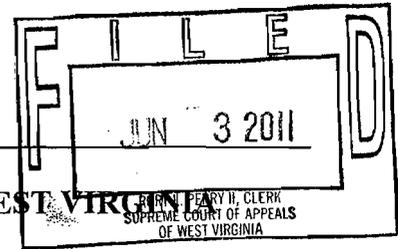


PLEADING FILED
WITH MOTION



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 11-0770

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

Petitioners

v.

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

Respondent.

RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION

Christopher J. Regan (WV Bar #8593) Counsel of Record
cregan@bordaslaw.com
James G. Bordas III (WV Bar #8518)
jgbordasiii@bordaslaw.com
Jason E. Causey (WV Bar #9482)
jcausey@bordaslaw.com
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410

AND

Andrew C. Skinner (WV Bar #9314)
andrewskinner@skinnerfirm.com
Laura C. Davis (WV Bar #7801)
davis@skinnerfirm.com
SKINNER LAW FIRM
PO Box 487
Charles Town, WV 25414
(304) 725-7029

TABLE OF CONTENTS

TABLE OF AUTHORITIESiv

I. QUESTIONS PRESENTED1

 A. When a party specifically challenges the ambiguity and unconscionability of an arbitration provision in an adhesion contract, may a trial court apply West Virginia substantive contract law to determine the validity of the arbitration provision by construing the provision in the context of the contract as a whole under Section 2 of the FAA?1

 B. If a contract contains a valid arbitration provision, is it enforceable even against adults who did not agree to arbitrate and against minors who neither agreed to arbitrate, nor have competence to do so?.....1

II. STATEMENT OF THE CASE.....1

III. SUMMARY OF ARGUMENT.....4

 A. The five-factor test of *Hinkle v. Black* is not met because there is no legal error, much less a clear one, and no novel issue.....4

 B. Since this case has a direct challenge to the arbitration agreement and not to a delegation clause, the “severability analysis” of *Rent-A-Center v. Jackson* does not apply.....4

 C. Under Section 2 of the FAA, the trial court is *required* to apply state substantive law to determine the validity of the arbitration provision; in this case, the exculpatory provisions and burdensome procedures are unconscionable under the general contract law of West Virginia...5

 D. The Circuit Court was correct to apply West Virginia substantive law under Section 2 of the FAA that the arbitration clauses repeated references to court action was an ambiguity to be construed against the drafter and against mandatory arbitration; and moreover, Petitioners voluntarily declined to proceed with the contract they now seek to enforce.....6

 E. Non-signatories to the contract cannot be bound by its terms as no grounds to bind them exist. This is doubly so for the children Petitioners claim are bound since they would not even be competent to bind themselves had they actually signed7

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....7

V.	ARGUMENT	8
A.	The five factor test of <i>Hinkle v. Black</i> weighs heavily against acceptance of the Petition since there is no showing of a clear legal error, no oft-repeated error and no new or important problem of law presented	8
B.	Since the Plaintiffs below challenged the arbitration agreement itself, the severability doctrine has no application and Petitioners' arguments to the contrary are unavailing.....	10
1.	Richmond has attempted to make the severability doctrine something that it is not and the doctrine is inapplicable to this case.....	17
2.	The FAA's "Saving Clause" requires the trial court to apply West Virginia substantive law to determine whether the arbitration clause is unconscionable.....	19
3.	There is no federal policy favoring the enforcement of <u>invalid</u> arbitration agreements	23
C.	The Circuit Court correctly found the agreement at issue to be unconscionable under West Virginia general contract law	25
1.	Richmond concedes that its agreements with plaintiffs are contracts of adhesion	26
2.	Numerous exculpatory provisions render the arbitration clause unconscionable.....	28
a.	Richmond concedes the restrictions on remedies are exculpatory.....	28
b.	The Independent Action Only Clause Weighs In Favor of Unconscionability.	30
c.	The Restriction On Attorneys' Fees Renders The Arbitration Clause Unconscionable	32
d.	The Mediation/Arbitration Provision Imposes Unreasonably Burdensome Costs	33
e.	Richmond Has Made No Effort To Show Exceptional Circumstances That Warrant These Exculpatory and Unfair Provisions	36

D.	Richmond’s arbitration provision is ambiguous in light of its repeated references to court action, an ambiguity that must be construed against enforcement.....	38
1.	Under the “saving clause” in section 2 of the FAA, the ambiguity in the adhesion contract is construed pursuant to West Virginia contract law against Richmond.....	38
2.	Petitioners breached or abandoned the agreement they seek to enforce....	39
E.	Non-Signatories Cannot be Bound by Arbitration Provisions to Which They Have not Assented.	40
1.	Equitable Estoppel is not applicable in these circumstances under West Virginia Law.....	41
2.	Richmond fares no better seeking equitable estoppel under Federal Law	44
VI.	CONCLUSION	46

TABLE OF AUTHORITIES

Supreme Court of Appeals of West Virginia Cases

<i>Arnold v. United Companies Lending Corp.</i> , 204 W.Va. 229, 511 S.E.2d 854 (1998).....	21
<i>Art's Flower Shop, Inc. v. C & P Telephone Company</i> , 186 W.Va. 613, 413 S.E.2d 670 (1991).....	20, 21, 22, 23, 26, 27
<i>Auber v. Jellen</i> , 196 W.Va. 168, 469 S.E.2d 104 (1996).....	39
<i>Benson v. AJR, Inc.</i> , 226 W. Va. 165, 698 S.E.2d 638 (2010).	8
<i>Board of Education of Berkeley County v. W. Harley Miller</i> , 160 W.Va. 473, 236 S.E.2d 439 (1977)).....	23
<i>Cleaver v. Big Arm Bar & Grill, Inc.</i> , 202 W.Va. 122, 502 S.E.2d 438 (1998).....	42, 44
<i>Drake v. West Virginia Self-Storage, Inc.</i> , 203 W.Va. 497, 509 S.E.2d 21 (1998).....	21, 22
<i>Hatfield v. Health Management Associates of West Virginia</i> , 223 W.Va. 259, 672 S.E.2d 395...	44
<i>Hinkle v. Black</i> , 164 W.Va. 112, 262 S.E.2d 744 (1979).....	4, 8, 10
<i>Hunter v. Christian</i> , 191 W.Va. 390, 446 S.E.2d 177 (1994).....	42
<i>Lang v. Derr</i> , 212 W.Va. 257, 569 S.E.2d 778 (2002).....	21
<i>Morgan v. Price</i> , 151 W.Va. 158, 150 S.E.2d 897 (1966).	8
<i>Perdue v. Coiner</i> , 156 W.Va. 467, 194 S.E.2d 657 (1973).....	8
<i>Ruckdeschel v. Falcon Drilling Co., LLC</i> , 225 W.Va. 450, 693 S.E.2d 815 (2010).....	16, 19, 23
<i>Saylor v. Wilkes</i> , 216 W.Va. 766, 613 S.E.2d 914 (2002).....	26
<i>State ex rel. TD Ameritrade v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (2010).....	5, 10, 15, 18, 24, 25
<i>State ex rel. AT&T Mobility v. Wilson</i> , 226 W.Va. 517, 703 S.E.2d 543 (2010).....	2, 3, 4, 26, 31
<i>State ex rel. City Holding Co. vs. Kaufman</i> , 216 W.Va. 594, 609 S.E.2d 855 (2004).....	41
<i>State ex rel. Clites v. Clawges</i> , 224 W.Va. at 305, 685 S.E.2d 693.....	15, 16, 19

State ex rel. Dunlap v. Berger, 211 W.Va. 549,
567 S.E.2d 265 (2002)2, 3, 4, 6, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37

State ex rel. Richmond American Homes v. Sanders, 226 W.Va. 103, 697 S.E.2d 139 (2010)3

State ex rel. United Asphalt Supplies, Inc. v. Sanders, 204 W.Va. 23, 511
S.E.2d 134 (1998)9, 40

Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1978)28

Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986)22, 23

Federal Cases

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995)31

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)16, 20, 30, 31, 32

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415 (1986)14

Buckeye Check Cashing, Inc. v. Cardengna, 546 U.S. 440, 126 S.Ct. 1204 (2006)13, 31

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S.Ct. 1652 (1996) 15, 16, 20, 23, 37, 38

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754 (2002)40

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct.
1920 (1995)11, 13, 14, 15, 19

Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002)40

Gilmer v. Interstate/Johnson Lane Corp 500 U.S. 20, 111 S.Ct. 1647 (1991)10

Granite Rock Co. v. International Brotherhood of Teamsters, 130 S.Ct. 2847
(2010)23, 25, 40

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)31

Hewitt v. Helms, 482 U.S. 755 (1987)32

International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d
411 (C.A.4, 2000)44

Jacobsen v. U.S. Postal Serv., 993 F.2d 649 (9th Cir. 1992)32

<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52, 115 S.Ct. 1212 (1995).....	15, 19
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S.Ct. 3346 (1985).....	10
<i>Perry v. Thomas</i> , 482 U.S. 483, 107 S.Ct. 2520 (1987)	15, 16, 19, 20
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008).....	31
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395, 87 S.Ct. 1801 (1967).....	10, 17
<i>Rent-A-Center v. Jackson</i> , 130 S.Ct. 2772 (2010).....	4, 5, 11, 12, 13, 14, 17, 18, 20, 23
<i>R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n</i> , 384 F.3d 157 (C.A.4, 2004)	45, 46
<i>Southland Corporation v. Keating</i> , 465 U.S. 1, 104 S.Ct. 852 (1984).....	15
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 130 S. Ct. 1758 (2010).	7
<i>Ting v. AT&T</i> , 182 F. Supp. 2d 902, 938-939 (N.D. Cal.2002))	37
<i>United States v. Gerke Excavating, Inc.</i> , 464 F.3d 723 (7th Cir. 2006)	32
<i>Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.</i> , 489 U.S. 468, 109 S.Ct. 1248, (1989).....	10, 15, 19
<i>Wilson v. Dell</i> , No. 5:09-cv-00483, 2009 WL 2160775 (S.D.W.Va. July 16, 2009)	45, 46

Cases From Other States

Aberdeen Golf & Country Club v. Bliss Const., Inc., 932 So.2d 235
(Fla. App. 4 Dist., 2005)39

Accomazzo v. CEDU Educ. Services, Inc., 15 P.3d 1153, 1156 (Idaho 2000)41

Ex parte Dickinson, 711 So. 2d 984 (Ala. 1998)41

Finney v. Nat'l Health Care Corp., 193 S.W.3d 393 (Mo. Ct. App. 2006)41

Flores v. Evergreen at San Diego, Inc., 148 Cal. App. 4th 581,
587, 55 Cal. Rptr. 3d 823 (2007)41

In re Kepka, 178 S.W.3d 279 (Tex. App. 2005)41

Scharf v. Kogan, 285 S.W.3d 362, 369-371 (Mo. Ct. App. 2009)40

Slusher v. Ohio Valley Propane Services, 896 N.E.2d 715 (Ohio Ct. App. Jan. 7, 2008)41

Snyder v. Belmont Homes, Inc., 899 So. 2d 57, 64 (La. Ct. App. 2005)41

Statutes

W.Va. Code § 36B-4-115(b).....28

W. Va. Code, § 36B-4-11732

W. Va. Code § 46A-5-10432

W. Va. Code § 46A-6-10432

9 U.S.C. § 2.....38

9. U.S.C. § 4.....40

I. QUESTIONS PRESENTED

- A. When a party specifically challenges the ambiguity and unconscionability of an arbitration provision in an adhesion contract, may a trial court apply West Virginia substantive contract law to determine the validity of the arbitration provision by construing the provision in the context of the contract as a whole under Section 2 of the FAA?
- B. If a contract contains a valid arbitration provision, is it enforceable even against adults who did not agree to arbitrate and against minors who neither agreed to arbitrate, nor have competence to do so?

II. STATEMENT OF THE CASE

The Petitioning construction companies, Richmond American Homes and MDC Holdings (hereinafter “Petitioners” or “Richmond”), built dozens of homes in the Eastern Panhandle of West Virginia with defective, absent or fake radon removal systems. Petitioners knew that these homes were for families and constructed them in an EPA Level 1 radon zone (the most dangerous designation possible in the continental United States). A number of families filed suit against Petitioners seeking damages related to the defective and dangerous condition of the homes built by the Petitioners, including the families’ substantial increased risk of contracting lung cancer. Radon gas exposure is the number two cause of lung cancer in the United States, after smoking.

The contracts of sale between Petitioners and the original purchasers of the homes included a variety of dispute-resolution provisions including breathtakingly broad exculpatory clauses (“SELLER EXPRESSLY DISCLAIMS LIABILITY AND PURCHASER EXPRESSLY WAIVES ANY . . . CLAIMS RESULTING FROM . . . RADON GAS”),¹ severe limitations on damages (“UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE FOR ANY

¹ Purchase Agreement at p. 3, ¶ 8(c).

SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES),² categorical waivers of statutory rights (“PURCHASER EXPRESSLY WAIVES . . . ALL WARRANTIES OF FITNESS, MERCHANTABILITY OR HABITABILITY”),³ burdensome, if not impossible, procedural hurdles (“any action brought shall be an independent action brought by PURCHASER against SELLER”),⁴ requirements for the expenditure of large sums under the Rules of the American Arbitration Association (thousands of dollars owed merely to be heard)⁵ and unconscionable limits on the right to seek attorney’s fees. These dispute resolution provisions, intended to abrogate the rights of the Plaintiffs below in their entirety, are void as against the public policy of our state and the clearly-announced law of this Court.

This Court has held and recently reaffirmed that

Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Syl. pt. 2, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002) reaffirmed in *State ex rel AT&T Mobility v. Wilson*, 226 W.Va. 517, 703 S.E.2d 543 (2010). In a straightforward application of *Dunlap*, Judge Sanders voided the agreement and denied the Motion to Compel Arbitration filed by Petitioners.

Interestingly, in addition to imposing unconscionable adhesion contracts on Plaintiffs below, which disclaims all liability even for intentional torts, Petitioners also compelled their subcontractors to agree to a contract purporting to indemnify them against their own negligence,

² Purchase Agreement at p. 3 ¶ 8(a).

³ *Id.*

⁴ Most of the Plaintiffs are not PURCHASERS, nor eligible to bring an independent action on behalf of the PURCHASER. *Cf.* Case Caption below with Purchase Agreements at p. 1 and p. 6 ¶ 21(a).

⁵ \$6,000.00 or more would be required just to have the claim filed and heard, plus various other expenses not charged in a court action that would be imposed on Plaintiffs. *See infra* at pp. 33-36.

in clear violation of applicable Virginia law.⁶ Petitioners also attempted to enforce their onerous, unconscionable contract against non-signatories to the agreement, later *bona fide* purchasers of these homes and a number of children. This attempt was properly turned aside by the Circuit Court.

The gist of the situation is that, before transacting business in West Virginia, Richmond drafted contracts essentially immunizing themselves from the law of West Virginia, no matter what misdeeds they might commit, and insulating themselves from public scrutiny and an appeal. Once actually brought into our courts in a similar case, Richmond behaved as though it was above the law. *See State ex rel. Richmond American Homes v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139, 153 (2010) (“II. Richmond American's Conduct Undermines the Integrity of the Judicial Process”) (concurring opinion of Davis, C.J.). Richmond’s perverse contracts should fair no better than its litigation tactics, as illegal contracts of adhesion such as the one at issue here are not enforced in West Virginia whether or not they pertain to arbitration – a stance wholly consistent with federal law. *See e.g.* Syl. pts. 3-4, *State ex rel. AT&T Mobility v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010) (reaffirming *Dunlap*).

This Petition for an extraordinary writ seeking to overturn Judge Sanders’ detailed and well-reasoned decision followed. The Plaintiffs below now file this Response and submit to the Court that the standards governing issuance of a writ are not met and the writ Petition should be REFUSED.

⁶ *See e.g.* Order of Court dated May 11, 2011 (granting partial summary judgment to third-party contractors Richmond/MDC had purported to bind to an agreement whereby those third parties, and not Richmond, would be liable for Richmond’s negligence and potentially even its intentional torts – applying Virginia law, the Circuit Court found such contracts to be unenforceable), included as Exhibit A.

III. SUMMARY OF THE ARGUMENT

A. The five-factor test of *Hinkle v. Black* is not met because there is no legal error, much less a clear one, and no novel issue.

Petitioners are incorrect that the five-factor test for issuance of a writ is met in these circumstances. The lack of any legal error, let alone a clear legal error, is fatal to Petitioner's application. See, Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). Moreover, there is no oft-repeated error or novel or important question presented. The contract at issue is so egregious, as set forth above, that this matter calls for the routine application of this Court's arbitration jurisprudence as set forth in *Dunlap* and reaffirmed in *AT&T Mobility* and that is exactly what the Circuit Court did.

B. Since this case has a direct challenge to the arbitration agreement and not to a delegation clause, the "severability analysis" of *Rent-a-Center v. Jackson* does not apply.

In making their arguments below, Petitioners sought a misapplication of the "severability doctrine" based on a misanalysis of the United States Supreme Court decision in *Rent-A-Center v. Jackson*, 130 S.Ct. 2772 (2010) and the Circuit Court did not go along. In *Rent-A-Center*, a specific contractual provision called a "delegation provision" committed the issue of the enforceability of the contract as a whole to the arbitrator. Since Jackson did not challenge the delegation provision, the Supreme Court enforced it and left the issue of the enforceability of the balance of the agreement to the arbitrator as the parties had agreed.

But, here, there is no delegation provision and the Plaintiffs below are challenging the arbitration provision directly, in addition to other aspects of the contract, leaving no application for *Rent-A-Center* in this case. *Rent-A-Center* emphasizes the significance of the delegation clause and the lack of challenge to it repeatedly in the text and is plainly limited to those

situations.⁷ Since this case *lacks* a delegation clause and *challenges* the arbitration agreement specifically, *Rent-A-Center* is simply off topic.

The severability doctrine, where applicable, presumes that the arbitration agreement is valid and sends the balance of the matter to the arbitrator to determine the application of formation defenses like fraud in the inducement. *Id.* at 2279. But this relief is unavailable when the arbitration agreement itself is challenged. There is no dispute that Plaintiffs below challenged the arbitration agreement, so the Court was correct to decide the challenge itself. See Order Denying Richmond’s Motion to Compel Arbitration at 4-6.⁸ Finally, it is absolutely clear that Judge Sanders’ decision reached only the enforceability of the arbitration provision and did not reach out to decide the merits of the case itself before referring the matter to arbitration – the error corrected by this Court in *State ex rel. TD Ameritrade v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010). Judge Sanders denied only the Motion to Compel Arbitration and issued no summary-judgment orders or other substantive orders in ruling on Richmond’s Motion.⁹

C. Under Section 2 of the FAA, the trial court is *required* to apply state substantive law to determine the validity of the arbitration provision; in this case, the exculpatory provisions and burdensome procedures are unconscionable under the general contract law of West Virginia.

Although Petitioners acknowledged that the Circuit Court was to decide the issue of validity of the arbitration provision, and that the Circuit Court was required to apply state

⁷ *E.g.*: “Jackson’s appeal to the Ninth Circuit confirms that he did not contest the validity of the delegation provision in particular” and “unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator” and “[i]t may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court.” *Id.* at 2779-2781 (emphasis in original).

⁸ Before it was filing a Writ Petition, Richmond specifically stated that the threshold issue of whether a valid agreement existed was for the Court. Richmond’s Motion to Compel Arbitration at 8. Order Denying Motion to Compel Arbitration at 6.

⁹ Order Denying Motion to Compel Arbitration at 24-25.

substantive law to do so, Petitioners nevertheless contend that the Circuit Court was incorrect to hold the arbitration agreement unconscionable. However, Petitioner's challenge simply does not withstand even minimal scrutiny. The agreement imposed prohibitive expenses, limitations on the structure of the actions that can be brought and, perhaps, most significantly, indicated that only the *purchaser* of the home is even *eligible* to bring an action under the agreement.¹⁰ It likewise wholly abrogated the rights of those "purchasers" if they did bring an action by disclaiming that Petitioners could be held liable for most any type of damage, or for anything they did pertaining to radon, no matter how tortious or fraudulent. The unconscionability of the contract was, thus, as easy a call under the syllabus of *Dunlap* as could be imagined. Petitioners purported to take from their customers substantially all of their relevant rights, which this Court has consistently not permitted, nor should the Circuit Court have permitted it.

D. The Circuit Court was correct that the arbitration clauses repeated references to court action was an ambiguity to be construed against the drafter and against mandatory arbitration; and moreover, Petitioners voluntarily declined to proceed with the contract they now seek to enforce.

Petitioners incorrectly dispute the Circuit Court's finding of ambiguity in the arbitration agreement, which expressly referred to "court action" as a possible outcome. Moreover, Petitioners refused to follow through with the conditions for mediation in their own contract. After they named a slate of mediators as required by ¶ 21(a) of the Purchase Agreements, Plaintiffs below selected one and agreed to mediate. But Petitioners abandoned their own procedure and filed the subject motion.¹¹ Accordingly, Petitioners deliberately chose not to

¹⁰ Petitioners attempt to whipsaw most of the Plaintiffs as "bound by" the arbitration agreement (since it relates to Petitioners tortiously defective work), but at the same time, they are unable to initiate an action under the arbitration agreement since they are not "Purchasers."

¹¹ Exhibit B hereto (letter from Jim Walls to Jamie Bordas dated June 22, 2010 and letter from Jamie Bordas to Jim Walls dated June 24, 2010, agreeing to mediate, naming a mediator from Petitioners list). Petitioners never responded or mediated and, thus, have yet to fulfill their own contracts condition precedent to mediation.

fulfill a condition precedent to the arbitration they are now demanding. They are accordingly entitled to relief neither at law, nor in equity.

E. Non-signatories to the contract cannot be bound by its terms as no grounds to bind them exist. This is doubly so for the children Petitioners since they would not even be competent to bind themselves had they actually signed.

Petitioners bury at the conclusion of their writ application the most astonishing request for relief of all. Petitioners contend that arbitration – universally agreed to as a matter of consent only¹² – can be imposed on non-signatories to the purchase agreements and even on children residing in the homes. The idea that an unrelated adult, who is a previous purchaser of a child’s home, could wholly abrogate the minor’s right to a judicial forum (and her underlying substantive rights as well) elegantly illustrates the merit of Petitioners’ arguments as a whole.

The Circuit Court made a correct call based on clearly applicable syllabus point law and the Petition should be REFUSED.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In light of clearly applicable law and the lack of novelty or difficulty, no oral argument should be required.

¹² . . . [A]rbitration “is a matter of consent, not coercion,” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010).

V. ARGUMENT

A. **The five factor test of *Hinkle v. Black* weighs heavily against acceptance of the Petition since there is no showing of a clear legal error, no oft-repeated error and no new or important problem of law presented.**

The balance of the *Hinkle v. Black* factors do not favor acceptance of this Petition. Plaintiffs below concede that, as with any petition challenging the adjudicatory forum, Petitioners can show that direct appeal would be an unsatisfactory. However, it is certainly not the law that this Court will hear and decide an extraordinary writ petition in every single case challenging the jurisdiction of or venue in the trial court. Accordingly, significant attention must be paid to the last three factors under *Hinkle*. All three weigh heavily against Richmond in this case.

Judge Sanders' well-reasoned order is not erroneous at all, let alone "clearly erroneous as a matter of law." The order Richmond petitions from sets forth twenty-five pages of detailed analysis regarding the applicable cases from this Court and the Supreme Court of the United States. It is both presumptively correct¹³ and correct in fact as set forth herein. Furthermore, as Petitioners fail to show any error in Judge Sanders' order, they have certainly failed to show an "oft repeated error." The order below reflects a careful application of well-established case law to a clearly unconscionable contract. Finally, the questions presented in the Petition are only "novel" in the sense that they propose radically incorrect applications of this Court's arbitration jurisprudence in an attempt to force arbitration without consent, and under unconscionable terms.

More specifically, there is no error pertaining to the "severability doctrine" since the lack of any delegation clause and the presence of a direct challenge to the arbitration agreement make

¹³ Syl. pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966). Accord Syl. pt. 2, *Perdue v. Coiner*, 156 W.Va. 467, 194 S.E.2d 657 (1973) cited in *Benson v. AJR, Inc.*, 226 W. Va. 165, 698 S.E.2d 638, 644 (2010).

that doctrine inapplicable. Richmond's argument to the contrary is simply an attempt to put a square peg into a round hole. Furthermore, there is no error pertaining to unconscionability since Petitioners exculpatory clauses and burdensome provisions are beyond the pale, subjecting the homeowners in the case to the most egregious exculpatory provisions possible including a broadly worded provision purporting to exclude all damages related to radon and unreasonable costs that deter any attempt at redress. As such, the contractual provisions Richmond seeks to enforce via its motion are tantamount to a grant of immunity from suit.

In addition, the arbitration provisions are ambiguous as to signatories, purporting to provide them with a right of action both in court and in arbitration, and do not apply in any way whatsoever to non-signatory adults and children. In fact, Richmond's contention that because, in some cases, a previous, unrelated purchaser might have signed an arbitration agreement, a child who lives in the home of a subsequent purchaser is equally bound is simply outrageous. Such a construction of the law would completely transgress the public policy of the State of West Virginia. Accordingly, Judge Sanders in no way erred by simply following the dictates of *State ex rel. United Asphalt v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998).¹⁴ Finally, Richmond itself breached the mediation/arbitration agreement it seeks to enforce in this case in failing to mediate before invoking arbitration. Therefore, even if all the foregoing was somehow incorrect, waiver would adequately support Judge Sanders' decision.

¹⁴ While Petitioners seek to take advantage of language in *United Asphalt* indicating that this Court might be disposed to adopt exceptions to this rule, Petitioners present no evidence or affidavits that any such exceptions should actually apply to adult non-signatories, still less the children. This was the exact flaw in presentation that led the *United Asphalt* Court to say it would not "even consider" whether an exception could apply in that case. *Id.* at 138, 27. Instead of evidence, Petitioners argue somewhat disingenuously that all the Plaintiffs below have contract claims that somehow trigger the doctrine of equitable estoppel, but in fact the Complaint clearly pleads any contract claims alternatively with warranty claims, which do not arise under the purchase agreements. Certainly those Plaintiffs that signed the purchase agreements might have claims under it, whereas those that did not have implied and/or statutory warranty claims.

Accordingly, the five-factor test of *Hinkle* weighs heavily *against* Petitioners' arguments and the Petition should be REFUSED.

B. Since the Plaintiffs below challenged the arbitration agreement itself, the severability doctrine has no application and Petitioners' arguments to the contrary are unavailing.

The FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 1806, n.12 (1967). The United States Supreme Court cautioned in *Gilmer v. Interstate/ Johnson Lane Corp.* that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" 500 U.S. 20, 32, 111 S.Ct. 1647 (1991)(citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346 (1985)); *see also, Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, (1989) (noting that arbitration "is a matter of consent, not coercion"). The Court stressed that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 26 (citing *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. 3354).

When a party moves to compel arbitration pursuant to the FAA, the trial court is vested with the authority to decide "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." Syl. pt. 2, *State ex rel TD Ameritrade v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293, 294 (2010). The only time that these threshold

issues, or “gateway questions,” are not decided by the trial court, is when “there is clear and unmistakable evidence” that the parties agreed to delegate these threshold issues to an arbitrator. *Rent-A-Center*, 130 S.Ct. at 2779, n. 1 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920 (1995)).

In the instant case, Richmond has conceded that the “gateway issues” regarding the validity and scope of the arbitration agreement have not been delegated, as in *Rent-A-Center*, *supra*. (See Writ Petition at 5) (Acknowledging that “[t]he 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 the provision is valid[.]”).

Each specific aspect of the arbitrability question (validity and scope) has produced substantial case law advising how courts should undertake each independent inquiry. Depending upon what aspect of the analysis the Court is undertaking will determine whether federal or state law applies under Section 2 of the FAA.¹⁵ As will be further explained below, the required analysis is logical, linear, and it cannot be transposed as Richmond attempted in its Motion to Compel Arbitration, and now, in its Petition.

In order to demonstrate to the lower court the deficiency in Richmond’s analysis, and its misplaced reliance on *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), Respondents prepared a color-coded flow chart, demonstrating the divergence between the Supreme Court’s analysis in *Rent-A-Center* as opposed to the analysis required in the instant case. (See Appendix

¹⁵ Throughout the Writ Petition, Richmond contradicts itself with respect to whether federal or state law applies to the analysis. For example, Richmond assailed the lower court for using West Virginia law to determine the validity of the arbitration provision (Writ Petition at p. 8), but later, conceded that “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 Writ Petition at p. 18).

at 174).¹⁶ Unfortunately, the copy that Richmond included in the Appendix is in black and white and, thus, is less clear. To correct this, Respondents have attached a color copy of the flow chart as **Exhibit C**.

As the Court will see, the logical progression in the Supreme Court's *Rent-A-Center* decision is quite different than the analysis required in the instant case.¹⁷ As the flow chart shows, the "severability doctrine" analysis is also quite different and inapplicable here. Under the "severability doctrine," a trial court does not decide the "gateway question" of validity of the arbitration agreement because it instead, presumes its validity, severs it from the remainder of the contract, and enforces it. *Id.* Thus, when the "severability doctrine" applies, there is nothing for the trial court to do but send the case to arbitration. No validity determination of any kind is made before the arbitration provision is "severed" and enforced.

However, in its Motion to Compel Arbitration and now in its Petition, Petitioners have taken the contradictory and mutually exclusive positions that the lower court must *both* decide the "gateway question" of validity of the arbitration provision (*see* Writ Petition at 5) while simultaneously following the "severability doctrine." (*see* Writ Petition at 5-6). As noted before, when the severability doctrine applies, the court does *not* conduct the gateway analysis of validity because the validity of the arbitration clause is *presumed*. Because these two scenarios cannot occur at the same time, Petitioners are clearly mistaken.

¹⁶ Richmond predicated its Motion to Compel primarily on this recent case handed down by the Supreme Court. However, because Richmond concedes that there was no delegation clause delegating the "arbitrability" decision to an arbitrator, the *Rent-A-Center* case is inapposite.

¹⁷ The Supreme Court's *Rent-A-Center* analysis is marked in red whereas the required analysis in this case is marked in blue. (See Exhibit C).

The analytical process required in the instant case consists of four (4) discrete steps. The first step is to determine if the subject contract contains an arbitration provision governed by federal law. If it does, the FAA is implicated.¹⁸

The second step requires a decision to be made as to *who* will decide the validity of the arbitration agreement—the court or the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 1923 (1995). The answer to this question is predicated entirely upon the type of challenge that a party makes to the contract. As the Supreme Court explained in *Rent-A-Center, supra* at 2778, there are two (2) types of challenges to an arbitration agreement under Section 2 of the FAA:

One type challenges specifically the validity of the agreement to arbitrate, and the other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

Id. If a party challenges the legality of the contract as a whole, “but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardengna*, 546 U.S. 440, 446, 126 S.Ct. 1204 (2006). This is the “severability doctrine.” As set forth above, the “severability doctrine” requires the Court to presume that the arbitration provision is valid and “pluck from a potentially invalid contract a potentially valid arbitration agreement” and enforce it. *Rent-A-Center, supra* at 2786 (Stevens, J. dissenting) (emphasis in original).

Notably, stage 2 is the *only* stage of the analytical process where the “severability doctrine” has any application.¹⁹ Because in the instant case, the Plaintiffs made several specific

¹⁸ Here the Circuit Court assumed the FAA applies. The contract at issue, however, chooses West Virginia law and does not mention the FAA or federal law. For clarity's sake and for the limited purpose of this Response, Plaintiffs will assume the Circuit Court was correct that the FAA applies.

challenges to the validity of arbitration provision itself, including the ambiguity thereof, the severability doctrine is inapplicable in this case.²⁰

The third step in the arbitration analysis is to determine whether the “gateway questions” of arbitrability (i.e. the validity and scope of the arbitration provision), have been delegated to an arbitrator per *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920 (1995) and *Rent-A-Center, supra*.²¹ The Supreme Court has explained there is a presumption that the trial court—and not the arbitrator—will decide the “gateway questions” of arbitrability unless “there is clear and unmistakable evidence” that the parties delegated the issues to the arbitrator. *First Options*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995) (citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-19 (1986)). Because in the instant case, Richmond concedes that there was no delegation provision in the Respondents’ Purchase Agreements stripping the trial court of jurisdiction over the arbitrability decision, the decision concerning the validity of the arbitration provision remains vested with the trial court.²²

The fourth step of the required arbitration analysis is actually divided into two subparts:

1) whether the subject arbitration provision is valid, and 2) whether all of the claims are covered

¹⁹ This clarification is necessary because Richmond attempts to convince this Court that the “severability rule” may be applied throughout the trial court’s analysis. Richmond is mistaken and Respondents will further explain the genesis and application of the “severability doctrine” *infra*.

²⁰ Richmond has repeatedly and incorrectly asserted that the Plaintiffs failed to challenge the arbitration provision specifically but, instead, tried to invalidate the contract as a whole. This is untrue. Plaintiffs have never tried to set aside their Purchase Agreements in their entirety. None of the Plaintiffs have alleged fraud or duress. They have not asserted that the contract as a whole was unconscionable. Instead, Plaintiffs asserted that the arbitration provisions were unconscionable which, as will be discussed below, must be decided under state law pursuant to Section 2 of the FAA.

²¹ The only significance of *Rent-A-Center* is that the Supreme Court expanded the “severability doctrine” to require a party to now make a specific challenge to the delegation clause itself, and not just to an arbitration agreement as a whole. Thus, under this new case, if a party fails to challenge the delegation of the “gateway questions” of validity and scope to the arbitrator, the delegation provision will be “severed” from the remaining arbitration agreement, and enforced. In the instant case, Richmond concedes that there was no delegation provision in the Respondents’ Purchase Agreements; thus, *Rent-A-Center* has no application here.

²² To sum up, there two ways that the trial court loses jurisdiction over the matter when the FAA is implicated. The first is when the party tries to set aside the entire contract, as opposed to just the arbitration provision (i.e. the severability doctrine), and the second is a product of contract itself, when the parties “clearly and unmistakably” agreed to delegate the issue of arbitrability to the arbitrator. Neither situation is applicable here.

by the *scope* of the subject arbitration provision. Syl. pt. 2, *State ex rel. TD Ameritrade v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293, 298 (2010). For the purposes of clarity, we will describe the “validity” question as step 4(a) and the “scope” question as step 4(b). The threshold “gateway question” in 4(a) must be decided before 4(b) because, if the arbitration provision is found to be invalid, the court need not proceed to question 4(b) to determine the scope of what the court has already determined to be an invalid and unenforceable arbitration provision.

To answer the question in step 4(a), whether the arbitration provision is valid and enforceable, Section 2 of the FAA²³ requires courts to “apply ordinary state-law principles that govern the formation of contracts” when determining the validity of an arbitration provision.” *First Options*, 514 U.S. at 944; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, n. 9, 115 S.Ct. 1212 (1995); *Volt*, 489 U.S. at 475-76, 109 S.Ct. 1248; *Perry v. Thomas*, 482 U.S. 483, 492-93, n. 9, 107 S.Ct. 2520 (1987). Richmond has conceded this point (*see* Writ Petition at p. 18), although it has taken the contrary position that the court must also follow the “severability doctrine” (*see* Writ Petition at p. 5-6), which would have stripped the court of jurisdiction before it could have begun its validity analysis.

While the FAA preempts state law that would “undercut the enforceability of arbitration agreements” simply because they are arbitration agreements, *Southland Corporation v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852 (1984), the issue of whether an arbitration agreement is a valid contract is a matter of *state contract law* and capable of state judicial review.” *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (emphasis added).²⁴ The “saving

²³ This provision is also referred to by the U.S. Supreme Court as the “saving clause.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652 (1996); *see also, Perry v. Thomas*, 482 U.S. 483, 492-93, n. 9 107 S.Ct. 2520 (1987).

²⁴ As such, despite Richmond’s assertion that “the question of what a court may consider under the FAA is a federal question which must be resolved under federal law” (*see* Writ Petition, p. 8), the saving clause in § 2 of the FAA clearly refutes Richmond’s position.

clause” permits provisions to arbitrate to be invalidated by generally applicable contract defenses that exist at *state law*, such as fraud, duress, unconscionability, or ambiguity, “but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (citing *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652 (1996); *Perry v. Thomas*, 482 U.S. 483, 492–493, n. 9, 107 S.Ct. 2520 (1987)).

As the West Virginia Supreme Court of Appeals held in Syllabus Point 2 of *Ruckdeschel v. Falcon Drilling Co., LLC*,

[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, *the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract*, the nature of the contracting parties, and the nature of the undertakings covered by the contract. Syllabus Point 3, *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977). Syl. pt. 3, *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 685 S.E.2d 693 (2009).

225 W.Va. 450, 451, 693 S.E.2d 815, 816 (2010). As will be further discussed below, this West Virginia precedent requires the examination of the arbitration provision within the larger context of the contract, whether the law was derived from non-arbitration cases, and whether the law equally applies to non-arbitration cases. As such, this Court’s prior analysis in *Ruckdeschel*, *supra*, and *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002) is still good law and it is not preempted by the FAA or *AT&T Mobility LLC v. Concepcion*, *supra*.

The lower court went through the four-step analysis required by both this Court's and the United States Supreme Court's precedents and found the arbitration provision in the Purchase Agreements to be invalid. Richmond has cited cases that do not support the propositions for which they are cited, and it has confused the linear analytical process required in this case. In further support of Respondents' position, Respondents will explain below in greater detail the severability doctrine and explain why Richmond's reliance upon it is misplaced; why our Supreme Court correctly continues to require trial courts to apply state substantive contract law when determining the validity of arbitration clauses, and why this is entirely consistent with both the FAA and United States Supreme Court precedent.

1. Richmond has attempted to make the severability doctrine something that it is not and the doctrine is inapplicable to this case.

Under the severability doctrine, if a party fails to make a specific challenge to an arbitration provision, but instead tries to set aside the whole contract as invalid, the Court will presume that the arbitration provision within the allegedly invalid contract is valid, sever it from the remaining contract, and enforce it. *Rent-A-Center, supra* at 2786 (Stevens, J. dissenting) (emphasis in original). Such challenges to the entire contract include the grounds that "the agreement was fraudulently induced" or "illegality of one of the contract's provisions renders the whole contract invalid." *Id.* at 2778. When such generalized objections are made, the Court is immediately stripped of jurisdiction over the matter per the "severability doctrine" and the case goes to the arbitrator.²⁵

In *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), where the Supreme Court first addressed the "severability doctrine," the Court held that,

²⁵ The *Rent-A-Center* case expanded this doctrine only in circumstances where there is a delegation provision in the contract that is not specifically challenged. Because Richmond concedes that there was no delegation provision, the *Rent-A-Center* case is inapposite.

while fraud in the inducement of *an agreement to arbitrate* is for a court to determine, the issue of fraud in the inducement of a *contract*, that happens to also contain an arbitration provision, is to be resolved by the arbitrator. The Court reasoned that “arbitration clauses, as a matter of federal law, are ‘separable’ from the contracts in which they are embedded.” *Id* at 402. Therefore, if there is an agreement to arbitrate all claims between the parties to a contract, “the statutory language (of the FAA) does not permit the ... court to consider claims of fraud in the inducement of contracts generally.” *Id* at 404. The arbitration provision is presumed valid, severed, and enforced, sending the issue of fraud in the inducement of the entire contract to the arbitrator. *Id*.

On the other hand, when a party (such as in the instant case) challenges the validity of the specific arbitration provision specifically within a larger contract, and not just the contract as a whole, it will be for the Court to determine whether a legal and enforceable arbitration provision exists before it may send any claims to an arbitrator. *Rent-A-Center, supra* at 2778.

In the instant case, the Plaintiffs have not asserted that the Purchase Agreement was fraudulently induced. Nor have they asserted that another unrelated provision in the contract has rendered the entire contract void. Plaintiffs have not attempted to rescind their Purchase Agreements, nor have they made any other challenge to the contracts’ validity as a whole. Instead, the Plaintiffs have directly and specifically challenged Richmond’s arbitration provision on the basis of its ambiguity and unconscionability. This Court cannot simultaneously conduct the required threshold analysis in *Kaufman, supra*, by determining the validity of the arbitration provision (see Motion to Compel, App. at 101), while also presuming (under the “severability doctrine”) that the arbitration provision is valid, severable, and enforceable. Richmond was right when it first asserted that the threshold issues of validity and scope must be decided by this Court. *Id*.

2. The FAA’s “Saving Clause” requires the trial court to apply West Virginia substantive law to determine whether the arbitration clause is unconscionable.

Section 2 of the FAA requires courts to “apply ordinary state-law principles that govern the formation of contracts” when determining the validity of an arbitration provision. *First Options*, 514 U.S. at 944; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, n. 9, 115 S.Ct. 1212 (1995); *Volt*, 489 U.S. at 475-76, 109 S.Ct. 1248; *Perry v. Thomas*, 482 U.S. 483, 492-93, n. 9, 107 S.Ct. 2520 (1987).

This Court has recognized on numerous occasions that the FAA preempts state laws that single out arbitration agreements whether expressly or in application. *See e.g., Clites*, 224 W.Va. 299, 685 S.E.2d. 693. And with this principle well at hand, the Court recently held in Syllabus Point 2 of *Ruckdeschel v. Falcon Drilling Co., LLC*, 225 W.Va. 450, 693 S.E.2d 815, 816 (2010) that

[w]here a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Id.

Notwithstanding, Richmond argues that this Court may not consider the arbitration provision in the context of the Purchase Agreement as a whole. Instead, Richmond asserts that the court must “apply the severability doctrine” and focus only on the arbitration provision when determining validity and ignore the remainder of the contract. (See Writ Petition at 9). This is clearly a misapplication of the severability doctrine which, as noted before, only applies in the

initial stages of the court's analysis (step 2). As Justice Stevens explained, the severability doctrine "is akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement must expressly say so in order to get his dispute into court." *Id.* at 2784 (Stevens, J., dissenting) (emphasis added). That is all that the severability doctrine is, and nothing more.

Below, Richmond relied heavily on the *Rent-A-Center* decision, although *Rent-A-Center* does not alter its prior precedent which requires trial courts to apply state contract law to determine the validity question. *Doctor's Assocs.*, 517 U.S. at 686-88; *Perry v. Thomas*, 482 U.S. at 492-93, n. 9.²⁶ There is also no precedent precluding evaluation of a disputed arbitration provision in the context of a greater contract to determine validity, *as long as the same occurs in non-arbitration cases*. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. at 1745-46 ("courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.")(citations omitted). Indeed, the only requirement that the Supreme Court has with respect to the validity determination is for courts to treat arbitration clauses the same as they would other challenged contracts. *Perry v. Thomas*, 482 U.S. at 492-93, n. 9 (a court may not "construe the agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.").

West Virginia has long held that the determination of unconscionability is made by examining the contract as a whole, regardless of whether the challenged provision involves arbitration or not. For example, in a non-arbitration case involving a consumer transaction, the West Virginia Supreme Court of Appeals, noted that "[u]nconscionability is a general contract

²⁶ The *Rent-A-Center* decision merely expands the Court's severability doctrine to "stand alone" arbitration contracts that contain "delegation provisions" that send the threshold questions of arbitrability to an arbitrator. Because Richmond has not asserted that the Plaintiffs delegated the issue of arbitrability to an arbitrator, the *Rent-A-Center* decision is inapposite.

law principle, based in equity, which is deeply ingrained in both the statutory and decisional law of West Virginia.” *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 234, 511 S.E.2d 854, 859 (1998).

In one of the first cases where the West Virginia Supreme Court of Appeals was called upon to consider the unconscionability of an arbitration provision, *Art's Flower Shop, Inc. v. C & P Telephone Company*, 186 W.Va. 613, 413 S.E.2d 670 (1991), the Court relied heavily on the Restatement (Second) of Contracts § 208 (1981) which, notably, is a treatise that applies to contracts generally. *Lang v. Derr*, 212 W.Va. 257, 569 S.E.2d 778 (2002). In *Art's Flower Shop*, the West Virginia Supreme Court of Appeals

essentially adopted the points discussed in the comment on the Restatement section. In Syllabus Point 4 of *Art's Flower Shop, Inc. v. C & P Telephone Company*, *id.*, the Court stated: “A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’”

Lang, 212 W.Va. at 260, 569 S.E.2d at 781. Subsequently, in Syllabus Point 2 of *Drake v. West Virginia Self-Storage, Inc.*, 203 W.Va. 497, 498, 509 S.E.2d 21, 22 (1998), the Supreme Court applied these same principles to a non-arbitration case to determine the unconscionability of a default provision in a storage agreement. Significantly, in *Drake*, the Supreme Court held that in order to determine whether a term is unconscionable, *the Court must examine the term in the context of the contract as a whole:*

Unconscionability 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.*, 173 W.Va. at 114, 312 S.E.2d at 777. We have held that “[u]nconscionability is an equitable principle, and the determination of whether a contract or a provision therein is

unconscionable should be made by the court.” Syl. pt. 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986). In *Ashland Oil, Inc. v. Donahue*, 159 W.Va. 463, 474, 223 S.E.2d 433, 440 (1976), this Court held that “[i]n most commercial transactions it may be assumed that there is some inequality of bargaining power, and this Court cannot undertake to write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area, nor do we think it necessary that we undertake to do so.” See also *Barn-Chestnut, Inc. v. CFM Development Corp.*, 193 W.Va. 565, 570, 457 S.E.2d 502, 507 (1995). Undertaking “[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.” Syl. pt. 3, *Troy*.

Drake, 203 W.Va. at 500, 509 S.E.2d at 24 (emphasis added).

Likewise, in Syllabus point 2 of *Art’s Flower Shop*, the Court also reiterated its holding from the non-arbitration case, *Troy Mining Corp.*, *supra*:

“An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.”

Syl. pt. 2, *Art’s Flower Shop*, 186 W.Va. at 614, 413 S.E.2d at 671 (citing Syl. pt. 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986)). These points of law, which arose out of non-arbitration cases, are precisely in step with Syllabus Point 1 of *Art’s Flower Shop* which held that

where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Syl. pt. 3, *Art's Flower Shop*, 186 W.Va. at 614, 413 S.E.2d at 671 (citing Syl. pt. 3, in part, *Board of Education of Berkeley County v. W. Harley Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977)).

In light of prior precedent concerning contracts *generally* (i.e. non-arbitration cases), *Ruckdeschel* and *Harley Miller* before it are consistent with long-standing West Virginia contract law. Their holding that arbitration provisions should be considered in the context of the contract as a whole merely reiterates Syllabus Point 3 of the non-arbitration case, *Troy Mining Corp*, 176 W.Va. at 601, 346 S.E.2d at 750 (the “analysis of whether a contract term is unconscionable necessarily involves an inquiry into . . . the fairness of the contract as a whole”).

Thus, this Court’s prior arbitration rulings are predicated upon ordinary West Virginia contract cases and are fully compliant with the “saving clause” of the FAA. See *Doctor's Assocs., Inc.*, 517 U.S. at 686-87 (“state law may be applied ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”).

3. There is no federal policy favoring the enforcement of invalid arbitration agreements.

Richmond’s contention that a federal policy in favor of arbitration expressed through the FAA requires this Court to construe the challenged arbitration provision in favor of arbitration. However, there has never been a federal presumption favoring the enforcement of invalid arbitration agreements.

In a case decided only three days after *Rent-A-Center*, the Supreme Court held that the only time that a federal presumption may arise favoring arbitration is *after* the party has already proven that a *valid* arbitration provision exists. *Granite Rock Co. v. International Brotherhood of*

Teamsters, 130 S.Ct. 2847, 2858-59 (2010).²⁷ As the Supreme Court explained, prior precedent only “compelled arbitration of a dispute . . . after the Court was persuaded that the parties’ arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable.” *Id.* at 2858. Justice Thomas writing for the majority explained that the Supreme Court has

never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration “only those disputes . . . that the parties have agreed to submit.” *First Options*, 514 U.S., at 943, 115 S.Ct. 1920; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contract parties”); *AT & T Technologies*, 475 U.S., at 650- 651, 106 S.Ct. 1415 (applying the same rule to the “presumption of arbitrability for labor disputes”). Nor have we held that courts may use policy considerations as a substitute for party agreement. *See, e.g., id.*, at 648-651, 106 S.Ct. 1415; *Volt, supra*, at 478, 109 S.Ct. 1248. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute (citation omitted).

Id. at 2859-60 (emphasis added).

Another way of looking at the federal presumption favoring arbitration is through the prism of *Kaufman, supra*. In that case, this Court held that a trial court must (1) determine whether the arbitration provision is valid; and (2) determine whether the claims fall within the substantive scope of the arbitration agreement. Syl. pt. 2, *Kaufman*, 225 W.Va. 250, 692 S.E.2d

²⁷ In other words, the presumption favoring arbitration is only applicable to the “scope” of the claims to be arbitrated, once the provision has been found to be valid. This would have been step 4(b) in the analysis process referenced above, had the lower court found that a valid arbitration agreement existed. Because the trial court found Richmond’s arbitration provision to be invalid in step 4(a), the trial court never got to step 4(b), as it was unnecessary for it to determine the “scope” of the invalid and unenforceable arbitration provision.

294 (2010). As set forth in *Granite Rock*, any presumption favoring arbitration may only arise after a court has met the first element of *Kaufman*, and found a valid arbitration provision to exist. Even then, a presumption favoring arbitration will only arise if the arbitration agreement is also ambiguous as to the scope of the claims covered (the second element of *Kaufman*). On the other hand, if a court determines that the arbitration provision is invalid, as the trial court did herein, there is no need to proceed to the second element to determine scope and thus, no presumption favoring arbitration arises in this case. As *Granite Rock* made clear, any federal presumption favoring arbitration is limited to scope and does not apply to the determination of the validity of the arbitration agreement itself. *Id.*

C. The Circuit Court correctly found the agreement at issue to be unconscionable under West Virginia general contract law.

This Court, in the second syllabus point of *Dunlap*, provides the rule that disposes of Richmond's position regarding unconscionability:

Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

211 W.Va. 549, 567 S.E.2d 265. Further, as *Dunlap* instructs, "exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved." *Id.* at 588 and 274. The exculpatory provisions that Richmond has forced on the Plaintiffs cannot withstand such scrutiny. This clearly applicable syllabus point of

Dunlap does not single out arbitration agreements, but is rather a contract-law point of general application in West Virginia.²⁸

1. Richmond concedes that its agreements with Plaintiffs are contracts of adhesion.

Richmond does not contest the first prong of the analysis under *Dunlap*. Under West Virginia law, form contracts and standardized contracts offered on a take-it-or-leave-it basis are adhesion contracts by definition. *Dunlap*, 211 W.Va. 549, 567 S.E.2d 265, 273-274; *Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914, 921 (2002). The contract at issue here is, by its very nature, an adhesion contract. It is a standardized, pre-printed form contract. There are no individualized terms relating to the Plaintiffs or any other individual consumers. Richmond did not offer Plaintiffs an opportunity to negotiate the terms of the agreements. It simply presents its customers with a non-negotiable, take-it-or-leave-it standardized contract, which Richmond alone drafted, forcing customers who do not accept the terms to decline the entire deal and find another home.

Despite the fact that Richmond's agreements have all the hallmarks of classic contracts of adhesion, Richmond argues that the trial court failed to make sufficient findings of "procedural unconscionability." To be clear, West Virginia law does not create a two prong analysis that some jurisdictions utilize. Instead, the Court in Syl. pt. 4, *Art's Flower Shop*, 186 W.Va. 613, 413 S.E.2d 670 (1991) set forth various interactive factors that are either procedural or substantive in nature to be considered as a whole. *Id.* ("A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the

²⁸ *Dunlap* was affirmed just last fall in *State ex rel. AT & T Mobility, LLC v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010) (repeating the syllabus and clarifying that *Dunlap* does not create a per se rule that would invalidate all class action waivers).

meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract.”)

The trial court acknowledged the *Arts’ Flower Shop* factors and found the Purchase Agreements were presented “on a take-it-or-leave-it basis and the mediation/arbitration provisions were non-negotiable.” See Order Denying Motion to Compel Arbitration, at 16-17. The trial court further found that “Richmond American was solely responsible for preparing and providing the signatory Plaintiffs the adhesion contract” and the “signatory Plaintiffs were not entitled to ‘opt out’ of the arbitration provision.” *Id.* Finally, the trial court found

that it is not credible for Richmond American to suggest that the signatory Plaintiffs had the same level of sophistication or understanding about the legal terms in the Purchase Agreement as Richmond American and its attorneys who drafted the language. The homeowners’ comparative bargaining power as against the multi-million dollar national corporation was negligible.

Id. at 17. Accordingly, the trial court has sufficiently addressed the factors of a procedural nature as articulated in *Arts’ Flower Shop*. Moreover, the Court in *Dunlap* added the above referenced syllabus point and simplified the analysis as it applies to contracts of adhesion. As *Dunlap* explains, there is no bargaining power when it comes to contracts of adhesion, because “[o]ne of the purposes of standardization is to *eliminate bargaining* over details of individual transactions.” 211 W.Va. 549, 567 S.E.2d 265, 558 (emphasis added). To be clear, the fact a consumer with lesser bargaining power could presumably—under Richmond’s analysis—have a meaningful choice to “take-it-or-leave-it” is irrelevant.

For these reasons, the trial court correctly concluded that signatory Plaintiffs were presented with contracts of adhesion and that bargaining power grossly weighs in favor of Richmond.

2. Numerous exculpatory provisions render the arbitration clause unconscionable.

As with the arbitration clause at issue in *Dunlap*, Richmond's arbitration clause here, when examined in the context of the entire contract under Section 2 of the FAA, contains the kinds of exculpatory provisions that prohibit or substantially limit the plaintiffs' ability to vindicate their rights and obtain the remedies they are entitled to under state law. In fact, the exculpatory provisions here are largely the same provisions that the Court deemed unconscionable there: restrictions on damages; waiver of a class actions or aggregate claims; restrictions on attorney's fees and unreasonably burdensome costs of arbitration. Each is addressed here in turn.

a. Richmond concedes the restrictions on remedies are exculpatory.

In the instant case, as in *Dunlap*, all of the subject provisions either implicitly or explicitly limited the homeowners' ability to seek compensatory damages for property damage and bodily injury; limited the homeowners' ability to seek punitive damages to redress and punish misconduct; and improperly relieve the Defendant from liability for the breach of the implied warranty of habitability.

Paragraph 8(c) in the Purchase Agreement sets forth that "UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES" This provision purports to exculpate Richmond from damages for pain and suffering, intentional and negligent infliction of emotional distress, medical bills or lost wages, medical monitoring, and punitive damages. In addition, in Paragraph 8(a) of the Purchase Agreement, Richmond also inserted the following: "PURCHASER EXPRESSLY WAIVES . . . ALL WARRANTIES OF FITNESS, MERCHANTABILITY OR

HABITABILITY.” Richmond included such exculpatory language even though West Virginia has forbidden such waivers for almost thirty (30) years. *See Teller v. McCoy*, 162 W.Va. 367, 253 S.E.2d 114 (1978) (holding that “waivers of the implied warranty of habitability are against public policy”); *see also* W.Va. Code § 36B-4-115(b) (stating that “no general disclaimer of implied warranties of quality is effective”). Moreover, Richmond defies all boundaries with the following language:

SELLER EXPRESSLY DISCLAIMS LIABILITY, AND PURCHASER EXPRESSLY WAIVES ANY AND ALL CLAIMS FOR PROPERTY AND/OR PERSONAL INJURY OR OTHER ECONOMIC LOSS RESULTING FROM ENVIRONMENTAL CONDITIONS, INCLUDING, BUT NOT LIMITED TO RADON GAS[.]²⁹

Effectively, if these provisions were to be enforced, they collectively waive any and all meaningful claims and damages on behalf of the signatory Plaintiffs. But again, syllabus point 2 of *Dunlap* plainly prohibits the enforcement of these exculpatory provisions that “would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public.” Syl. pt. 2, 211 W.Va. 549, 567 S.E.2d 265.

Richmond’s bid at immunity clearly violates the rule stated in *Dunlap*. Given Richmond has used its bargaining position to immunize itself from all liability, the Court should affirm the trial court’s conclusion of unconscionability and allow for a full and fair adjudication of Plaintiffs’ claims.

²⁹ Purchase Agreement at p. 3, ¶ 8(c)

b. The independent action only clause weighs in favor of unconscionability.

In all but two of the mediation/arbitration provisions in this case, Richmond attempted to prevent the homeowners from aggregating claims with other affected like-minded homeowners.³⁰ The mediation/arbitration provision's limitation preventing the aggregation of homeowners' claims has the effect of imposing upon homeowners prohibitively high costs to enforce their rights. In this matter, Plaintiffs have consolidated 11 separate civil actions and will likely seek leave to consolidate numerous others into a single action. The purpose of consolidation would be to reduce the costs of litigation, including the expense of retaining expert witnesses for all the Plaintiffs' households. However, Richmond's arbitration provision restricts such consolidation in arbitration and would require the duplication and prohibitive accumulation of expert fees among other costs.

An adhesion contract provision that requires individual actions or bans class actions is a factor that may be considered in the assessment of an unconscionability claim. The Supreme Court of Appeals in *Dunlap* said so expressly. 211 W.Va. at 562-564, 567 S.E.2d at 278-80. The Court explained:

Class action relief—including the remedies of damages, rescission, restitution, penalties, and injunction—is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases. In *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982), this Court stated that: “[i]n general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers....”

Id. 562 and 278.

³⁰ The relevant language is as follows: “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.” (See Purchase Agreement at p. 6, ¶21 (b)).

In *AT & T Mobility, LLC v. Wilson*, this Court made clear that *Dunlap* does not create a categorical prohibition on waivers of class actions and the like in arbitration clauses. Again, the anti-aggregation/no class actions clause is simply one of any number of factors to consider in determining an unconscionable contract claim. The U.S. Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 is 100% consistent with the decisions of this Court — holding that California's categorical prohibition of class-action bans in arbitration clauses cannot stand. "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress', California's Discover Bank rule is preempted by the FAA." *Id.* at *1753 (citation omitted). Accordingly, Richmond greatly overstates the import of *Concepcion*.³¹

³¹ Even if the opinion in *Concepcion* could be read to preempt any consideration of the independent action clause, here, the *Concepcion* holding is limited to cases in the federal court system. The 5-4 holding of *Concepcion* -- that California's *Discover Bank* rule stands as an obstacle to the purposes of the FAA and is thus preempted--is limited to cases which, like *Concepcion* itself, arose in federal court. Had the issue in *Concepcion* reached the U.S. Supreme Court from a state court, there could not have been five votes for preemption. We know this because Justice Thomas -- who provided the crucial fifth vote for the *Concepcion* majority -- has consistently maintained that the FAA does not apply to cases in state court.

Since the 1995 case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 285 (1995), Justice Thomas has been adamant that the FAA in general, and § 2 in particular; simply "does not apply in state courts." *Id.* at 285 (Thomas, J., dissenting). In *Allied-Bruce*, the Court held that the FAA preempted a state law making written, predispute arbitration agreements unenforceable. *Id.* at 269. Justice Thomas, however, dissented, on the grounds that Congress intended for the FAA to apply only to federal courts. As he explained, at the time of the FAA's passage in 1925, "laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance," and as such it "would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts." *Id.* at 286, 288-29 (emphasis in original). To the contrary, as the 1925 Congress understood matters, "state arbitration statutes prescribed rules for the state courts, and the FAA prescribed rules for the federal courts." *Id.* at 289. In Justice Thomas's view, this federal-court limitation on the FAA applies to § 2 no less than it applies to provisions that specifically refer to the federal courts, because the text of the statute as a whole "makes clear that § 2 was not meant as a statement of substantive law binding on the States" but is instead "a purely procedural provision." *Id.* at 291.

Since Justice Thomas was appointed to the U.S. Supreme Court in 1991, the Court has on five occasions -- *Allied-Bruce*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Preston v. Ferrer*, 552 U.S. 346 (2008) -- confronted the question of whether the FAA applies to cases arising in state court. In every single one of those cases, Justice Thomas reiterated his view that it does not.

In short, plaintiffs urge this Court to consider the issue in terms of this hypothetical: If the FAA preemption issue had reached the U.S. Supreme Court in *this* case, and not *Concepcion*, would the Court have held preempted the trial court's ruling based solely on West Virginia law? The only way that this Court could conclude that the answer for this case is "Yes" would be if the Court guessed that Justice Thomas did not mean the statements he made in five different opinions.

Accordingly, the trial court gave due and proper consideration to the independent action clause at issue here.

c. The restriction on attorneys' fees renders the arbitration clause unconscionable.

The *Dunlap* Court explicitly stated, "Provisions in a contract of adhesion that would operate to restrict the availability of an award of attorneys' fees to less than that provided for in applicable law would, under our decision today, be presumptively unconscionable." *Id.* at n.15. That presumption arises here.³² Each Plaintiff sought attorney fees in their Complaints against Richmond to the extent provided for by law.

Here, at least two West Virginia statutes would provide for fee shifting with respect to Plaintiffs' claims of breach of warranty and deceptive acts or practices. W. Va. Code, § 36B-4-117 provides for attorney fees for violations of the Uniform Common Interest Ownership Act, including its warranty provisions. Likewise, West Virginia Code § 46A-5-104 provides for fee shifting when a consumer is subject to "illegal, fraudulent or unconscionable conduct."³³

The Court in *Concepcion* also had no occasion to consider the extent to which its rule would apply in a state-court proceeding. When the Court makes a "judicial pronouncement," that pronouncement's value comes from "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Put another way, the *Concepcion* decision should be understood as a pronouncement that extends only to the context of that case -- a case litigated in federal court. As a result, Justice Thomas's statement in *Concepcion*, which arose in federal court, that the "*Discover Bank* rule is pre-empted" by the FAA can properly be understood to mean only that the *Discover Bank* rule is preempted by the FAA in federal courts. So long as one takes Justice Thomas at his consistent and repeated word, it follows that he would not have voted the way he did had *Concepcion*, like this case, arisen in a state court. *Cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 664 n.2 (9th Cir. 1992) (counting votes to consider whether "the Supreme Court would have five votes for holding a post office is a nonpublic forum").

³² While Section 2 of the FAA allows the trial court to determine unconscionability by applying West Virginia contract law and examining the contract as a whole, it should be noted that *this* exculpatory provision is included in the arbitration provision itself. Indeed, the same is true with respect to the "independent action" exculpatory provision discussed *supra*.

³³ West Virginia Code § 46A-6-104 provides that "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." While not expressly pled, the conduct alleged by plaintiffs against Richmond plainly falls under this provision of Chapter 46A and, therefore, would allow for attorney fees under West Virginia Code § 46A-5-104.

In contrast, Richmond's mediation/arbitration provision provides that "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."³⁴ Neither the Uniform Common Interest Ownership Act nor the Consumer Protection Act limits the recovering of attorneys' fees in such a fashion. Under *Dunlap*, these restrictions on remedies are presumptively unconscionable, and Richmond can offer nothing with which to overcome the presumption.

d. The mediation/arbitration provision imposes unreasonably burdensome costs.

Not only does Richmond's mediation/arbitration provision run afoul of Syllabus Point 2 of *Dunlap* but also fails under Syllabus Point 4 of *Dunlap*, which addresses unreasonably burdensome costs:

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. 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; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Syl. pt. 4, 211 W.Va. 549, 567 S.E.2d 265.

³⁴ Purchase Agreement at p. 6, ¶ 21(a)

Again, paragraph 21(a) of the Purchase Agreement requires mediation and strips a Purchaser of any right to recovery of attorney fees if he or she fails to mediate. Likewise, paragraph 21(b) confirms that mediation is a prerequisite to arbitration – “any and all disputes . . . which are not settled through mediation shall be decided by . . . arbitration . . .”

Pursuant to paragraph 21(a), “Mediation fees, if any, shall be divided equally among the parties involved.” One-half of a mediator’s fee could and often does exceed \$1,000. In addition, the Plaintiff purchaser would likely incur attorney fees and travel costs for mediation - all before making his or her way through the front door of the judicial system.

Assuming the case does not settle at mediation, AAA’s rules would govern who pays for the arbitration, because, unlike most corporate parties to modern consumer contracts, Richmond does not offer to pay for the costs of arbitration. Pursuant to AAA’s Home Construction Arbitration Rules, the costs of arbitration vary depending on the size of the claim. See chart reproduced below.³⁵

ADMINISTRATIVE FEES AND ARBITRATOR COMPENSATION

Fee Schedule

Level 1 Disputes -- \$0 to \$10,000

Hearing Type	Initial Filing Fee		Case Service Fee (if necessary)		Arbitrator Compensation (if necessary)	
	Homeowner	Builder	Homeowner	Builder	Homeowner	Builder
Desk or Telephone	\$125	\$650	-	\$200	-	\$250
In Person	\$125	\$650	-	\$200	-	\$750/day

³⁵ The section addressing costs of AAA’s Home Construction Arbitration Rules is included as Exhibit D.

Level 2 Disputes -- Above \$10,000 to \$75,000

Hearing Type	Initial Filing Fee		Case Service Fee (if necessary)		Arbitrator Compensation (if necessary)	
	Homeowner	Builder	Homeowner	Builder	Homeowner	Builder
In Person	\$150	\$825	\$100	\$200	\$500*	\$500*

*This contemplates a one-day hearing. If additional days of hearing are needed, the parties will be responsible for sharing in the additional cost.

Level 3 Disputes -- Above \$75,000 and Non-monetary

Amount of Claim	Initial Filing Fee		Case Service Fee (if necessary)		Arbitrator Compensation (if necessary)	
	Homeowner	Builder	Homeowner	Builder	Homeowner	Builder
Above \$75,000 to \$300,000	\$550	\$1,525	\$100	\$300	\$900*	\$900*
Above \$300,000	\$1,000	\$2,850	\$150	\$475	\$1,000*	\$1,000*
Non-Monetary or Specific Performance Claims	\$575	\$1,725	\$100	\$200	\$1,000*	\$1,000*

*This contemplates a one-day hearing. If additional days of hearing are needed, the parties will be responsible for sharing in the additional cost.

For example, a homeowner is required to pay a \$550 filing fee upon making a claim for more than \$75,000 and less than \$300,000, which is followed by a \$100 case service fee and \$900 per day for any hearing. If one were to assume one-week was reasonable for a trial/hearing of a homeowner's claims, here, which is very conservative for a case this complex, the total administrative costs to the homeowner would easily exceed \$6,000.³⁶ And this amount does not even include the cost of rental for the hearing room, for which the homeowner must pay an equal share.³⁷ Furthermore, because the arbitration clause prohibits the aggregation of claims, each and every homeowner in this matter would be subject to these administrative costs in addition to the aforementioned expert witness fees incurred for the same testimony given over and over again on behalf of each homeowner.³⁸

Needless to say, these costs are a much greater burden on an individual and even prohibitive, in comparison to a court action. Plainly, by requiring both mediation and arbitration, Richmond's contracts have a chilling effect on most any homeowner considering litigation. Because these administrative costs are unreasonably burdensome, pursuant to *Dunlap*, the arbitration clause is unenforceable.

e. Richmond has made no effort to show exceptional circumstances that warrant these exculpatory and unfair provisions.

Just as in *Dunlap*, the mediation/arbitration provision in the instant case contains exculpatory provisions and unreasonably burdensome costs that, if applied, would effectively

³⁶ \$1,000 (estimate for mediator's charges) + \$550 (filing fee) + \$100 (case service fee) + \$4,500 (one week hearing) equals \$6,150. Petitioners could respond that since Plaintiffs won't be allowed to make any claims, the hearings will be short, but that cuts against their overall position.

³⁷ See **Exhibit D** at pp.1 & 3.

³⁸ Arbitration in this instance also provides the Defendant with the benefit of ensuring that there is no written record to use as precedent, even though the cases raise important public health issues in the Eastern Panhandle. Thus, it was both the silence of the arbitration process and the limitation of liability that Defendant sought to achieve by placing the mediation/arbitration clause in their adhesion contract.

limit Richmond's legal exposure, accountability, and liability in a fashion that would not otherwise exist under West Virginia law. *Dunlap*, 211 W.Va. 558, 567 S.E.2d at 274. As such, a rebuttable presumption has been created that the arbitration clause is unconscionable and void. *Id.* at 560 and 276. Despite Richmond's burden of proof on this matter, it has failed to show any exceptional circumstances that would render the exculpatory provisions conscionable.

The arbitration provision that Richmond seeks to enforce is unconscionable and unenforceable. *Dunlap* itself supplies the best summation of the nature of the question now before the Court:

This lawsuit is not about arbitration [Under the guise of requiring arbitration, the company] was actually rewriting substantially the legal landscape on which its customers must contend [The company] sought to shield itself from liability . . . by imposing Legal Remedies Provisions that eliminate class actions, sharply curtail damages in cases of misrepresentation, fraud, and other intentional torts, cloak the arbitration process with secrecy and place significant financial hurdles in the path of a potential litigant. It is not just that [the company] wants to litigate in the forum of its choice—arbitration; it is that [the company] wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable[.]

Dunlap, 211 W.Va. at 568-69, 567 S.E.2d at 284-85 (quoting *Ting v. AT&T*, 182 F. Supp. 2d 902, 938-939 (N.D. Cal. 2002)) (alterations in original). For the forgoing reasons, Plaintiff homeowners ask the Court to deny Richmond's Petition for Writ of Prohibition.

D. Richmond's arbitration provision is ambiguous in light of its repeated references to court action, an ambiguity that must be construed against enforcement.

1. Under the "Saving Clause" in Section 2 of the FAA, the ambiguity in the adhesion contract is construed pursuant to West Virginia contract law against Richmond.

Section 2 of the Federal Arbitration Act (FAA) sets forth that "arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus, under the FAA, arbitration provisions like other contracts may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88, 116 S.Ct. 1652 (1996). Ambiguity is a contract defense, which clearly applies in the instant case.

Richmond concedes that "[t]he mediation provisions in the Purchase Agreements are part and parcel of the arbitration provisions and, as such, the two provisions should be considered as one." (See Motion to Compel Arbitration, n. 16 at App. 100). However, because the mediation and arbitration provisions are contradictory, and thus ambiguous, they are invalid under West Virginia contract law. Specifically, Paragraph 21(a) of the Purchase Agreement provides as follows:

(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 disputes 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.

Reference to court action five (5) times in a section that Richmond concedes is "part and parcel" of the arbitration agreement, creates an irreconcilable conflict. Paragraph 21(a) clearly suggests that the homeowners may still retain the ability to vindicate their claims in court. Such language creates an ambiguity in the arbitration provision that, pursuant to well-settled West Virginia contract law, must be construed against the drafting party, Richmond. *Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996) (holding that ambiguous contract provisions, especially those having the qualities of contracts of adhesion, are to be construed against the drafter).

2. Petitioners breached or abandoned the agreement they seek to enforce.

As explained above, the provision Petitioners seek to enforce includes mediation as a precondition to arbitration. Believing the agreement void in its entirety, Plaintiffs below proceeded with Court action. Thereafter, Richmond purported to invoke the mediation provision and named a slate of mediators. Maintaining their position, Plaintiffs selected a mediator and agreed to mediate per the agreement – but *Petitioners declined to proceed*. Therefore, a condition precedent – mediation – to the very agreement Petitioners seek to enforce was unfulfilled because of Petitioners own action. This defeats Petitioners' right to a remedy at law on the contractual provision they have breached as well as any entitlement Petitioners might have had in equity. *See, e.g., Aberdeen Golf & Country Club v. Bliss Const., Inc.*, 932 So.2d 235 (Fla. App. 4 Dist., 2005) ("owner's refusal to initiate mediation as a precondition to arbitration . . .

could be deemed a voluntary and intentional relinquishment of the known right to arbitration”). See also, 9. U.S.C. § 4.

E. Non-signatories cannot be bound by arbitration provisions to which they have not assented.

Because arbitration is a matter of contract, it should be compelled only when it is consistent with the intent of the contracting parties. “It goes without saying that a contract cannot bind a nonparty.” *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754 (2002). As the United State Supreme Court put it recently in *Granite Rock Co. vs. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2857, “[a]rbitration is strictly a matter of consent.”

Similarly under West Virginia law, as a general rule, non-signatories cannot be bound by contract. In *State, ex rel. United Asphalt Supplies, Inc. v. Sanders*, 204 W.Va. 23, 27, 511 S.E.2d 134, 138 (1998), this Court found that a material supplier, who did not sign the arbitration agreement between contractor and general contractor, could not be directed to participate in arbitration. *Id.* Significantly, the Court held that a trial court “may not direct a non-signatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the non-signatory exception to the rule requiring express assent to arbitration should be invoked.” *Id.* at Syl. pt. 3.

Most of the exceptions to the general rule deal with corporate identities and agency theories. With respect to individuals, the mere fact that a non-signatory and a signatory share a close relationship – such as husband and wife or parent and child is not sufficient to subject the non-signatory to the arbitration clause.³⁹ And, here, the arbitration agreement does not purport to waive the right to a jury trial for an entire family. In fact, the implication is quite the opposite.

³⁹ *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (children were not bound by the arbitration agreement); *Scharf v. Kogan*, 285 S.W.3d 362, 369-371 (Mo. Ct. App. 2009) (husband's signature did not

Paragraph 20(k) of the Purchase Agreement provides that “if more than one Purchaser executes this Agreement then the Purchasers shall be jointly and severally liable for the performance of the obligations of Purchaser hereunder.” Similarly, Paragraph 21(a) states that “Purchaser and Seller agree to mediate” and Paragraph 21(b) provides that “Purchaser and Seller agree [to] . . . arbitration.” Finally, the notice provision of paragraph 21 provides “By initialing in the space below you are agreeing to have any dispute [arbitrated] and you are giving up . . . [a] jury trial.” *Id.* (emphasis omitted). Plainly, there was no intent on behalf of the parties to force non-signatories into arbitration and, therefore, a court should not be inclined to do so. “Parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.” *State ex rel. City Holding Co. vs. Kaufman*, 216 W.Va. 594, 609 S.E.2d 855 (2004).

1. Equitable Estoppel is not applicable in these circumstances under West Virginia law.

With this background in mind, we turn to Richmond’s calculating attempt at employing the doctrine of equitable estoppel to bind children and other non-signatories to these unconscionable contracts that purport to strip them of any meaningful remedy. There is nothing equitable about these contracts and a request to enforce them against innocent third parties under

bind wife in the absence of evidence that the husband was acting as the wife's agent); *Slusher v. Ohio Valley Propane Services*, 896 N.E.2d 715 (Ohio Ct. App. Jan. 7, 2008) (children were not required to arbitrate negligence claims against mobile home company because the contract containing the arbitration provision was signed only by their parent); *Flores v. Evergreen at San Diego, Inc.*, 148 Cal. App. 4th 581, 587, 55 Cal. Rptr. 3d 823 (2007) (signature of husband did not bind wife); *Finney v. Nat’l Health Care Corp.*, 193 S.W.3d 393 (Mo. Ct. App. 2006) (daughter who signed nursing home agreement on behalf of her mother was not required to arbitrate wrongful death claims because only claims on behalf of her mother, rather than her own personal claims, were subject to arbitration); *Snyder v. Belmont Homes, Inc.*, 899 So. 2d 57, 64 (La. Ct. App. 2005) (refusing to compel arbitration of child’s claim on the basis of arbitration clause signed by parents because under state law, a child is not bound by parent’s contract); *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005) (overruled on other grounds) (wife who signed arbitration agreement with nursing home as legal representative of her husband was not required to arbitrate wrongful death claim that was personal to her and was not brought in her representative capacity); *Accomazzo v. CEDU Educ. Services, Inc.*, 15 P.3d 1153, 1156 (Idaho 2000)(child not bound to arbitrate); *Ex parte Dickinson*, 711 So. 2d 984 (Ala. 1998) (signature of husband did not bind wife).

the guise of equity should be rebuked by this Court. “The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done.” Syl. pt. 1, *Hunter v. Christian*, 191 W.Va. 390, 446 S.E.2d 177 (1994). Moreover, Richmond does not come close to meeting the elements of equitable estoppel under West Virginia law.

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.

Syl. pt. 4, *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W.Va. 122, 502 S.E.2d 438, Syl. pt. 4 (1998).

Richmond reads way too much into Plaintiffs’ complaint and fails to recognize the alternative nature of Plaintiffs’ pleading. For example, paragraph 71 of the Complaint reads:

71. Richmond American failed to install a radon removal system in the Burgmans’ home which the Defendants were required by law to install, and which Richmond American contractually agreed to install. Richmond American’s failure to install an operating radon removal system constitutes a breach of the Burgmans’ contract and/or warranty.

Clearly all the residents may have implied or statutory warranty claims, but the contract claims are plead on behalf of the Plaintiffs who are parties to the contract (i.e. “constitutes a breach of Michelle Burgmans’ contract and/or warranty.”) Still it is true that Plaintiffs’ counsel did not break out which claims and damages applied to which Plaintiffs in the collective “wherefore clauses.” But at most, Richmond has pointed to very technical pleading issues that, even if accurately read, are easily corrected. To be clear, non-signatory Plaintiffs are not pursuing and have not pursued breach of contract claims, nor are they seeking contractual damages.

Each and every cause of action asserted by the non-signatory Plaintiffs arises from legal duties, which are either based in tort or are statutory in nature, opposed to arising from contractual duties. For example, the Burgmans pled: (1) a product liability claim based on a strict liability tort theory – paragraph 66 of the Complaint; (2) breach of a tort duty for failure to warn – paragraph 69; (3) negligence per se based on failure to abide by building codes – paragraph 70; (4) legally implied warranties of habitability and fitness (duties which the contracts purport to waive) – paragraph 72; (5) common law negligence – paragraph 73; (6) intentional infliction of emotional distress or tort of outrage – paragraph 74; (7) negligent infliction of emotional distress – paragraph 75; (8) fraud sounding in tort – paragraph 76; (9) negligent misrepresentation sounding in tort – paragraph 77; (10) tortious conduct resulting in medical monitoring damages – paragraph 78; and (11) intentional conduct by violating law and industry standards as grounds for punitive damages – paragraph 79. In fact, all of the damages that non-signatory Plaintiffs seek in their prayer are also tortious in nature – compensatory damages, including emotional distress, personal injury and medical monitoring, and punitive damages. As such, the sole claim arising out of the purchase agreements or contracts belongs exclusively to the signatory Plaintiffs.

As for the elements of equitable estoppel, to the extent Richmond can make out false representations, such representations would have to be based on an over-technical reading or a misreading of the Complaint. Being that these statements were not intended to be read as Richmond urges, there was no intention that they be acted upon.⁴⁰ Finally, there is no showing

⁴⁰ Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice.

of reliance by or prejudice to Richmond.⁴¹ “It is essential to the application of the principles of equitable estoppel that the one claiming the benefit thereof establish that he relied, to his disadvantage or detriment, on the acts, conduct or representation of the one alleged to be estopped.” Syl. pt. 4, *Cleaver*, 202 W.Va. 122, 502 S.E.2d 438. Accordingly, grounds for equitable estoppel do not exist here.

2. Richmond fares no better seeking equitable estoppel under federal law.

Richmond relies on federal case law to employ equitable estoppel against the non-signatory Plaintiffs. As you will see, federal law is of no help to Richmond.

Specifically, Richmond invokes the rule from *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (C.A.4, 2000).

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 . . . A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.

206 F.3d 411, 418 (citations omitted).

The instant case is quite distinguishable from *International Paper*. First the non-signatory Plaintiffs have not “consistently maintained that other provisions of the same contract should be enforced to benefit [them].” Instead, at most, they made a single allegation in their initial complaint, which Richmond misinterprets as an attempt to enforce the purchase

Syl. pt. 4, *Hatfield v. Health Management Associates of West Virginia*, 223 W.Va. 259, 672 S.E.2d 395 (citation omitted).

⁴¹ In fact, the Complaint identifies the home purchasers (i.e. parties to the contracts) in separate paragraphs. For example, paragraph 63 of the Complaint states: “Plaintiff Michele Burgman purchased the home on Lot 377 in Locust Hill, Jefferson County, West Virginia, from Richmond America on January 28, 2005. Since that time, until they moved out of the house, the Burgmans lived there with their minor children, Gabrielle Burgman, age 7, and Isaiah Burgman, age 4.” See also paragraphs 45, 80, 98, 114, 130, 146, 162, 178, 194 & 210 of the Complaint.

agreements to the non-signatory Plaintiffs' benefit. Second, "International Paper's entire case hinge[d] on its asserted rights under the . . . contract" and, therefore, the court held "it cannot seek to enforce those contractual rights and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated." *Id.* Here, the breach of contract claim applies only to signatories but, even as surmised by Richmond, was at most tangential to the non-signatory plaintiffs' case, which features at least 11 claims that are based on common or statutory law.

Not surprisingly, Richmond fails to cite a strikingly similar fourth circuit case that disposes of its argument. *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157 (C.A.4, 2004).

In *R.J. Griffin*, the owner/developer of beach front property entered into a contract with a builder for the construction of several condominiums. Subsequently, the homeowners association (the "Association") sued both the owner/developer and builder for construction defects. The Association made two claims: (1) negligence based on failure to comply with building codes and (2) breach of the implied warranty of good workmanship. Defendants argued that by bringing these two claims, the Association is seeking a direct benefit from the general contract. The court disagreed and found that the basis for the Association's claim was South Carolina common law and the benefits flowed from South Carolina law not the contract. *Id.* at 162. Accordingly, the court found the Association was not seeking a direct benefit from the provisions of the general contract it did not sign, and the doctrine of equitable estoppel could not be used to force the Association to arbitrate. *Id.* at 164.

The matter of *Wilson v. Dell*, No. 5:09-cv-00483, 2009 WL 2160775 (S.D.W.Va. July 16, 2009), as cited by Richmond, is in accord. In *Wilson*, the court refused to force a non-signatory husband into arbitration for bringing common law and statutory claims against a debt collector

regarding illegal debt collection activity, which all stemmed from a credit account for which only his wife signed. The fact that the husband made purchases on his wife's account did not amount to a direct benefit, as the proper inquiry was whether the primary intent of his lawsuit was to enforce a right contained in the contract.

Here, as in *R.J. Griffin and Wilson*, the non-signatory Plaintiffs are not attempting to avail themselves to rights under any contract in this litigation. Instead, their claims are independent of the contracts and arise out of West Virginia law. For these reasons, the non-signatory Plaintiffs should not be compelled to arbitrate.

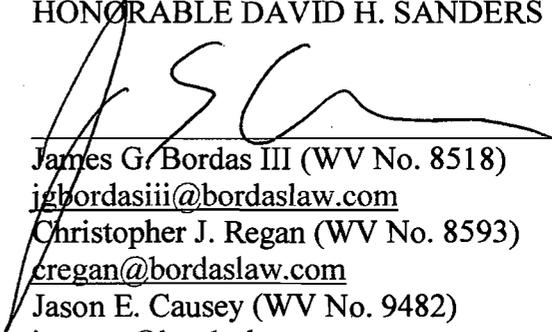
VI. CONCLUSION

WHEREFORE, in view of all the foregoing, Plaintiffs below respectfully suggest that the Petition for a Writ of Prohibition be REFUSED.

Respectfully Submitted,

HONORABLE DAVID H. SANDERS

By:


James G. Bordas III (WV No. 8518)

jgbordasiii@bordaslaw.com

Christopher J. Regan (WV No. 8593)

cregan@bordaslaw.com

Jason E. Causey (WV No. 9482)

jcausey@bordaslaw.com

BORDAS & BORDAS, PLLC

1358 National Road

Wheeling, WV 26003

(304) 242-8410

and

Andrew C. Skinner (WV No. 9314)
andrewskinner@skinnerfirm.com
Laura C. Davis (WV No. 7801)
davis@skinnerfirm.com
SKINNER LAW FIRM
PO Box 487
Charles Town, WV 25414
(304) 725-7029

Counsel for Plaintiffs

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 11-0770

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

Petitioners,

v.

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

Respondent.

CERTIFICATE OF SERVICE

I, Jason E. Causey, counsel for Plaintiffs, do hereby certify that on the 3rd day of June, 2011, service of the foregoing **RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION** 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:

A.L. Emch, Esq.
JACKSON KELLY PLLC
500 Lee Street
Charleston, WV 25301
*Counsel for Defendants Richmond
American Homes of West Virginia, Inc.*

Michael M. Stevens, Esq.
Walter M. Jones, Esq.
MARTIN & SEIBERT, LC
1453 Winchester Avenue
PO Box 1286
Martinsburg, WV 25402-1286
Counsel for JSC Concrete Construction, Inc.

Robert W. Trumble, Esq.
Suzanne M. Williams-McAuliffe, Esq.
MCNEER HIGHLAND MCMUNN & VARNER, LC
PO Box 2509
Martinsburg, WV 25402-2509
Counsel for Breeden Mechanical

Tracey A. Rohrbaugh, Esq.
Brian M. Peterson, Esq.
BOWLES RICE MCDAVID GRAFF & LOVE, LLP
101 South Queen Street
Martinsburg, WV 25401
Counsel for North Star Foundations

Debra H. Scudiere, Esq.
Teresa J. Dumire, Esq.
KAY CASTO & CHANEY, PLLC
5000 Hampton Center, Suite 3
Morgantown, WV 26505
Counsel for Modern Enterprises

Dale A. Buck, Esq.
LAW OFFICE OF DALE BUCK, PLLC
306 West Burke Street
Martinsburg, WV 25401
Counsel for Bar-Nel Concrete, Inc.

Michael D. Lorensen, Esq.
BOWLES RICE MCDAVID GRAFF & LOVE LLP
PO Drawer 1419
Martinsburg, WV 25402-1419
Counsel for Virginia Plumbers, Inc.

Kenneth G. Stallard, Esq.
THOMPSON O'DONNELL, LLP
1212 New York Ave., NW, Ste. 1000
Washington, DC 20005
Counsel for Specialized Engineering

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



Christopher J. Regan (WV Bar #8593)
James G. Bordas III (WV Bar #8518)
Jason E. Causey (WV Bar #9482)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410

AND

Andrew C. Skinner (WV Bar #9314)
Laura C. Davis (WV Bar #7801)
SKINNER LAW FIRM
PO Box 487
Charles Town, WV 25414
(304) 725-7029
Counsel for Plaintiffs

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE