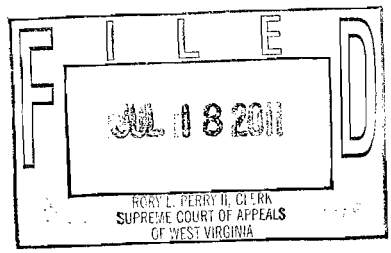
No. 11-0770

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.



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

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT
OF WRIT OF PROHIBITION

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

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I. INTRODUCTION AND SUMMARY

On 23 June 2011 this Honorable Court issued a rule directing the Respondents to show cause why a writ of prohibition should not be awarded and scheduled the matter for oral argument on 28 September 2011 under Rule 20 of the Rules of Appellate Procedure. This Court also ordered supplemental briefing by the parties.

In order to avoid repetition of arguments already made in the Petition, this submission primarily focuses on additional analysis of a recent decision of the United States Supreme Court, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that supports and confirms several arguments made in the Petition. Petitioners also address this Court's recent decision in *Brown v. Genesis Healthcare Corp., et al.*, No. 35494 (W. Va. June 29, 2011), which was decided after the Petition was filed.

This supplemental analysis confirms that the Circuit Court contravened the Federal Arbitration Act ("FAA") by failing to place the arbitration agreement at issue "'on an equal footing with other contracts . . . and enforce [it] according to [its] terms.'" *Brown*, slip op. at 34 (quoting *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)). The parties entered into an unequivocal written agreement to arbitrate their disputes. The Circuit Court, however, refused to enforce the parties' agreement to use streamlined dispute resolution procedures on the ground that the agreement is unconscionable. This ruling was based primarily on provisions of the contract that were outside of the arbitration agreement itself and on provisions within the arbitration agreement that the U.S. Supreme Court has now clearly held *cannot* be the basis for invalidating an arbitration agreement. The Circuit Court's holdings squarely conflict with binding precedent of the U.S. Supreme Court under the FAA. They should be reversed.

The U.S. Supreme Court's decision in *Concepcion* confirms that the Circuit Court erred in holding that the arbitration agreements at issue are unconscionable because they contain a class arbitration waiver and a discovery floor. The U.S. Supreme Court addressed these precise types of contractual provisions in *Concepcion* and recognized that they serve critical purposes in arbitration agreements. Accordingly, the U.S. Supreme Court held that the FAA bars courts from using the state-law doctrine of unconscionability to set aside arbitration agreements that contain such provisions. That is, the Supreme Court held that the FAA bars all courts from doing precisely what the Circuit Court did here. Plaintiffs' attempts to distinguish *Concepcion* are unpersuasive. The *Concepcion* holdings are dispositive here.

The Circuit Court also based its finding that the arbitration agreement is unconscionable on contract provisions outside of the arbitration agreement itself. This was clear error under the U.S. Supreme Court's severability precedent, which dictates that it is for the arbitrator – not the court – to determine the unconscionability of non-arbitration provisions and the contract as a whole.

This Court's recent decision in *Brown v. Genesis Healthcare Corporation* further supports Richmond's position here. This Court's analysis in *Brown* confirms the flawed nature of the Circuit Court's ruling because this Court acknowledged the preemptive effect of the FAA, the FAA's mandate that arbitration agreements be enforced according to their terms, and its applicability to state court proceedings such as this one. As explained in *Brown*, and contrary to the Circuit Court's decision, the U.S. Supreme Court has held that the FAA is a substantive law that preempts state law in both state and federal courts. Thus, the primacy of *Concepcion* and other U.S Supreme Court precedent in the arbitration context is clear. The precise holdings of *Brown*, invalidating the arbitration provisions at issue in that case, have no application here. The

analysis in *Brown* consistently focused on and was driven by the unique concerns that are raised by contracts signed during the nursing home admission process, which involves considerable urgency, confusion, and stress. The *Brown* Court's holdings are expressly limited to that context and to the particular arbitration clauses under consideration. The Court's holdings and analysis in *Brown* do not apply to the much different context of home purchase contracts, which are classic commercial transactions that do not take place in a crisis atmosphere, do not involve inherently vulnerable parties, and are separately signed by each homebuyer.[1] *Brown* also sheds no light on the legal issues presented by the class arbitration waiver and discovery provisions in the arbitration agreements in this case, which are controlled by the U.S. Supreme Court's extensive analysis in *Concepcion*.

II. ARGUMENT

A. The U.S. Supreme Court's Rulings Under the FAA, Particularly its Recent Decision in Concepcion, Confirm That the Circuit Court Erred in Finding the Arbitration Agreements to be Unconscionable.

The Circuit Court found the arbitration agreement to be unconscionable based on two provisions in the arbitration agreement itself – a class arbitration waiver[2] and a provision that the Circuit Court characterized as a limitation on discovery – as well as other provisions that are in the purchase contract, but are neither part of nor functionally related to the parties' agreement to arbitrate disputes that arise under the contract. *See* Circuit Court Order (App. 0001-0036), at 20-21 (finding the arbitration agreement to be unconscionable based on damages limitations and

[1] The Purchase Agreements were not only signed by each homebuyer, but the specific arbitration provision itself was **separately initialed** and accepted by each homebuyer.

[2] Section 21(b) of the Purchase Agreement (App. 0183) provides, *inter alia*, that the parties 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."

other provisions affecting warranties in Paragraph 8 of the purchase contract, as well as on the class arbitration waiver and discovery provision in Paragraph 21 (the arbitration agreement)). The Petition demonstrated that none of these provisions provides a valid basis for invalidating the arbitration agreement. The Circuit Court's reliance on contract provisions outside of the arbitration agreement was clear error under the U.S. Supreme Court's severability precedent, which dictates that it is for the arbitrator – not the court – to determine the unconscionability of non-arbitration provisions and the contract as a whole. *See* Petition at 17-25. And the Circuit Court's reliance on the class arbitration waiver and discovery provisions *within* the arbitration agreement was unsound and conflicts with U.S. Supreme Court precedent. Petition at 28-34.[3]

With respect to the severability doctrine, this Court recognized that this doctrine is firmly established by binding U.S. Supreme Court precedent and has not been overturned. *See Brown*, slip op. at 42-44. While the severability doctrine requires a court to consider the enforceability of an arbitration provision without regard to the remainder of the contract, the doctrine does not hold that contractual provisions outside of arbitration agreements are not subject to unconscionability challenges or that they cannot be found substantively unconscionable. The doctrine simply holds that the unconscionability of non-arbitration provisions and the contract as whole must be decided by the arbitrator applying the relevant state law – not a court. Thus, the severability doctrine in no way insulates non-arbitration provisions from state-law unconscionability review, but instead simply holds that such review must be performed by the arbitrator.

[3] The Circuit Court also found that the arbitration provision was "contradictory" and "ambiguous," Circuit Court Order at 22-24, but as the Petition demonstrates (at 34-35), the references to "court action" in the mediation and arbitration clauses do not create any confusion regarding the parties' clear intent to mediate and arbitrate their disputes in the first instance.

Because the Circuit Court erred in considering provisions outside of the arbitration clause in assessing whether the arbitration agreement is enforceable, the only remaining bases for the Circuit Court's unconscionability finding are the class arbitration waiver and the discovery provision. The Circuit Court's reliance on these provisions, however, is equally unsustainable. As an initial matter, the class arbitration waiver could not have provided a valid basis for refusing to enforce the parties' agreement to arbitrate disputes because the Plaintiffs have not brought a class action. The waiver therefore has no application here.

In any event, the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* held that the Federal Arbitration Act bars States from using the doctrine of unconscionability to set aside an arbitration agreement merely because it contains a class arbitration waiver or fails to provide the same discovery procedures as would be available in court litigation. Because the Circuit Court set aside the arbitration agreement in Richmond's purchase contracts for precisely those reasons, this recent Supreme Court decision merits additional analysis. This analysis reveals that the Circuit Court's order is so clearly contrary to *Concepcion* that it must be reversed.

1. Under *Concepcion*, the Circuit Court's Findings of Unconscionability With Respect to the Class Arbitration Waiver and Discovery Provisions Are Preempted by the Federal Arbitration Act.

Concepcion addressed the enforceability of a provision in a cellular telephone contract that provided for arbitration of all disputes between the parties and required that claims be brought in the parties' "individual capacity and not as a plaintiff or class member in any purported class or representative proceeding." *Concepcion*, 131 S. Ct. at 1744. The issue was whether the class action waiver was unconscionable under the *Discover Bank* decision of the

California Supreme Court,[4] which held that class-action waivers in consumer contracts are unconscionable when (1) the contract is a contract of adhesion, (2) "predictably small" amounts of damages are involved in the parties' dispute, and (3) the consumer alleges that the defendant has engaged in a scheme deliberately to cheat a large number of consumers out of individually small amounts of money. *Id.* at 1744-46. The U.S. Supreme Court held that the waiver was not unconscionable and that the *Discover Bank* rule conflicts with the FAA because class arbitration, to the extent that it is not expressly agreed to by the parties, is inconsistent with the FAA, whose "overarching purpose ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748, 1750-51.

In addition, the U.S. Supreme Court made clear in *Concepcion* that its ruling extends not only to state prohibitions of class arbitration waivers, but also to other state rules that have an exclusive or disproportionate impact on arbitration agreements. The U.S. Supreme Court reasoned that a state court "may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.'" *Id.* at 1747 (quoting *Perry v. Thomas,* 482 U.S. 483 (1987)). As an "obvious illustration of this point," the U.S. Supreme Court cited a state court ruling that an arbitration agreement is unconscionable or unenforceable because it "fail[s] to provide for judicially monitored discovery," explaining that such a rule "[i]n practice ... would have a disproportionate impact on arbitration agreements." *Id.* While parties are free to agree to arbitrate pursuant to a full discovery process like that in litigation, such a process "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Id.* at 1752-53.

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[4] *See Discover Bank v. Superior Court,* 36 Cal.4th 148, 113 P.3d 1100 (2005).

Under the U.S. Supreme Court's holdings in *Concepcion,* the Circuit Court's grounds for finding the arbitration agreement in Richmond's purchase agreements unconscionable were clear error. As noted, the Circuit Court found two provisions in Richmond's arbitration agreement to be unconscionable: the class arbitration waiver and what it described as "limitation[s] on discovery." *See* Circuit Court Order at 21-22. The Circuit Court's determinations on both issues squarely conflict with the U.S. Supreme Court's analysis in *Concepcion.*

With respect to the class arbitration waiver, the Circuit Court's decision contains little analysis, simply finding that the waiver is unconscionable because it would have the effect "of imposing upon homeowners prohibitively high costs to enforce their rights." *See* Circuit Court Order at 21. *Concepcion,* however, held that such a finding of unconscionability is preempted by the FAA, because it has the effect of requiring class arbitration notwithstanding the terms of the parties' agreement. As the U.S. Supreme Court explained, imposing class arbitration on parties who have only agreed to bilateral arbitration undermines the critical purpose that the class waiver serves – ensuring that the parties' dispute will be resolved by an informal proceeding that saves costs and achieves a speedier result. As a consequence, the Circuit Court's invalidation of the class arbitration waiver conflicts with *Concepcion* and fundamentally frustrates the FAA's goal of promoting the enforcement of arbitration agreements according to their terms.

The Circuit Court's ruling regarding the provision in the arbitration agreement that addresses discovery is equally erroneous under *Concepcion.* The Circuit Court found this provision to be unconscionable because it "favors the Defendants who would like to limit the Plaintiffs' ability to pursue information concerning its widespread wrongdoing." *Id.* at 21-22. Leaving aside the fact that the Circuit Court improperly prejudged the issue of whether the Defendants have committed *any* "wrongdoing," the Circuit Court's characterization of the

discovery provision as a "limitation on discovery," *id.* at 22, is incorrect. Section 21(b) of the Purchase Agreement provides only a discovery *floor* for arbitration proceedings, not a discovery *ceiling*; it states that in cases involving $10,000 or more in dispute, "the arbitrator shall establish a discovery schedule allowing, *at a minimum*, depositions of the parties and their expert witnesses." *See* App. 0183 (emphasis added). Thus, far from limiting or restricting discovery, the provision imposes a discovery requirement that the arbitrator can only *increase*.

In any event, even if the discovery provision placed "limitations" on discovery, it would be lawful and enforceable under *Concepcion*. As previously discussed, the U.S. Supreme Court held in *Concepcion* that a state court finding that a discovery limit in an arbitration provision is unconscionable would be inconsistent with, and hence preempted by, the FAA. A ruling that parties to an arbitration must follow the same discovery rules as used in court litigation would deny the parties the informal, speedy, low-cost proceeding that the FAA intended to promote. Such a ruling would, in fact, invalidate most arbitration agreements. As the Fourth Circuit has stated:

> While discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate. *Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement.*

In re Cotton Yarn Antitrust Litigation, 505 F.3d 274, 286 (4th Cir. 2007) (internal citation omitted; quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985)) (emphasis added).[5]

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[5] Even though the Circuit Court did not discuss or rely on this provision in the arbitration agreement, Plaintiffs assert that the agreement is also unconscionable because it restricts the availability of attorneys fees in situations where West Virginia law would otherwise allow such fees. *See* Response at 32-33 (citing the availability of attorneys fees under West Virginia Code §§ 36B-4-117 and 46A-5-104). This argument ignores, however, that the language at issue does not restrict attorneys fees generally, but instead restricts attorneys fees only in the specific
Footnote continued on next page.

Plaintiffs' cursory attempts in their Response to distinguish *Concepcion* are unavailing. As an initial matter, there is no merit to Plaintiffs' assertion (Response at 31-32 n.31) that "the *Concepcion* holding is limited to cases in the federal court system." Plaintiffs assert that this conclusion follows from the fact that "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." *Id.* This is simply wrong. Justice Thomas' solely held view that the FAA does not apply to cases in state court is not the law. Binding U.S. Supreme Court precedent unequivocally establishes that the FAA applies to state court actions. *Southland Corp. v. Keating,* 465 U.S. 1, 12-16 (1984). *See also, e.g., Preston v. Ferrer,* 552 U.S. 346, 349 (2008); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445 (2006). Indeed, the U.S. Supreme Court expressly rejected a request to overrule its holding in *Southland* that the FAA applies to state courts. *Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 272 (1995) (finding it "inappropriate to reconsider what is by now well-established law," since "[n]othing significant has changed in the 10 years subsequent to *Southland;* no later cases have eroded *Southland's* authority; and no unforeseen practical problems have arisen"). The Circuit Court in its Order acknowledged that *Southland* remains good law. *See* Circuit Court Order at 6. Moreover, this Court clearly and correctly held in its recent decision in *Brown v. Genesis Healthcare Corporation, et al.*, No. 35494 (W. Va. June 29, 2011), discussed *infra*, that "the United States

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situation where a party "commences an arbitration or court action . . . without first attempting to resolve the matter through mediation" and only if the arbitrator or judge exercises "discretion" to disallow fees. App. 0183 (Purchase Agreement ¶ 21(a)). Such a penalty provision furthers the purposes of the FAA because it prevents a party who breaches a mediation or arbitration agreement from benefiting from this breach through the recovery of attorneys fees. Accordingly, a state court ruling invalidating such a provision would "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. In any event, Plaintiffs' suggestion that this provision could prevent them from recovering attorneys fees that are otherwise available in this case is incorrect because as Plaintiffs acknowledge (Response at 32 n.33), they have not pled in their complaint claims under the fee-shifting statutes that they rely on and, in all events, the recovery of attorneys fees under these fee-shifting statutes is a matter of discretion, which the provision preserves.

Supreme Court has ruled that the FAA 'appli[es] in state as well as federal courts.'" Slip op. at 35 (quoting *Southland*, 465 U.S. at 16). Accordingly, the U.S. Supreme Court's rule of decision in *Concepcion* concerning the preemptive effect of the FAA is equally applicable to cases in federal court and state court.

Plaintiffs are also wide of the mark in contending that *Concepcion* has no applicability here because West Virginia does not impose the "categorical prohibition of class-action bans in arbitration clauses" that the U.S. Supreme Court found to be preempted by the FAA. Response at 31. Instead, Plaintiffs contend, such a ban in West Virginia is "simply one of any number of factors to consider in determining an unconscionable contract claim." *Id.* Plaintiffs' argument reflects a misunderstanding of *Concepcion.* Nothing in *Concepcion* suggests that the U.S. Supreme Court based its ruling on whether California's *Discover Bank* rule constituted a "categorical prohibition." To the contrary, the U.S. Supreme Court acknowledged that the rule did *not* prohibit collective-action waivers in *all* arbitration agreements.[6] Moreover, as shown, the U.S. Supreme Court's analysis in *Concepcion* was based on the fundamental "inconsisten[cy]" between class arbitration and the FAA, 131 S. Ct. at 1750-1751, and that inconsistency exists regardless of whether the requirement that class arbitration be permitted stems from a "categorical prohibition" of class arbitration waivers or a regime in which such waivers are evaluated on a case-by-case basis.

In any event, the Circuit Court's ruling on the class arbitration waiver at issue here was as "categorical" as the *Discover Bank* rule that the U.S. Supreme Court found to be unlawful in

[6] The U.S. Supreme Court, for example, stated that the issue in *Concepcion* was "whether § 2 [of the FAA] preempts California's rule classifying *most* collective-arbitration waivers in consumer contracts as unconscionable." *Concepcion,* 131 S. Ct. at 1746 (emphasis added). *See also id.* at 1744 (describing the issue as "whether the FAA prohibits States from conditioning the enforceability of *certain* arbitration agreements on the availability of classwide arbitration procedures.") (emphasis added).

Concepcion. No real analysis – "case-by-case" or otherwise – is evident in the Circuit Court's cursory discussion of the class arbitration waiver. *See* Circuit Court Order at 21. The Circuit Court simply struck it down on the basis of this Court's decision in *State ex rel. Dunlap v. Berger,* 211 W. Va. 549, 555, 567 S.E.2d 265, 271 (2002), a decision which appeared to adopt a virtually irrebuttable presumption of unconscionability for class arbitration waivers.

Plaintiffs note that this Court's recent decision in *State ex rel. AT&T Mobility, LLC v. Wilson,* 226 W. Va. 572, 703 S.E.2d 543 (2010), "made clear that *Dunlap* does not create a categorical prohibition on waivers of class actions and the like in arbitration clauses." Response at 31. Plaintiffs fail to point out, however, that this Court did not issue *AT&T Mobility* until October 28, 2010 – nearly two months *after* the Circuit Court issued its challenged order – and the Circuit Court therefore did not have the benefit of this clarification. Instead, the Circuit Court considered itself bound by *Dunlap* and *Dunlap*'s categorical prohibition of class arbitration waivers. Thus, *AT&T Mobility v. Wilson* only serves to establish that the Circuit Court's analysis was erroneous under West Virginia law, as well as preempted by the FAA pursuant to the principles established in *Concepcion.*

2. Plaintiffs' Attempt to Defend the Circuit Court's Ruling By Alleging That Arbitration Would Cause Them to Incur "Prohibitive Costs" Is Baseless and Unsupported By the Record.

Plaintiffs also attempt to justify the Circuit Court's finding of unconscionability by repeating the unsupported determination below that the class arbitration waiver is unenforceable because it imposes "prohibitively high costs" on Plaintiffs "to enforce their rights," and "would require the duplication and prohibitive accumulation of expert fees[,] among other costs." *Compare* Response at 30 *with* Circuit Court Order at 21. Evidently to bolster this argument, Plaintiffs – for the first time – make the new argument that the *entire* mediation/arbitration provision of the contract is unconscionable because it imposes "unreasonably burdensome" costs

that "have a chilling effect on most any homeowner considering litigation." *See* Response at 33-36. Neither of these arguments has merit.

As a preliminary matter, Plaintiffs' assertion that mediation and bilateral arbitration would be "prohibitively" or "unreasonably" expensive as compared to court litigation is contrary to the consistent recognition by numerous courts and Congress that mediation and bilateral arbitration are *less* expensive than court litigation. In *Concepcion,* for example, the U.S. Supreme Court stated: "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. ... And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." 131 S. Ct. at 1749 (citations omitted).[7]

Moreover, Plaintiffs' allegations that the arbitration agreements at issue would impose "prohibitive" or "unreasonably burdensome" costs are an insufficient basis for invalidating the agreements in any event. A party seeking to avoid arbitration must demonstrate that the costs of arbitration would preclude it from effectively vindicating its rights. *See Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000); *In re Cotton Yarn Antitrust Litigation,* 505 F.3d 274, 286 (4th Cir. 2007); *State ex rel. Wells v. Matish,* 215 W. Va. 686, 691-692, 600 S.E.2d 583, 588-589 (2004). Thus, an arbitration agreement is unenforceable only when the arbitration fees and costs "are so prohibitive as to effectively deny the [party] access to the arbitral forum." *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F.3d 549, 554 (4th Cir.

[7] *See also, e.g., Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the cost of litigation"); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 510-511 (1974) (the Federal Arbitration Act "was designed to allow parties to avoid the 'costliness and delays of litigation'") (citations omitted); *Levin v. Alms & Associates, Inc.,* 634 F.3d 260, 264-265 (4th Cir. 2011) ("[T]he principal benefits of arbitration [are] avoiding the high costs and time involved in judicial dispute resolution") (quoting *Blinco v. Greentree Servicing, LLC,* 366 F.3d 1249, 1253 (11th Cir. 2004)); *State ex rel. Wells v. Matish,* 215 W. Va. 686, 693, 600 S.E.2d 583, 590 (2004) ("several courts, including the United States Supreme Court, have made express findings regarding the benefits and financial savings associated with the arbitration of employment disputes") (citing, *inter alia, Circuit City Stores, Inc., supra*).

2001). More specifically, "[t]he cost of arbitration, as far as its deterrent effect, cannot be measured in a vacuum or premised upon a claimant's abstract contention that arbitration costs are 'too high.'" *Id.* at 556 n.5. Rather, a claimant must present evidence with respect to his "expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs." *Id.*

The claimant bears the burden of proof, *see Green Tree,* 531 U.S. at 92; *AT&T Mobility,* 703 S.E.2d at 549; *Dunlap v. Berger,* 211 W. Va. at 565-566, 567 S.E.2d at 281-282, and this burden "is a substantial one" that cannot be satisfied by mere "speculation about difficulties that *might* arise in arbitration." *In re Cotton Litigation,* 505 F.3d at 286 (emphasis in original); *see also Green Tree,* 531 U.S. at 90 n.6 (finding information on costs to be insufficient because it "relied entirely on unfounded assumptions"); *Dunlap*, 211 W. Va. at 567, 567 S.E.2d at 283 (finding party's "excessive costs" argument to be unpersuasive because they were "at best speculative and not well-supported in the record"); *Wells*, 215 W. Va. at 693, 600 S.E.2d at 692 (rejecting claim that arbitration imposed excessive costs, because claim that costs could be as much as $8,500 "is not supported by the record and is simply speculative at this point").

Plaintiffs fall far short of meeting their burden of proof. None of the homebuyer plaintiffs presented *any* evidence to the Circuit Court regarding their ability to pay, the expected cost differential between arbitration and litigation, or the effect of the cost differential on their ability to pursue their claims in arbitration. Instead, counsel simply made the bald, unsupported allegation – accepted without support by the Circuit Court – that the costs of mediation and arbitration would be "prohibitive" and "unreasonably burdensome," apparently for each set of homebuyers, regardless of their individual circumstances. Only now, in their Response to the Petition, do the Plaintiffs offer anything more – and what they offer merely consists of the fee

schedule set forth in the Home Construction Arbitration Rules of the American Arbitration Association ("AAA"). Response at 34-35. This "evidence," however – never presented to, much less vetted before, the Circuit Court – is woefully insufficient to satisfy Plaintiffs' burden. If a plaintiff could satisfy that burden merely by showing that it might be required to pay AAA fees, courts would routinely hold arbitration clauses to be unenforceable, given the frequent use of AAA fees in arbitration proceedings. Such a result would be clearly contrary to the objectives of the FAA and the jurisprudence interpreting it.

Furthermore, simply reciting the AAA fee schedule alone cannot establish that the fees for mediation and arbitration would deter Plaintiffs from pursuing their claims. Plaintiffs have provided no evidence that they cannot afford to pay these fees, or any evidence that the fees are so high that they would thereby be deterred from proceeding with arbitration.[8] Plaintiffs also have provided no evidence comparing the costs of arbitration and litigation. This failure, by itself, is dispositive because Plaintiffs bear the burden of showing "the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford,* 238 F.3d at 556. In sum, Plaintiffs' "prohibitive costs" argument must fail because they have presented no evidence whatsoever that the fees they characterize as "prohibitive" would preclude them from effectively vindicating their rights.[9]

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[8] In addition, the AAA Home Construction Arbitration Rules cited by Plaintiffs provide that the AAA "may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees" therein. *See* Response, Exhibit D, p. 1. Thus, Plaintiffs' contention that the AAA fees would deter them from pursuing mediation and arbitration is entirely speculative, since the AAA could waive the fees if any of the Plaintiffs could demonstrate financial hardship.

[9] There is no merit to Plaintiffs' assertion that Petitioners "breached" or "abandoned" the arbitration agreement by "fil[ing] the subject motion" to compel arbitration before mediating the matter. Response at 6, 39-40. Petitioners' motion, of course, was in direct response to Plaintiffs' having filed a court action without seeking either mediation or arbitration, in clear breach of the mediation and arbitration provisions in the agreement. Under these circumstances, where Plaintiffs had shown complete disregard for mediation, Petitioners can hardly be faulted for filing their motion even though no mediation had taken place. Moreover, as Plaintiffs point out, Petitioners nevertheless suggested mediation at the same time they filed the motion to compel arbitration in June 2010. The
Footnote continued on next page.

B. <u>This Court's Decision in *Brown v. Genesis Healthcare Corporation* Provides No Basis for Invalidating the Arbitration Provisions at Issue Here.</u>

This Court's recent decision in *Brown v. Genesis Healthcare Corporation, et al.*, No. 35494 (W. Va. June 29, 2011), further supports Richmond's position.

In *Brown*, the issue before this Court was whether the plaintiffs' wrongful death and personal injury actions against nursing homes, based on alleged negligent care of nursing home residents, should be dismissed because of arbitration agreements in the nursing home admission documents. This Court held that the specific arbitration agreements at issue were not enforceable. It first held that the arbitration agreements were not void under Section 15(c) of West Virginia's Nursing Home Act, West Virginia Code § 16-5C-15(c) – which prohibits "[a]ny waiver by a resident or his or her legal representative of the right to commence an action under" the Act – because Section 15(c) is preempted by Section 2 of the FAA since it "singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements." *Brown*, slip. op. at 48-49. This Court then held that the arbitration agreements were not enforceable as a matter of West Virginia public policy, pursuant to which "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death . . . shall not be enforced to compel arbitration of a dispute concerning the negligence." *Id.* at 73; *id.* at 2 ("In *the context of pre-injury nursing home admission agreements*, we do not believe that such arbitration clauses are enforceable to compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death.") (emphasis added). This Court found that this West Virginia

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parties eventually held a mediation on 7 June 2011 that encompassed the *Thorin* claims, and it was terminated without any resolution. Accordingly, the mediation pre-condition has been fulfilled and any suggestion that Petitioners should be denied their unequivocal right to arbitration due to "unfulfill[ment]" of the mediation precondition is baseless. *See* Response at 39.

public policy is not preempted by Section 2 of the FAA because the Court believed that "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act." *Id.* at 73. In addition, this Court found that two of the arbitration agreements at issue were also unenforceable under West Virginia law because they were procedurally and substantively unconscionable. *Id.* at 76-79, 81-82.

As an initial matter, this Court's analysis in *Brown* confirms much of the foregoing discussion demonstrating that the Circuit Court's ruling in the instant cases cannot be squared with the FAA. This Court acknowledged the "preemptive powers" of the FAA under the Supremacy Clause and that the FAA's fundamental purposes are "to reverse the longstanding judicial hostility toward arbitration agreements and to place arbitration agreements on equal footing with other contracts." *Id.* at 29, 32-33 (internal quotation marks omitted); *see also id.* at 46 (the FAA "ensures that private agreements to arbitrate are enforced according to their terms"). In addition, this Court recognized that controlling Supreme Court precedent holds that the FAA applies in state court proceedings, *id.* at 35, and binds state courts to the severability doctrine, *id.* at 42-44. It further acknowledged that the FAA preempts state statute and common law doctrines that either expressly "target[] arbitration provisions for disfavored treatment" or "stand[] as an obstacle to the accomplishment and execution of the purposes and objectives" of the FAA. *Id.* at 46.

None of this Court's specific holdings in *Brown*, with respect to the nursing home contract provisions at issue, applies to this case. This Court's analysis in *Brown* consistently focused on and was driven by the unique concerns that are raised by contracts signed during the

nursing home admission process, and its holdings are expressly limited to that context and to the particular arbitration clauses there at issue.[10] The opinion contains an extensive discussion of the "urgency, confusion, and stress" that often accompany the signing of nursing home admission agreements, attributable to multiple factors including the "vulnerable" nature of the patient due to "illness, incapacitation, or physical or mental impairment"; the "crisis" nature of the admission decision, usually following acute hospitalization or sudden loss of a caregiver, which leaves little time for the patient and/or his family to "comparison shop" or "consider alternatives"; and "lack of knowledge about long-term care options." *Id.* at 15-20. All of these factors, this Court explained, mean that the formation of a contract to enter a nursing home often occurs when the patient and/or family's "decision-making abilities are seriously impaired" and the prospects for "informed" decisionmaking are compromised. *Id.* at 18-19.

Moreover, in finding that the specific arbitration agreements at issue were unconscionable, this Court emphasized the presence of many of these factors. *See, e.g., id.* at 73-74 (noting that this Court was "troubled" by the agreements because the residents were entering nursing homes "as a result of physical and mental impairments" and "it was a stressful and confusing time for each resident's family"); *id.* at 76-77 (finding that plaintiff Brown lacked "any meaningful alternative other than to sign the agreement" because the record did not show that other nursing homes in the area had available bed space or offered the medical services needed by Mr. Brown's brother); *id.* at 82 (noting plaintiff Taylor's "lack of sophistication and

[10] *See, e.g.*, slip op. at 2 ("*In the context of pre-injury nursing home admission agreements*, we do not believe that such arbitration clauses are enforceable to compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death) (emphasis added); *id.* at 73 (West Virginia public policy precludes enforcement of "an arbitration clause *in a nursing home admission agreement* adopted prior to an occurrence of negligence that results in a personal injury or wrongful death") (emphasis added); *id.* at 76 ("arbitration clauses *in nursing home admission agreements* – which were signed prior to the alleged occurrence of negligence that resulted in a person[al] injury or wrongful death of a nursing home resident – cannot be enforced to compel arbitration of a later negligence action against the nursing home") (emphasis added).

advanced age" and the absence of any indication "that the arbitration clause was explained, reviewed, or that Mrs. Taylor knew what rights were being waived"). In sum, the *Brown* holdings are limited to and expressly tailored to address the unique concerns that arise in the nursing home admissions context.

These holdings have no application here because this case does not involve nursing home admission agreements, or any sort of agreement to provide medical care. The home purchase contracts at issue do not present any of the concerns that drove this Court's analysis in *Brown.* Persons seeking to buy homes do not have any of the inherent "vulnerability" of nursing home patients due to physical and/or mental impairments. In contrast to the "crisis" atmosphere of many nursing home admission decisions, home purchase decisions typically involve considerable deliberation and comparison shopping, and ample access to information and opportunity to make an informed decision. The homebuyers in these cases were buying a finished product, a home. Prior to closing, they had an opportunity to inspect each home and the homebuyers were obviously not forced to buy from Richmond. They had available to them legal counsel and other consultants, experts and brokers to advise them; in each instance, legal counsel was involved in the closing. Moreover, home buyers are usually presented with a multitude of options that can serve their housing needs, unlike nursing home patients who may have only one realistic option. In short, home purchases are quintessential "interstate commercial transaction[s]" from which this Court sought to distinguish nursing home admission agreements in *Brown*. Slip op. at 15. Accordingly, this Court's analysis and determinations in *Brown* are wholly inapposite here.

Brown also did not address the specific legal issues that are presented in this case. This Court had no occasion to address class arbitration waivers in arbitration agreements, minimum

discovery floors contained in arbitration agreements, or the other specific bases upon which the Circuit Court erroneously invalidated the arbitration agreements in the home purchase agreements here presented for review. As noted, the U.S. Supreme Court's recent decision in *Concepcion* contains extensive analyses of these issues, and the Circuit Court's decision cannot stand in the face of that opinion. *Brown* says nothing to the contrary.

Finally, considerations of federal law and this Court's legitimate public policy concerns with respect to nursing home agreements confirm that the holdings in *Brown* should be limited to the nursing home or medical services context. As noted, this Court concluded in *Brown* that West Virginia public policy prohibits the enforcement of "pre-injury nursing home admission agreements" that "compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death." Slip op. at 2. On its face, this public policy "singles out for nullification written arbitration agreements with nursing home residents" in the same way as the statutory provision of the Nursing Home Act that this Court found preempted by the FAA. *Id.* at 48. This Court nonetheless reasoned that the FAA, while preempting the statute, does not preempt the public policy because "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence to be submitted to arbitration, to be governed by the Federal Arbitration Act." *Id.* at 73. This holding should be limited to the nursing home context and not be extended to situations involving allegations of negligence in the building of a home, as is the case here.[11]

[11] The factual circumstances and "personal injury" allegations in these cases lie in stark contrast to the claims in the nursing home cases. Here, the Plaintiffs allege certain defects in the construction of the passive radon control systems in their Richmond homes. These defects and the alleged negligence which caused them would necessarily have occurred before the homebuyers closed on their homes. Thus, any negligent construction should have been apparent prior to closing. Moreover, the "personal injury" allegations are based on claims that the radon control systems did not effectively reduce the amount of naturally-occurring radon gas that could enter the home and, as a
Footnote continued on next page.

The FAA comprehensively deems "valid, irrevocable, and enforceable" as a matter of federal law:

> A written provision in *any* maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal . . . save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphases added). This unqualified statutory language – "any" written arbitration provision in a contract involving commerce – provides no indication that Congress intended to exclude from the scope of the FAA arbitration provisions that, by their terms, encompass claims based on negligent conduct or for personal injuries when the contracts involve commercial transactions such as at issue here.

The U.S. Supreme Court consistently has recognized the broad and comprehensive scope of the FAA. As this Court acknowledged, the U.S. Supreme Court has interpreted the term "contract evidencing a transaction involving commerce" in Section 2 to mean that Congress meant to "'signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Brown*, slip. op. at 30 n.50 (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)). Indeed, the U.S. Supreme Court held in *Southland* that there are "only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act" – the arbitration provisions must be part of a written contract involving commerce and they can be invalidated based on generally applicable state law defenses – and "nothing in the Act indicat[es] that the broad principle of enforceability is subject to *any additional limitations under state law*."

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result, the Plaintiffs claim they require medical monitoring. These are not at all the kinds of personal injury and wrongful death claims that this Court was concerned with in the *Brown* case; the claims in the instant cases arise completely out of alleged defects in the construction of a home, and not from any subsequent acts of negligence. These home-related defects are the very issues that the homebuyer Plaintiffs expressly agreed to arbitrate and they are inextricably intertwined with the allegations of personal injury.

Southland, 465 U.S. at 10-11 (emphasis added). The U.S. Supreme Court has further noted that the FAA's legislative history supports this broad interpretation. *See Allied-Bruce*, 513 U.S. at 275 ("the Act's legislative history, to the extent that it is informative, indicates an expansive congressional intent") (discussing legislative history); *see also id.* at 279 (noting that the legislative history "indicates that the Act's supporters saw the Act as part of an effort to make arbitration agreements *universally enforceable*") (emphasis added).[12]

Moreover, Section 2 expressly deems enforceable both agreements to arbitrate controversies that "thereafter aris[e] out of [a] contract or transaction" and "existing" controversies. Consistent with the language of Section 2, the U.S. Supreme Court consistently has enforced arbitration agreements that encompass "thereafter arising" claims. *See, e.g.*, *Rent-A-Center West, Inc. v. Jackson,* 130 S. Ct. at 2775, 2777 (employment discrimination claim arising out of arbitration agreement that was signed as a condition of employment and covered "all 'past, present or future' disputes arising out of [plaintiff's] employment"); *Perry v. Thomas*,

[12] Moreover, any suggestion that the FAA would not apply to claims based on negligence or personal injury outside of the nursing home context is belied by numerous decisions applying the FAA to such claims. *See, e.g., Edwards v. Hovensa, LLC*, 497 F.3d 355, 363 (3d Cir. 2007) (vacating district court's order denying motion to compel arbitration of employee's claims of negligence and personal injury against employer, and directing district court to grant motion; finding "unpersuasive" the district court's argument that the FAA did not apply because the case involved a personal injury claim rather than a contractual or statutory claim); *Hill v. Hornbeck Offshore Services, Inc.*, No. 10-02121, 2011 U.S. Dist. LEXIS 70571, at *12-13 (E.D. La. June 30, 2011) (granting motion to compel arbitration of employee's suit for negligence and unseaworthiness against employer; "there is no unique policy reason not to compel arbitration of claims merely because they concern personal injury"); *Mendez v. New Bell General Services, L.P.*, 727 F. Supp. 2d 585, 595 (W.D. Tex. 2010) (granting employer's motion to compel arbitration of employee's negligence claim and claim for intentional infliction of emotional distress; noting that the employee's "claims are the type of claims that are often subject to arbitration" and that there is "no federal law or policy" that "renders the claims nonarbitrable"); *Foodbrands Supply Chain Services, Inc. v. Terracon Inc.*, No. 02-2504-CM, 2003 U.S. Dist. LEXIS 25279, at *20 (D. Kan. Dec. 8, 2003) (granting defendant's motion to compel arbitration of claims, including claims of negligence and negligent misrepresentation, arising in connection with construction project; noting that "[t]he FAA contains no exception for tort claims"); *Parsely v. Terminix International Co., L.P.*, No. C-3-97-394, 1998 U.S. Dist. LEXIS 22891 (S.D. Ohio Sept. 15,1998) (granting motion of defendant Terminix to stay proceedings pending arbitration, where plaintiff had sued exterminator for personal injuries and wrongful death); *In re Golden Peanut Co., LLC*, 298 S.W.3d 629 (Tex. 2009) (reversing trial court's denial of employer's motion to compel arbitration of wrongful death claim by wrongful death beneficiaries, where the agreement to arbitrate provided that any claims or controversies relating to employment, including personal injury and wrongful death claims, must be submitted to arbitration pursuant to the FAA).

482 U.S. 483, 484-85 (1978) (dispute over unpaid commissions arising out of arbitration agreement that was signed in connection with application for employment and covered "any dispute, claim or controversy that may arise" between employee and firm).

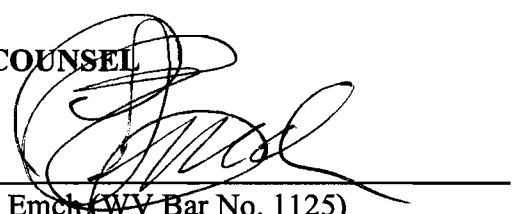
The contracts at issue here relate to a controversy arising out of a strictly commercial transaction and to our knowledge no West Virginia public policy – such as the one applicable to nursing homes – would require special treatment of the residential purchase agreements at issue here. Accordingly, as a matter of state and federal law, the arbitration provisions in Richmond's contracts with its homebuyers should be upheld.

III. CONCLUSION

For the foregoing reasons and those previously stated in earlier filings, Petitioners respectfully ask this Honorable Court to issue a writ of prohibition ordering the Circuit Court to vacate the 11 *Thorin* Orders, to compel all Plaintiffs to arbitrate their claims, and to grant such further relief as this Court deems proper.

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

BY COUNSEL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0770

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

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

Petitioners,

v. **Civil Action Nos. 10-C-152 – 10-C-162**

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

Respondent.

CERTIFICATE OF SERVICE

I, A. L. Emch, counsel for defendants Richmond American Homes of West Virginia, Inc. and M.D.C. Holdings, Inc., do hereby certify that on 18 July 2011 service of the foregoing ***Supplemental Brief in Support of 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:

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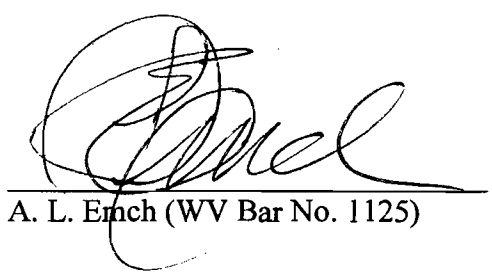

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