." This Court has yet to issue a syllabus point addressing the severability doctrine's authority in West Virginia's jurisprudence. Moreover, as this Petition demonstrates, the Circuit Court has failed to conform to this Court's decisions that

¹⁰ See footnote 2, *supra*.

¹¹ The *Thorin* cases involve 11 houses and 39 plaintiffs; all of the four pending cases/groups comprise a total of 56 houses and 222 plaintiffs.

follow the severability doctrine, the FAA, and governing federal precedent. This Petition thus focuses the spotlight on an “important problem or issue of law of first impression” involving the confluence of federal and state law under the FAA. Further, the question of whether non-signatories may be compelled to arbitrate if their claims are made under a contract including an agreement to do so is one of first impression for this Court. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009).

The writ should issue so that this Court can correct the clear errors of law made below.

B. The Circuit Court’s Unlawful Refusal To Enforce The Arbitration Agreement Was Based On Its Consideration of Contract Provisions Outside of That Agreement In Violation of The FAA And Its Severability Doctrine.

In these cases, Richmond sought to enforce the arbitration provision of its Purchase Agreements with its homebuyers. The severable agreement to arbitrate that is at issue, Paragraph 21(b) (shown in full on page 3, *supra*), may, for the convenience of argument, be further divided into five parts:

- (1) *Mutual Obligation to Arbitrate*: “Purchaser and Seller agree that any and all disputes, claims and/or controversies in law or equity between Purchaser and Seller arising out of, related to or in any way connected with the Property, this Agreement, or any resulting transaction which are not settled through mediation shall be decided by neutral, binding arbitration and not by court action.”
- (2) *Class-Action Waiver*: “Purchaser and Seller further agree that any action brought by Purchaser against Seller shall be brought by independent action and that Purchaser shall neither serve as a class representative nor become a class member to pursue such action.”¹²
- (3) *Application of AAA Rules*: “Except as otherwise expressly stated herein, the arbitration shall be conducted in accordance with the rules of the American Arbitration Association (“AAA”).”

¹² As noted in footnote 8, *supra*, this waiver language appears in 9 of the 11 Purchase Agreements here at issue.

- (4) *Discovery Floor*: “In all cases involving \$10,000 or more in dispute, the arbitrator shall establish a discovery schedule allowing, at a minimum, depositions of the parties and their expert witnesses, if any.”
- (5) *Entry of Judgment on Award*: “Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

The FAA applies to the Purchase Agreements, as the Circuit Court recognized. *See generally* Order, Appendix Ex. 1 at App0012-0013 (applying the FAA). The FAA “create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). On a motion to compel under the FAA, a court’s inquiry is limited to two issues:

- (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.

Syl. Pt. 2, *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 293; *see also, e.g., Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858-59 (2010). Although the enforceability of an agreement to arbitrate is an issue of federal law, Section 2 of the FAA looks to applicable state law in assessing whether there is a valid basis to refuse to enforce the agreement to arbitrate. *See, e.g., Rent-A-Center*, 130 S. Ct. at 2776; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under Section 2 of the FAA, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate” an agreement to arbitrate. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). “But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons.” *Concepcion*, 563 U.S. ___, slip op. at 17. Further, “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives” (*id.* at 9) are preempted by it (*id.* at 18).

As *Rent-A-Center*, *Buckeye Check Cashing*, and their predecessors make clear, federal law dictates that the inquiry into the validity of an agreement to arbitrate must be limited to “the

specific ‘written provision’ . . . that [a] party seeks to enforce,” *Rent-A-Center*, 130 S. Ct. at 2779 (emphasis added), because “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Buckeye Check Cashing, Inc.*, 546 U.S. at 445. Under the severability doctrine, “a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Center*, 130 S. Ct. at 2778. The court has authority to examine the validity of only the precise arbitration provision that a moving party seeks to enforce. *Id.* at 2778-79. The validity of other contractual provisions, including *other arbitration provisions*, is for the arbitrator to decide:

Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 [of the FAA] operates on the specific “written provision” to “settle by arbitration a controversy” that the party seeks to enforce. Accordingly, unless [plaintiffs] challenge[] the . . . provision [sought to be enforced] specifically, [the court] must treat it as valid under § 2 and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [a]greement as a whole to the arbitrator.

Id. at 2779 (emphasis added). Any “argument . . . that under state law . . . unconscionable clauses” elsewhere in the contract as a whole—or elsewhere in the agreement to arbitrate itself—“c[an] not be severed from the arbitration agreement . . . fails.” *Id.* at 2780, n.4.

The Circuit Court dismissed the severability doctrine as inapplicable on the ground that it is addressed solely to the question of whether the court or the arbitrator decides validity. That is clearly incorrect. It is “a matter of substantive federal . . . law” that dictates not just who may decide validity, but also precisely what may and may not be considered in doing so. *Buckeye Check Cashing*, 546 U.S. at 445 (emphasis added). In assessing the validity of the arbitration agreement at issue, the Circuit Court considered far more than federal law permits.

As long ago as *Prima Paint* in 1967, the United States Supreme Court held that “in passing upon [a motion to compel arbitration under the FAA] . . . , a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” *Prima Paint*, 388 U.S. at 404. That holding was strongly reaffirmed in 2006 in *Buckeye Check Cashing*, 546 U.S. at 447.

The United States Supreme Court emphasized the narrow scope of a court’s authority regarding arbitration agreements in *Rent-A-Center*.¹³ In a routine contract, such as the one at bar, the “agreement to arbitrate” is the arbitration clause or clauses of the contract, while the entire contract (usually dealing with substantive matters other than just arbitration) is the “contract as a whole.” In *Rent-A-Center*, however, the precise agreement to arbitrate under review was the “delegation provision” of the arbitration agreement, while the entire arbitration agreement itself was the “contract as a whole.” 130 S. Ct. at 2777. Thus, the *Rent-A-Center* majority focused solely to the delegation provision, and held that a challenge to the entire arbitration agreement (the “contract as a whole” in that instance) was irrelevant to the court’s threshold inquiry about whether to enforce the delegation provision. *Rent-A-Center*, 130 S. Ct. at 2781 (emphasis added).

Under the FAA, the alleged unconscionability of terms elsewhere in the Purchase Agreements cannot make the parties’ agreement to arbitrate substantively unconscionable. The severability doctrine precludes that analysis. For example, consumers in *Wince* recently invited the United States District Court for the Northern District of West Virginia to void an arbitration agreement in their cellular-telephone service agreements on the same grounds that Plaintiffs have urged here: they argued that various provisions outside the specific agreement to arbitrate

¹³ “[A] party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Center*, 130 S. Ct. at 2778.

(including a limitation period for filing certain claims, a waiver of warranty, and a disclaimer of certain kinds of liability) rendered the arbitration agreement itself unconscionable. *Wince*, 681 F. Supp.2d at 686. The district court rejected their argument. *Id.* Because the provisions of the specific arbitration agreement itself were valid, the district court held that “any challenge to these liability-limiting provisions must be raised before an arbitrator.” *Id.* (citing, *inter alia*, *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (“[W]hen claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement.”)).

The district court explained:

This is because it is well established that, “if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity of enforceability of an arbitration provision on any grounds that ‘exist at law or in equity for the revocation of any contract’ 9 U.S.C. § 2, the grounds ‘must relate specifically to the arbitration clause and not just to the contract as a whole.’” *Snowden v CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). In fact, “when claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement.” *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001). Accordingly, any challenge to these liability-limiting provisions must be raised before an arbitrator.

Wince, 681 F. Supp.2d at 686; see also *Buckeye Check Cashing*, 546 U.S. at 448 (“It is true. . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void”).

In its analysis, the Circuit Court also incorrectly read this Court’s decisions in *Ruckdeschel* and *Dunlap* as authorizing it to assess the enforceability of Paragraph 21(b) through an analysis of the substantive conscionability of provisions outside Paragraph 21(b). Neither

Ruckdeschel nor *Dunlap* may be read as the Circuit Court read them. *Ruckdeschel* did not involve unconscionability at all, let alone the unconscionability of an arbitration clause. 225 W. Va. at 455, 693 S.E.2d at 820. It addressed the question of whether the arbitration clause, whose validity was unchallenged,¹⁴ was broad enough to embrace a claim of indemnification for negligence. *Ruckdeschel*, 225 W. Va. at 457, 693 S.E.2d at 822.

Nor can *Dunlap* be read to condone or mandate the Circuit Court's violation of the severability doctrine, as this Court made clear in *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 551. Indeed, *Dunlap* does not even cite *Prima Paint* or mention the severability doctrine (it preceded by 10 years the United States Supreme Court decisions in *Buckeye* and *Rent-A-Center*). In *Dunlap*, moreover, this Court addressed an arbitration agreement set out in the fourteenth paragraph of a consumer purchase-and-financing contract. See 211 W. Va. at 554, 567 S.E.2d at 270. All of the provisions this Court cited in determining that Paragraph 14 was substantively unconscionable were in Paragraph 14. See *id.* Thus, in *Dunlap*, the plaintiff "argued that several prohibitions on and/or limitations of his rights and remedies—that are part of Paragraph 14 in [the defendant's] purchase and financing agreement document—are unconscionable exculpatory provisions in a contract of adhesion." 211 W. Va. at 560, 567 S.E.2d at 276 (emphasis added).

In this case, unlike *Dunlap*, in analyzing the validity of the arbitration provision, the Circuit Court considered and found to be substantively unconscionable provisions in Paragraphs 8(a) and 8(c) that were neither "part of [n]or tied to" (*id.* 211 W. Va. at 564, 567 S.E.2d at 280) the agreement to arbitrate set out in Paragraph 21(b). These provisions can play no part in the analysis of the substantive conscionability of Paragraph 21(b). Under the FAA, in assessing the

¹⁴ *Ruckdeschel*, 225 W. Va. at 455, 693 S.E.2d at 820, fn. 3 ("The parties have not raised below, or even suggested, that the arbitration provision is unconscionable, or that it was thrust upon a party, or that it was part of a contract of adhesion.").

enforceability of an arbitration clause, a court may not consider provisions that are not part of or tied to the specific agreement to arbitrate at issue. It may consider only those provisions in the “specific agreement to arbitrate” that a party seeks to enforce. *Rent-A-Center*, 130 S. Ct. at 2778.

Moreover, *Dunlap* is distinguishable on its facts. First, here, unlike *Dunlap*, there is a mutual obligation to submit claims to arbitration; in *Dunlap* Paragraph 14 allowed the provider, but not the consumer, to forgo arbitration and pursue certain claims in court. Further, in this case the arbitrator has the authority to assess whether the provisions in Paragraphs 8(a) and 8(c) are enforceable as a matter of applicable West Virginia law, unlike *Dunlap*, where the agreement limited the arbitrator’s authority.

If the specific arbitration provision at issue is not unconscionable and is otherwise valid, controlling federal law commits decisions about the unconscionability of provisions elsewhere in the contract, and indeed of the contract as a whole, to the arbitrator. *Rent-A-Center* at 2778-79; *Buckeye*, 546 U.S. at 445-46; *see also Wince*, 681 F. Supp. 2d at 686. An arbitrator is then bound to apply the same West Virginia law of unconscionability as a court in considering those other provisions.¹⁵ If provisions outside of the arbitration clause are alleged to be unconscionable under West Virginia law, that is for an arbitrator—not the court—to decide.

In sum, in assessing the validity of the arbitration provision at issue, the Circuit Court had authority to refer only to the “specific ‘written provision’ ... that [a] party seeks to enforce.” *Rent-A-Center*, at 2779 (quoting FAA § 2). It is not permitted to look outside that provision; that the Circuit Court did so here is clear error of law. In considering the unconscionability of “the precise agreement to arbitrate” that Petitioners sought to enforce, the Circuit Court examined not

¹⁵ *Thorin Purchase Agreements* at ¶ 20(a), Appendix Ex. 7 at App0178-0253 (“This Agreement shall be governed and construed in accordance with the laws of the State of West Virginia.”).

only that arbitration provision, but the entirety of the Purchase Agreement. It found what it characterized as “unfair terms” outside the arbitration provision in question and then relied on those terms in holding that arbitration provision itself to be unconscionable. In doing so, it violated federal law.

Specifically, in assessing the validity of the arbitration provisions in Paragraph 21(b), the Circuit Court looked at a waiver of certain warranties in Paragraph 8(a); an exclusion of “special, indirect or consequential damages” in Paragraph 8(c); and a disclaimer of liability for damages “resulting from environmental conditions, including . . . radon gas,” in Paragraph 8(c). *See Thorin Purchase Agreements* at ¶ 8(a) and (c), Appendix Ex. 7 at App0178-0253 (emphasis added). It concluded that all of these other provisions were substantively unconscionable, and relied upon this finding to hold that Paragraph 21(b) was also unconscionable. *See Order*, Appendix Ex. 1 at App00030-0032 (“As such, the Court finds that the exculpatory provisions in the instant Purchase Agreements render the arbitration provision unconscionable.”).

That analysis exceeded the Circuit Court’s jurisdictional authority and usurped the authority of the arbitrator to whom the parties had delegated all disputes arising out of the Purchase Agreements, including determinations about whether or not substantive provisions in the agreements are unenforceable. Under the well-settled federal law described above, the Circuit Court had no authority to consider provisions outside of Paragraph 21(b) in assessing that provision’s validity. Plaintiffs’ challenge to the provisions in Paragraphs 8(a) and 8(c) is, under the severability doctrine, irrelevant to the validity of Paragraph 21(b). On this basis alone, the Circuit Court’s determination that the arbitration agreement is not enforceable is the product of clear legal error and may not stand.

C. **The Circuit Court Incorrectly Held That The Arbitration Clause Is Unconscionable Under West Virginia Law.**

As described above, the Circuit Court erred in considering provisions outside of the arbitration clause in assessing whether the arbitration agreement is enforceable. Once this error is eliminated and only the arbitration provision being challenged is analyzed, it is clear that the arbitration provision is not unconscionable under West Virginia law and must be enforced.¹⁶

Under West Virginia law, unconscionability means “overall and gross imbalance, one-sidedness or lopsidedness that justifies a court’s refusal to enforce a contract as written.” *Drake v. W. Va. Self-Storage, Inc.*, 203 W. Va. 497, 500, 509 S.E.2d 21, 24 (1998) (quoting *McGinnis v. Cayton*, 173 W. Va. 102, 113, 312 S.E.2d 765, 776 (1984) (internal quotation marks omitted)). Analytically, it “may be divided into two categories: procedural and substantive. Procedural unconscionability is concerned with the inequities and unfairness in the bargaining process. Substantive unconscionability is involved with determining unfairness in the contract itself.” *Id.*

Procedural unconscionability involves an evaluation of the fairness of the bargaining process. Thus, its determination “necessarily includes an inquiry beyond the face of the contract” in question (*Arnold v. United Companies Lending, Corp.*, 204 W. Va. at 236 n.6, 511 S.E.2d at 861 n.6 (quoting *Troy Mining*, 176 W. Va. at 603, 346 S.E.2d at 753) (internal quotation marks omitted)) that is focused “on the relative positions of the parties, the adequacy of the bargaining position, [and] the meaningful alternatives available to the plaintiff.” Syl. Pt. 4 (in part), *Art’s Flower Shop*, 186 W. Va. 613, 413 S.E.2d 670. In contrast, an individual term or an entire contract may be found substantively unconscionable only if it is “unreasonably favorable to the stronger party.” *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229,

¹⁶ Plaintiffs did not claim that their agreement to arbitrate was procured by fraud or induced by duress. See Order, Appendix Ex. 1 at App0015.

235, 511 S.E.2d 854, 860 (1998) (quoting *Troy Mining*, 176 W. Va. at 604, 346 S.E.2d at 753) (internal quotation marks omitted).

The Circuit Court correctly recognized that “not all adhesion contracts,” even those that are procedurally unconscionable, “are invalid.” Order, Appendix Ex. 1 at App0025; *see also AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 549 (“[T]he fact that the Agreement is a contract of adhesion does not necessarily mean that it is also invalid.”) (quoting *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 306, 685 S.E.2d 693, 700 (2009)); *Concepcion*, No. 09-893, slip op. at 12 (“the times in which consumer contracts were anything other than adhesive are long past”) (footnote omitted).¹⁷ This is in part because the final determination of validity turns on substantive unconscionability. “Since the bulk of contracts signed in this country . . . are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable” and, accordingly, a “[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it; . . . [a trial court must] distinguish[] good adhesion contracts which should be enforced from bad adhesion contracts which should not.” *Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273 (quoting *Am. Food Mgmt.*, 434 N.E.2d 59, 62 (Ill. App. 1982) (quoting Professor Corbin)) (internal quotation marks omitted). Both procedural and substantive unconscionability must be found before a court can refuse to enforce a contract under West Virginia law, and finding the contract or, as in this instance, the precise arbitration provision

¹⁷ Not only are the bulk of all contracts signed in this country adhesion contracts; so too are the bulk of all residential real-estate contracts. Many such contracts, moreover, include agreements to arbitrate. *See, e.g., Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App. 1996) (“The circumstances of [the] sale [of Plaintiffs’ homes] [we]re routine. To declare them unconscionable would be to outlaw arbitration *per se* in the large majority of residential real estate sales contracts. Holding this provision unconscionable . . . would negate the public policy in favor of arbitration.”).

being challenged, to be a contract of adhesion merely—and barely—starts the required analysis. *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 551.

1. **The Circuit Court incorrectly analyzed procedural unconscionability.**

Notwithstanding its own acknowledgement that such was not the case, the Circuit Court found the Purchase Agreement to be procedurally unconscionable solely because it found it to be a contract of adhesion. Order, Appendix Ex. 1 at App0032. This analysis cannot be reconciled with West Virginia law.

First, the Circuit Court made precisely the same error that this Court identified in *AT&T Mobility*. There, this Court laid out “the determinations required for declaring an adhesion contract to be unconscionable,” beginning with the four factors articulated in *Art’s Flower Shop* that relate primarily to procedural unconscionability. This Court said:

The starting point for conducting an unconscionability analysis is the four-part test we identified in *Art’s Flower Shop*. Upon application, that test requires an examination of the relative position of the parties; inquiry into each party’s bargaining power; consideration of the availability of meaningful alternatives; and identification of specific unfair terms in the subject contract. *See* 186 W. Va. at 614, 413 S.E.2d at 671, syl. pt. 4.

AT&T Mobility, 226 W. Va. 572, 703 S.E.2d at 550.

This Court then found that “[t]he trial court made no findings as to the four part test we articulated in *Art’s Flow Shop*.” *Id.* at 551 (citation omitted). Here, too, the Circuit Court failed to recognize that the Plaintiffs had presented no evidence of procedural unconscionability whatsoever. It held no hearing, took no evidence, and had no evidentiary record at all relating to the procedural conscionability of any of the 11 Purchase Agreements at issue. As a matter of law, a finding that a contract is one of adhesion, even if correct, is inadequate to demonstrate procedural unconscionability.

2. The Circuit Court's Conclusion of Substantive Unconscionability Is Also Based On Legal Errors.

Plaintiffs alleged that two provisions of Paragraph 21(b) were substantively unconscionable: the *Class-Action Waiver* and the *Discovery Floor*. The Circuit Court agreed and so clearly erred.

a. The Circuit Court's Determination of Unconscionability Does Not Accurately Reflect West Virginia Law and Is Preempted By the FAA.

The Circuit Court, relying upon a clearly incorrect reading of *Dunlap*, concluded that the arbitration provision at issue is unconscionable under West Virginia law because the provision bars class actions and authorizes some limits on discovery.¹⁸ This Court previously noted that the question of whether the FAA “preempts states from conditioning the enforcement of an arbitration agreement on the availability of procedures such as class wide arbitration when those procedures are not necessary to ensure that the parties may fully vindicate their rights . . . is likely to be addressed by the United States Supreme Court in *AT&T v. Concepcion*.” See *AT&T Mobility*, 226 W. Va. 572, 703 S.E.2d at 547-548 n.14. As a result, this Court refrained from deciding that precise question then. The United States Supreme Court has now done so, and the answer is an unequivocal “yes.” See *Concepcion* slip op. at 17-18.

Here, the Circuit Court's ruling is based on the conclusion that an agreement to arbitrate is unconscionable because it does not provide class-wide procedures and the precise discovery that might be available in civil litigation. That, however, is precisely what the FAA forbids, and *Concepcion* clearly holds that such “obstacle[s] to the accomplishment and execution of the full

¹⁸ The Circuit Court also relied on non-arbitration provisions of the Purchase Agreement in finding unconscionability. See Order, Appendix Ex. 3 at App0030-0031(discussing paragraphs 8(c) & 8(a)). For the reasons set forth in Part B *supra*, these provisions are irrelevant as a matter of law to an assessment of the enforceability of the arbitration clause.

purposes and objectives” of the FAA are preempted by it. *Concepcion*, 563 U.S. ___, slip op. at 18. As the United States Supreme Court explained in *Perry*, a court may not rely on the “uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” 482 U.S. at 492 n.9.

Thus, in this action, as a matter of governing federal law, the unavailability of class relief or a discovery provision that does not mirror those in civil litigation cannot render the arbitration clause unconscionable. On that ground alone, the Circuit Court’s holding of unconscionability is clear error.

b. The Class Action Waiver Is Not Unconscionable

Relying on *Dunlap*, the Circuit Court found the arbitration agreement unconscionable simply because it precluded the aggregation of claims. Order, Appendix Ex. 1 at App0031-0032.

This reading of *Dunlap* is wrong as this Court made clear in *AT&T Mobility*:

Looking to the specific result that obtained in *Dunlap* rather than applying the additional standards . . . adopted in *Dunlap*, the trial court incorrectly reasoned that *all* contracts of adhesion that bar . . . class wide relief are facially unconscionable. *Dunlap* does not impel or require that conclusion. As this Court recognized in *Dunlap*, every case in which the issue of an unconscionable adhesion contract is raised must be examined on the basis of the language of that particular contract in conjunction with the specific facts surrounding the dispute.

226 W. Va. 572, 703 S.E.2d at 549 (footnote omitted) (emphasis in original). “Standing alone, the lack of class action relief does not render an arbitration agreement unenforceable on grounds of unconscionability under this Court’s decision in *Dunlap*.” *Id.* at 551 (citing *Schultz*, 376 F.Supp.2d 685, 690).¹⁹ The *Schultz* holding and this Court’s cautious attitude in *AT&T Mobility* presaged the United States Supreme Court’s decision in *Concepcion* holding that a class action

¹⁹ *Schultz* characterized any such holding in *Dunlap* as preempted by the FAA. 376 F. Supp. 2d at 691.

waiver may not render an arbitration provision unconscionable and that any state law to the contrary is preempted by the FAA. *See Concepcion*, 563 U.S. ___, slip op. at 17-18.

Plaintiffs also claimed that the *Class-Action Waiver* “has the effect of imposing upon homeowners prohibitively high costs to enforce their rights.” Order, Appendix Ex. 1 at App0031. Plaintiffs, however, simply asserted that the costs would be “prohibitively high” without offering any support from the record to meet their burden. *See Green Tree Financial Corp., Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (“[A] party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs”); *see* Syl. Pt. 4, *AT&T Mobility*, 22 W. Va. 572, 703 S.E.2d 543 (citing Syl. Pt. 4, *Dunlap*, 211 W. Va. 549, 567 S.E.2d 265) (“In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision”). Finally, as this Court held in *AT&T Mobility*:

Similarly, while relying on *Dunlap* as the basis for its ruling, the trial court failed to rule on whether the applicable arbitration terms prevent Ms. Shorts from vindicating her rights and whether the costs attendant to pursuing her claims in arbitration are unreasonably burdensome. *See Dunlap*, 211 W. Va. at 550-51, 567 S.E.2d at 266-67, syl. Pts. 2, 4. When this matter is returned to the circuit court, the trial court should evaluate the provisions of the arbitration clause it has found to control against the ability of Ms. Shorts to enforce her rights in connection with her claim.²⁰ This determination will necessarily involve a consideration of the financial costs to proceed in arbitration; the opportunity to address her claims in arbitration and the ability to seek redress for her claims in arbitration.

226 W. Va. 572, 703 S.E.2d at 551 (footnote in original).

²⁰ As this Court made clear in *Dunlap*, “the denial of the consumer’s right to present claims to a jury was not a basis for our determination that the contract at issue was unconscionable. *See* 211 W. Va. at 561, 567 S.E.2d at 277 (acknowledging “complex issues of federalism” and stating that “we . . . give no weight to Mr. Dunlap’s state constitutional rights to a jury in the public system”).

Thus, as a matter of law, Plaintiffs' failed to present a sufficient basis for a finding of substantive unconscionability regarding the *Class Action Waiver* and, under *Concepcion*, the Circuit Court is prohibited by the FAA from doing so.

c. **The Discovery Floor is not Unconscionable.**

In Paragraph 21(b)'s *Discovery Floor*, the Circuit Court purported to detect another substantively unconscionable provision which it branded a "limitation on discovery" in arbitration "favor[ing] the [Petitioners] who would like to limit the Plaintiffs' ability to pursue information concerning [the alleged] widespread wrongdoing." Order, Appendix Ex. 1 at App0031-0032. As a matter of law as well as linguistics, the Circuit Court misconstrued the plain language of this provision.

First and foremost, this issue, like the *Class Action Waiver*, is settled by the United States Supreme Court's *Concepcion* decision which says that provisions that are unique to arbitration, like the failure "to provide judicially monitored discovery" or "to abide by the Federal Rules of Evidence," may not be used by a state court to hold an arbitration provision unconscionable because they would "stand as an obstacle to the accomplishment of the FAA's objectives" and are therefore preempted by it. *Concepcion*, 563 U.S. ___, slip op. at p. 8-9, 17-18. Declining arbitration because of a provision designed to accomplish the very goals that arbitration seeks—simplified, streamlined, less encumbered, more timely decisions—"stands as an obstacle" and violates the FAA. The FAA favors arbitration because it provides an alternative to litigation: a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628. The FAA mandates enforcement of an agreement to arbitrate even where the procedures chosen by the parties are different from those in litigation. The FAA does not permit state contract law to condition enforcement of agreements to arbitrate on the parties' adoption of all procedures

available in litigation. See e.g., *Perry*, 482 U.S. at 491 n.9; *Southland Corp.*, 465 U.S. at 16 n.11. See also, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (“the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights”).

Insistence that arbitration replicate litigation undermines Congress’ view that arbitration should serve as an alternative means of dispute resolution. Under the FAA, Congress’s “clear intent” was “to move the parties to an arbitrable dispute *out of court and into arbitration* as quickly and easily as possible.” *Moses H. Cone*, 460 U.S. at 22 (emphasis added). State law cannot be used to pull parties who have agreed to arbitrate under procedures different from those already available in litigation back into court. Congress sought to ensure that parties could agree to an alternative to litigation, not just to a mirror image of it.

As the United States District Court for the Northern District of West Virginia explained:

when the parties agree to resolve their disputes through arbitration, they concomitantly agree not to resolve their disputes by going to court. Thus, a rule imposing heightened requirements on ‘agreements not to go to court’ necessarily imposes heightened requirement on ‘agreements to go to arbitration.’ Because the Act requires that arbitration agreements be on the same legal footing as ‘any contract,’ such a rule would be preempted by the Act as it applied to prevent the enforcement of otherwise valid agreements to arbitrate.

Wince, 681 F. Supp. 2d at 686 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D.W.Va. 2004)). That is why federal courts in the Fourth Circuit have regularly concluded that the FAA preempts state law that treats arbitration provisions as inherently unconscionable simply because they create a process that does not mimic civil litigation. See *Snowden*, 290 F.3d 631 (rejecting claim that arbitration is unconscionable due to waiver of jury trial right, because “[t]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.”) (quoting *Sydnor*, 252 F.3d at 307); *Wince*,

681 F. Supp. 2d at 686 (finding the FAA preempts any legal rule that would invalidate plaintiffs' waiver of the right to pursue class relief) (citing *Schultz*, 376 F. Supp. at 691). The United States Supreme Court's decision in *Concepcion* seals this deal: the Discovery Floor may not be held to make Paragraph 21(b) substantially unconscionable. *See Concepcion*, 563 U.S. ____, slip op. at p. 8-9, 17-18.

Logic also dictates this result. This provision is a floor, not a ceiling. Its consequence is simply the application of the AAA rules with minimum discovery requirements, and that is plainly fair. It mandates that the arbitrator "establish a discovery schedule allowing, at a minimum, depositions of the parties and their expert witnesses, if any." *See Thorin Purchase Agreements* at ¶ 21(b), Appendix Ex. 7 (emphasis added). Thus, far from "restrict[ing] discovery"²¹ that the arbitrator may allow, the *Discovery Floor* fixes a minimum that the arbitrator has no authority to decrease. Paragraph 21(b) further states that AAA rules otherwise govern any arbitration proceeding; those rules authorize the arbitrator, "consistent with the expedited nature of arbitration," to "direct ... the production of documents and other information, and ... the identification of any witnesses to be called."²² Neither the *Discovery Floor* nor the AAA rules deprive Plaintiffs of their ability to develop their individual cases fully in arbitration.

Nor does the *Discovery Floor* "favor[]" Petitioners. Its application is mutual and even-handed. In fact, none of the provisions of Paragraph 21(b) creates an inherently biased dispute resolution process. Paragraph 21(b) equally compels both Purchaser and Seller to arbitrate and

²¹ Order, Appendix Ex. 1 at App0032 fn.5.

²² AAA Comm. Arbitration Rule R-21, <http://www.adr.org/sp.asp?id=22440> (last visited May 5, 2011). *See also* AAA Home Constr. Arbitration Rule ARB-22, <http://www.adr.org/sp.asp?id=32399> (last visited May 5, 2011) (providing, in addition, for expert inspection, documentation, and testing of the "alleged deficiencies" in the "design, materials or construction" of homes by all parties).

to forgo access to the courts. *Thorin* Purchase Agreement at ¶ 21(b), Appendix Ex. 7. Unlike the lopsided rules deemed unconscionable in other cases, the AAA rules applicable here are neutral and impartial. Indeed, Plaintiffs have never claimed otherwise.

The arbitration provision at issue is not unconscionable under West Virginia law for its failure to replicate class-action litigation and full civil discovery. The FAA does not allow states to require parties agreeing to arbitration also to agree to utilize procedures that are “fundamentally incompatible with arbitration” itself. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010); see *Concepcion* slip op. at 9, 17. Petitioner respectfully requests that this Court hold the Circuit Court’s unconscionability finding clear error as a matter of law.

D. There is No Ambiguity in Paragraph 21, and Richmond and the Signatory Plaintiffs Unambiguously Agreed to Arbitrate.

Although Plaintiffs principally argued that the arbitration agreement was unconscionable, they also claimed that certain language in Paragraph 21(a) rendered the *Mutual Obligation to Arbitrate* in Paragraph 21(b) ambiguous and therefore invalid. As a matter of law, no ambiguity exists in Paragraph 21(b): Plaintiffs unequivocally agreed to arbitrate.

Paragraph 21 addresses both mediation and arbitration; section (a) covers mediation as a prerequisite to seeking a binding decision anywhere—in court or arbitration—and section (b) is the agreement to arbitrate.²³ Neither is at all ambiguous. Indeed, the absence of ambiguity in section (b) is confirmed by the all-caps, independently-initialed by all Signatory Plaintiffs “NOTICE” that ends Paragraph 21.

²³ The parties have discussed mediation of the claims made in *Thorin*, but these discussions have all occurred after Plaintiffs filed and pursued these 11 Civil Actions in violation of Paragraph 21(a).

The Circuit Court asserted that the references to “court action” in Paragraph 21(a) created an “irreconcilable conflict” with Paragraph 21(b). Order, Appendix Ex. 1 at App0033. The Circuit Court opined that Paragraph 21(a) “clearly suggests that the homeowners may still retain the ability to vindicate their claims in court.” *Id.* Paragraph 21(a) does nothing of the kind. Read as a whole, Paragraph 21 unambiguously consigns the binding resolution of any and all relevant disputes to arbitration. Further, under the severability doctrine, the Circuit Court’s assessment of the validity of the agreement to arbitrate in Paragraph 21(b) is confined to the analysis of that provision. That text does not leave any room for confusion.

E. The Circuit Court Erred When It Refused to Compel Arbitration of Claims by Non-Signatories Seeking To Enforce Duties Arising Under The Purchase Agreements.

The Circuit Court also committed a clear error of law when it separately held that non-signatories of the Purchase Agreements who sought to recover damages under those agreements were not also bound by the arbitration provision.

Although a party ordinarily may not enforce or be bound by an arbitration agreement that he or she did not sign, “[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *Int’l Paper Co.*, 206 F.3d at 416-17. Indeed, the United States Supreme Court recently confirmed that “‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel’” *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (quoting 21 R. Lord, *Williston on Contracts* §57:19, p. 183 (4th ed. 2001)). As a result, the Circuit Court was simply wrong in ruling that this Court’s one decision addressing this question categorically precludes enforcement of arbitration agreements against non-signatories.

Specifically, the Circuit Court appeared to deny that there are exceptions to the general rule that non-signatories cannot be bound to contract agreements, saying that:

In *State ex rel. United Asphalt Supplies, Inc. v. Sanders*, 204 W. Va. 23, 27, 511 S.E.2d 134, 138 (1998), the West Virginia Supreme Court of Appeals reaffirmed the well-established rule that “only parties who have actually signed an agreement containing an arbitration clause can be forced to arbitrate their claims.”

Order, Appendix Ex. 1 at App0034. The Circuit Court misread *United Asphalt*. In fact, in *United Asphalt*, this Court explained:

The *J.J. Ryan case*²⁴ is frequently cited as authority for the well-recognized exception to the rule that only parties who have actually signed an agreement containing an arbitration clause can be forced to arbitrate their claims. See *Thomson-CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773, 776-79 (2d Cir. 1995) (discussing five theories for binding nonsignatories to arbitration agreements and stating that “[t]his Court has made clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency’”); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1432 (M.D. Ala. 1997); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1016 (M.D. Ala. 1997); *Usina Costa Pinto S.A. Acucar e Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996); *Hinson v. Jusco Co.*, 868 F. Supp. 145, 149 (D.S.C. 1994). As the district court explained in *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala.), *aff’d*, 127 F.3d 40 (11th Cir. 1997), “[t]here are instances, and cases, where nonsignatories to arbitration clauses may be equitably compelled to pursue their claims against a defendant in arbitration.” *Id.* at 1534; *cf. Dickinson v. Chris Myers Pontiac-Nissan-GMC, Inc.*, 711 So. 2d 984, 989 (Ala. 1998)

United Asphalt, 204 W. Va. at 27, 511 S.E.2d at 138 (footnote and emphasis added). “[A] clear exception to the rule against compelling nonsignatories to arbitrate does exist.” *Id.*

The record here demonstrates that the nonsignatory exception applies to the claims of all Nonsignatory Plaintiffs. In *Wilson v. Dell*, No. 5:09-cv-00483, 2009 WL 2160775, at * 4 (S.D.W.Va. July 16, 2009), the district court explained that there are circumstances where equity “dictates that a nonsignatory to an arbitration agreement should be bound by its terms” For example, “[a] nonsignatory is estopped from refusing to comply with an arbitration clause when

²⁴ *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988).

it receives a direct benefit from a contract containing an arbitration clause.” *Id.* (citing *Int’l Paper*, 206 F.3d at 418). As the Fourth Circuit noted,

. . . To be Subject to equitable estoppel, the nonsignatory’s claims must “either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause.” *Long*, 453 F.3d at 629; *see also Kepler Processing Co., LLC v. New Mkt. Land Co.*, 5:08-cv-00040, 2008 U.S. Dist. LEXIS 77714, at *18-19, 2008 WL 4509377, at *6 (S.D.W.Va. Oct. 2, 2008) (Johnston, J.) (applying equitable estoppel where a “party refusing to arbitrate also seeks to enforce rights that are contained in a contract to which it is not a party”). Stated differently, the nonsignatory must be suing to enforce a duty arising from the contract or, similarly, be suing to recover damages for a breach of a duty in the contract. Where, however, the nonsignatory sues to enforce a duty that derives not from the contract, but from statute or common law, the contract’s arbitration clause will be irrelevant.

Wilson, 2009 WL 2160775 at * 4 (citing *R.J. Riffin & Co., v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 163-64 (4th Cir. 2004)).

That is precisely the situation here: the Nonsignatory Plaintiffs seek to enforce a duty derived from the contract; they are, as a result, bound by its terms. In this circumstance, a signatory can compel nonsignatories to arbitrate because one may not “rely on the contract when it works to [one’s] advantage, and repudiate it when it works to [one’s] disadvantage.” *See, e.g., Int’l Paper Co.*, 206 F.3d at 417-18 (the doctrine of equitable estoppel may bind a nonsignatory to the arbitration agreement of others); *Jackson v. Iris.com*, 524 F. Supp. 2d 742, 749 (E.D. Va. 2007) (“Under the doctrine of equitable estoppel . . . , a party (or his agent) need not actually sign a contract in order to be bound by the contract’s arbitration clause so long as the party retains a ‘direct benefit’ of the contract.”). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper Co.*, 206 F.3d at 417-18 (internal quotation marks omitted).

In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently

maintained that other provisions of the same contract should be enforced to benefit him. “To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].”

Id. at 418 (quoting *Avila Group, Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)) (first alteration in original). Thus, where nonsignatories assert claims based on a contract, they “cannot seek to enforce those contractual rights and avoid the contract’s requirement that ‘any dispute arising out of’ the contract be arbitrated.” *Id.* They can’t “hav[e] it both ways.” *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir 2004).

There are 11 Plaintiff households in these cases comprising 39 Plaintiffs. All assert claims for “breach of ... contract and/or warranty” under the Purchase Agreements.²⁵ All of the minor children, none of whom signed the Purchase Agreements, assert precisely the same claims that their parents assert, including “breach of ... contract and/or warranty.”²⁶ Because all of the Plaintiffs in these 11 households—adult and child, Signatory and Nonsignatory alike—seek to recover damages under the Purchase Agreements, they cannot avoid Paragraph 21(b)’s requirement that “any and all disputes, claims and/or controversies in law or equity ... arising out of, related to or in any way connected with the Propert[ies], th[e Purchase] Agreement[s], or any resulting transaction[s] ... be decided by neutral binding arbitration and not by court action.” *Thorin* Purchase Agreements at ¶ 21(b), Appendix __. The “[w]ell-established”²⁷ common-law doctrine of equitable estoppel dictates that all of these Nonsignatory Plaintiffs should be “compelled to pursue their claims against [Defendants] in arbitration.” *United Asphalt*, 204 W.

²⁵ See *Thorin* Compl. ¶¶ 54, 71, 89, 105, 121, 137, 153, 169, 185, 201, 217; see also “Wherefore” clauses.

²⁶ See, e.g., *Thorin* Compl. ¶ 71 (Isaac and Michele Burgman claiming, on behalf of minors Gabrielle and Isaiah Burgman, that “Richmond’s failure to install an operating radon removal system constitutes a breach of the Burgmans’ contract and/or warranty”).

²⁷ *Int’l Paper Co.*, 206 F.3d at 416.

Va. at 27, 511 S.E.2d at 138 (internal quotation marks omitted). The Circuit Court clearly erred when it refused to compel this group to arbitrate.

V. CONCLUSION

The strong federal policy favoring arbitration of claims under the FAA and concern for correct application of the severability doctrine lie at the heart of recent activity of the Supreme Court of the United States and this Honorable Court in this area of law. The Circuit Court misunderstood the import of those decisions and committed several clear errors of law in the *Thorin* Order. Most clearly, especially in light of *Concepcion*, it erroneously held the arbitration provision to be substantively unconscionable because it contains a class action waiver and a discovery floor. That holding is wrong under West Virginia law and is preempted by the FAA. Petitioners respectfully ask this Honorable Court to issue a writ of prohibition ordering the Circuit Court to vacate the 11 *Thorin* Orders, to compel all Plaintiffs to arbitrate their claims, to stay this litigation as to the 11 Plaintiff households whose claims must be arbitrated, and to grant such further relief as this Court deems proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

ON PETITION FOR WRIT OF PROHIBITION TO THE
CIRCUIT COURT OF JEFFERSON COUNTY

STATE OF WEST VIRGINIA ex rel.
RICHMOND AMERICAN HOMES
OF WEST VIRGINIA, INC., M.D.C.
HOLDINGS, INC., *et al.*,

Petitioners,

v.

Civil Action Nos. 10-C-152 – 10-C-162

HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT
OF JEFFERSON COUNTY, WEST
VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, A. L. Emch, counsel for defendants Richmond American Homes of West Virginia, Inc. and M.D.C. Holdings, Inc., do hereby certify that on 6 May 2011 service of the foregoing *Verified Writ of Prohibition* and a copy of the *Appendix* was made upon counsel of record by causing a true and exact copy to be placed in the United States mail, postage prepaid, addressed as follows:

Andrew C. Skinner, Esq.
Laura C. Davis, Esq.
Skinner Law Firm
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Bordas and Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Counsel for Plaintiffs

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Counsel for Breeden Mechanical

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Teresa J. Dumire, Esquire
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Morgantown, WV 26505
Counsel for Modern Enterprises

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Counsel for North Star Foundations

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Counsel for JSC Concrete Construction, Inc.

Kenneth G. Stallard, Esq.
Thompson O'Donnell, LLP
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Washington, DC 20005
Counsel for Specialized Engineering

Dale Buck, Esq.
Law Office of Dale Buck PLLC
306 W Burke Street
Martinsburg, WV 25401
Counsel for Bar-Nel Concrete

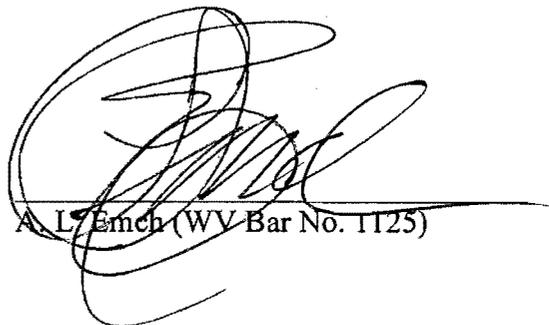
I further certify that I have mailed true and correct copy of same to the Honorable

David H. Sanders by U.S. mail, addressed as follows:

Honorable David H. Sanders
Jefferson County Courthouse
100 East Washington Street
Charles Town, WV 25414

I further certify that I have mailed true and correct copies of same to the Laura Rattenni, Jefferson County Circuit Clerk, for each of the individual civil action numbers referenced above by U.S. mail, addressed as follows:

Laura Rattenni, Jefferson County Circuit Clerk
Jefferson County Old Jail Annex
119 North George Street, Suite 100
PO Box 1234
Charles Town, WV 25414

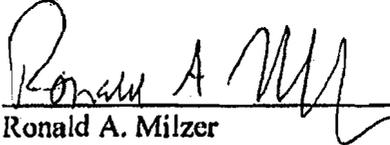


A. L. Emch (WV Bar No. 1125)

VI. VERIFICATION

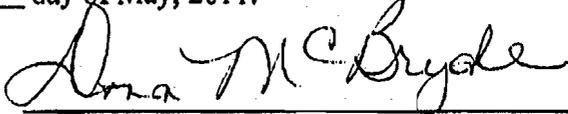
STATE OF COLORADO)
)
COUNTY OF DENVER) ss.
)

In accordance with the requirements of W. Va. Code § 53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil actions identified in this Petition, based upon his information and belief.



Ronald A. Milzer
Vice President, Real Estate
M.D.C. Holdings, Inc.

Subscribed and sworn before me this 6th day of May, 2011.



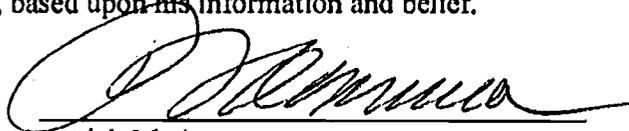
Notary Public

DONA MCBRYDE
Notary Public
State of Colorado

VII. VERIFICATION

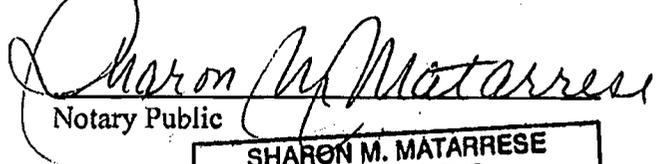
STATE OF VIRGINIA)
)
CITY OF RESTON) ss.

In accordance with the requirements of W. Va. Code § 53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil actions identified in this Petition, based upon his information and belief.



Patrick M. Annessa
President
Richmond American Homes of West Virginia

Subscribed and sworn before me this 6th day of May, 2011.



Notary Public

SHARON M. MATARRESE
NOTARY PUBLIC
REG. #358097
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES OCT. 31, 2013