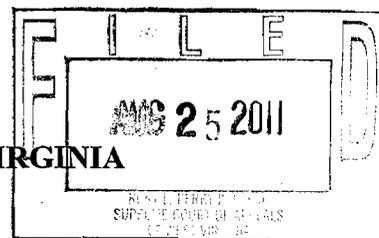


11-0770



**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.**

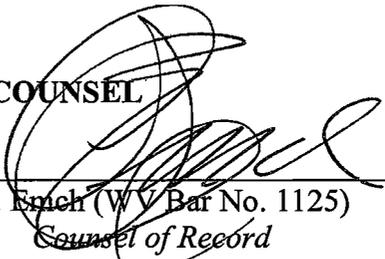
**HONORABLE DAVID H. SANDERS,  
JUDGE OF THE CIRCUIT COURT  
OF JEFFERSON COUNTY, WEST  
VIRGINIA,**

**Respondent.**

**SUPPLEMENTAL REPLY 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

Pursuant to this Honorable Court's 23 June 2011 Order, Petitioners filed their supplemental brief in support of the writ of prohibition on 18 July 2011. Respondents filed their supplemental response brief on 11 August 2011. Petitioners hereby file their supplemental reply brief.

Respondents' supplemental brief ("Supp. Response Br.") fails to respond to many of the points made in Petitioners' supplemental brief ("Supp. Br."), and simply ignores the federal and state authority that sets forth the appropriate legal standard to be applied in considering the enforceability of the arbitration provisions at issue here. In the opening to their supplemental response brief, Respondents focus the Court on matters that have no bearing on this Petition. Respondents begin their brief with a discussion of the purported health risks of radon, the building codes in the Eastern Panhandle, and the properties of radon. These issues go to the merits of the cases, which are hotly contested by Richmond.<sup>1</sup> In short, Respondents are

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<sup>1</sup> Respondents not only seek to distract the Court with issues that are not relevant here, but also misstate many of the "facts" they recite. For example, Respondents claim that in all of the subject homes, Petitioners failed to put in functioning passive radon control systems as required by law. Supp. Response Br. at 1. That is incorrect. By virtue of Appendix F of the building code adopted by Jefferson County, West Virginia, all new homes constructed after its effective date (which date is disputed, but at the earliest was 1 September 2001 and, if then, was intermittently in force thereafter during the time period relevant to this litigation) were for the first time required to incorporate "radon-resistant construction" techniques, which comprised what is often generically referred to as a "passive radon mitigation system." This "system" is very simple, consisting essentially of: 1) a 4 inch gas-permeable layer (typically gravel or sand); 2) a polyethylene (or equivalent) sheet on top of the permeable layer to serve as a soil gas retarder; 3) the filling of potential entry routes (*i.e.*, caulking joints where concrete slab meets foundation walls; caulking around plumbing penetrations through the concrete slab; covering sump pits with a gasketed or sealed lid); and 4) embedding a 3 inch PVC pipe vertically in the sub-slab gravel or sand layer and attaching a "T" fitting to ensure that the embedded pipe remains within the gravel or sand layer and running that pipe up through the roof of the house (at least 12 inches above the roof).

This "system," installed during new construction, costs perhaps \$500, and involves equipment, materials, and procedures that are among those ordinarily and routinely used. Its purpose, as described in Appendix F: "The following construction techniques are intended to resist radon entry and prepare the building for post-construction radon mitigation, if necessary." (emphasis added). Again, "prepare the building for post-construction mitigation, if necessary." If testing is later done by the owner (as recommended by the EPA and other agencies for all homeowners but not required for any) and an undesired level of radon gas is detected, then the radon-resistant construction will have made the home ready for mitigation, meaning the addition of a fan in the attic to exhaust the 3 inch PVC piping. Upon information and belief, all of the homes have indeed been fixed, and most if not all have had the attic fans added to boot, at an average cost of less than \$1000 per home.

attempting to turn a routine construction defect/negligence claim – with no evidence of fraud, no evidence of intentional wrongdoing, and no basis for seeking any damages beyond the nominal cost of repairing the systems themselves – into a host of what they claim are “complicated personal injury and medical monitoring claims.” Supp. Response Br. at 1. Their claims will ultimately be shown to be without merit. However, the issue before this Court is not whether Respondents have a strong or weak case, but whether Respondents clearly and unambiguously agreed to arbitrate their disputes with Richmond. Richmond respectfully submits that Respondents did so agree, and that these agreements should therefore be enforced.

Petitioners focused their supplemental brief primarily on additional analysis of the United States Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and this Court’s recent decision in *Brown v. Genesis Healthcare Corp.*, No. 35494 (W. Va. June 29, 2011), *available at* 2011 WL 2611327, both of which are very recent developments that support and confirm that the Circuit Court contravened the Federal Arbitration Act (“FAA”) by failing to enforce the parties’ agreement to use streamlined dispute resolution procedures, which was prominently displayed in the Purchase Agreements in bold print and capitalized text and was separately initialed and accepted by each of the purchasers. Respondents hardly address *Concepcion*, and in particular fail to rebut Petitioners’ showing that the U.S. Supreme Court held in that case that the FAA bars courts – state and federal – from using the state-law doctrine of unconscionability to set aside arbitration agreements that contain class action waivers and discovery limits, which is precisely what the Circuit Court did here. In contrast to Respondents’ attempt to downplay this U.S. Supreme Court decision that is squarely on point, they overreach in claiming that *Brown* somehow supports the proposition that the FAA does not apply to this

case at all. Petitioners already have shown that *Brown*, properly understood, requires these cases to be arbitrated and Respondents cannot rebut that showing.

In addition, Respondents' attempt to disparage arbitration and arbitrators, *see* Supp. Response Br. at 2, simply invites this Court to ignore the FAA's clear purpose to "promote arbitration" as a means of "efficient and speedy dispute resolution" that has advantages over litigation. *Concepcion*, 131 S. Ct. at 1749 (internal quotation marks omitted). As the U.S. Supreme Court and this Court consistently have recognized, however, "[a]rbitration agreements allow parties to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (the Federal Arbitration Act "was designed to allow parties to avoid 'the costliness and delays of litigation'"); *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011) ("the principal benefits of arbitration[] [are] avoiding the high costs and time involved in judicial dispute resolution") (alteration in original omitted) (quoting *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004)); *State ex rel. Wells v. Matish*, 215 W. Va. 686, 693, 600 S.E.2d 583, 590 (2004) (per curiam) ("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.*).

## 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 Substantively Unconscionable.

Petitioners have contended (Supp. Br. at 3-14) that the U.S. Supreme Court's rulings under the FAA, including its most recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), confirm that the Circuit Court erred in finding the arbitration agreements to be substantively unconscionable. Specifically, Petitioners argued that 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 provisions in the contract other than an arbitration clause and, of course, of the contract as a whole. Supp. Br. at 3-4; Petition at 17-24. In addition, Petitioners contended that the Circuit Court's findings that the class arbitration waiver and discovery provisions *within* the arbitration agreement render that agreement unconscionable were unsound and squarely conflict with *Concepcion*. Supp. Br. at 5-11; Petition at 28-34. Respondents cannot refute these showings.

Respondents have largely abandoned any attempt to defend the Circuit Court's ruling that the arbitration clause in the Purchase Agreements contain provisions that are substantively unconscionable or to reconcile this ruling with *Concepcion*. It is now settled that the FAA bars courts from using the state-law doctrine of unconscionability to set aside arbitration agreements that contain class action waivers and discovery limits – which is precisely what the Circuit Court did here. Petition at 28-34.

Respondents do not make any further attempts to distinguish *Concepcion* and instead seek to avoid its controlling force by making the sweeping argument that *Brown*, rather than *Concepcion*, “controls” on these issues. Supp. Response Br. at 7. *Brown*, however, did not address the unconscionability of class arbitration waivers or discovery limitations, and *Brown* does not alter this Court's most recent analysis of class arbitration waivers in *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010) (per curiam). To the contrary, this Court in *Brown* expressly acknowledged not only the primacy of federal law in the arbitration context, but also the FAA's mandate that arbitration agreements be enforced according to their terms, and that the FAA applies in state court proceedings such as this one.

*See Brown*, No. 35494, slip op. at 29-30, 35, 45-46. To the extent that Respondents are asserting that *Brown* holds that the FAA's sweeping text does not apply to home purchase contracts such as those here, Petitioners rebut that argument in section IIC, *infra*.

Presumably recognizing that the class arbitration waiver and discovery provisions in the arbitration agreement cannot provide a basis for finding it unconscionable, Respondents also assert that the agreement is substantively unconscionable because it restricts the availability of attorneys fees in situations where West Virginia law would otherwise allow such fees – even though the Circuit Court did not rely on this attorneys fees provision. Supp. Response Br. at 16. Nevertheless, Respondents' argument lacks merit. It ignores the limited applicability of the attorneys fees provision and that this provision would not prevent Respondents from recovering any attorneys fees that are otherwise available to them in this case. Supp. Br. at 9 n.5. Accordingly, Respondents have failed to demonstrate that the attorneys fees provision, or any other provision in the arbitration agreement itself, is substantively unconscionable.<sup>2</sup> As a result, the Circuit Court erred in refusing to enforce it as written, which is all that the FAA requires.

Respondents do not – and cannot – dispute that the Circuit Court also refused to enforce the arbitration agreement based on its determination that provisions in the Purchase Agreements *outside* of the arbitration agreement are substantively unconscionable. *See* Supp. Response Br. at 15 (noting that the Circuit Court also found unconscionable provisions in the Purchase Agreements that limit Respondents' ability to seek certain forms of damages and that relieve

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<sup>2</sup> Respondents also repeat their argument that the arbitration agreement as a whole is “unenforceable” because it imposes “unreasonably burdensome costs” on them in seeking to enforce their legal rights. Supp. Response Br. at 16-17. Petitioners addressed this issue extensively in their supplemental brief, explaining that, under governing federal law as well as West Virginia law, a party seeking to avoid arbitration through a claim that arbitration would impose prohibitive costs must make specific evidentiary showings and that Respondents have fallen far short of meeting their substantial burden of proof. *See* Supp. Br. at 11-14. Respondents do not respond to this analysis, instead asserting that they will “rely upon their prior legal papers submitted,” Supp. Response Br. at 17. As Petitioners have shown, however, those submissions do not satisfy their burden of proof on this issue.

Richmond from liability for breach of certain warranties); Circuit Court Order at 20-21. Instead, Respondents contend that the Circuit Court’s approach was proper under the U.S. Supreme Court’s severability decisions, *see* Supp. Response Br. at 2-5, 12-15. For reasons already discussed and that warrant no further extensive discussion, Respondents’ arguments lack merit. Pet. 5-9, 17-24. Petitioners need only address and reinforce the key points here.

As an initial matter, Respondents’ discussion of the severability doctrine is confusing because it addresses several propositions that are not in dispute. Petitioners do not dispute that under the U.S. Supreme Court’s FAA precedent, courts (rather than arbitrators) address the “gateway” issues of the validity and scope of arbitration agreements, that arbitration agreements can be found invalid based on the state-law doctrine of unconscionability, and that Respondents challenged the validity of the arbitration agreements at issue in this case under that doctrine. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858-59 (2010) (courts address these two gateway issues); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate” an agreement to arbitrate). Thus, Petitioners do not dispute that the Circuit Court had authority to determine whether the arbitration agreements are unconscionable under West Virginia law.

The issue here, however, is whether the Circuit Court could consider the validity of provisions of the Purchase Agreements outside of the arbitration clause in undertaking that inquiry. Respondents contend that the severability doctrine does not apply to that inquiry, Supp. Response Br. at 3, but that is where Respondents are wrong. The severability doctrine dictates not just who may decide validity, but also precisely what may and **may not** be considered in that undertaking. Specifically, the U.S. Supreme Court’s decisions under the FAA unequivocally

hold that in considering an arbitration clause's validity, a court must confine its assessment to the precise arbitration provision being challenged and may not consider other provisions. *See, e.g., Rent-a-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010) (a court's inquiry into the validity of an arbitration provision must be limited to "the *specific* 'written provision' ... that [a] party seeks to enforce") (emphasis added) (quoting 9 U.S.C. § 2); *see also id.* at 2778 (a court can only address the validity of "the precise agreement to arbitrate"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("in passing upon [a motion to compel arbitration under the FAA], a federal court may consider *only issues relating to the making and performance of the agreement to arbitrate*") (emphasis added); *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). As the U.S. Supreme Court has explained, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). This means that an arbitration provision may be enforceable – requiring the parties to arbitrate their disputes rather than litigate them – even if other provisions in the agreement that contains the arbitration provision are not enforceable. *See Rent-A-Center*, 130 S. Ct. at 2778 ("a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate").

The corollary to this principle is that a court may decide only the enforceability of the arbitration clause, and must leave to the arbitrator challenges to the enforceability of the contract as a whole and to non-arbitration provisions. *See id.* at 2779 ("[U]nless [plaintiffs] challenge[] the ... provision [sought to be enforced] specifically, [the court] must treat it as valid under § 2 and must enforce it under §§ 3 and 4, *leaving any challenge to the validity of the [a]greement as*

*a whole for the arbitrator*”) (emphasis added).<sup>3</sup> The severability doctrine in no way insulates non-arbitration provisions from state-law unconscionability review. Instead, it simply puts that responsibility on the arbitrator applying the relevant state law – not a court.

Respondents’ principal defense of the Circuit Court’s determination of the conscionability of non-arbitration provisions is that West Virginia case law required the court to consider the contract as whole in determining whether an arbitration agreement is enforceable. Supp. Response Br. at 4-5, 12-14; *see* Circuit Court Order at 17. The question of what a court may consider in resolving the validity of arbitration provisions under the FAA, however, is a federal question that must be resolved under federal law. *See Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1984). As shown, the U.S. Supreme Court has directly addressed that question in several decisions and unequivocally held that a court addressing the validity of an arbitration agreement must confine its review to the specific agreement challenged. Thus, the alleged unconscionability of terms elsewhere in a contract cannot render the parties’ agreement to arbitrate substantively unconscionable. In any event, none of the West Virginia cases that Respondents cite hold that West Virginia courts may ignore binding federal law and decide the unconscionability of an arbitration provision by considering the contract as a whole. *See* Petition at 21-23. In sum, by deciding the enforceability of non-arbitration provisions in the Purchase Agreements and then relying on those determinations to invalidate the arbitration provision, the Circuit Court fundamentally erred and usurped the authority of the arbitrator.<sup>4</sup>

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<sup>3</sup> *See also, e.g., Buckeye*, 546 U.S. at 445-46 (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002) (citation omitted).

<sup>4</sup> *See Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 686 (N.D.W. Va. 2010) (declining to void an arbitration agreement in cellular-telephone service agreements based on various exculpatory provisions outside the specific agreement to arbitrate, including a waiver of warranty and a disclaimer of certain kinds of liability, because “any challenge to these liability-limiting provisions must be raised before an arbitrator”).

**B. Respondents' Additional Arguments Lack Merit.**

Respondents also address several issues that were already briefed in the parties' initial filings, mostly repeating their previous positions. Because Petitioners addressed these issues in detail in the Petition, for the convenience of the Court, Petitioners will briefly reiterate their prior responses here.

**1. Procedural Unconscionability**

Respondents again attempt to defend the Circuit Court's finding that the arbitration provision is procedurally unconscionable. *See* Supp. Response Br. at 9-10; Circuit Court Order, at 16-17. As shown in the Petition, however, the Circuit Court's ruling was erroneous. *See* Petition at 27.

Under West Virginia law, unconscionability "may be divided into two categories: procedural and substantive. Procedural unconscionability is concerned with the inequities and unfairness in the bargaining process." *Drake v. W. Va. Self-Storage, Inc.*, 203 W. Va. 497, 500, 509 S.E.2d 21, 24 (1998) (per curiam). Both procedural and substantive unconscionability must be found before a court can refuse to enforce an agreement under West Virginia law. Because procedural unconscionability involves an evaluation of the fairness of the bargaining process, its determination "necessarily includes an inquiry beyond the face of the contract" in question. *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 236 n.6, 511 S.E.2d 854, 861 n.6 (1998) (internal quotation marks omitted). This inquiry is focused "on the relative positions of the parties, the adequacy of the bargaining position, [and] the meaningful alternatives available to the plaintiff." Syl. Pt. 4 (in part), *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va.*, 186 W. Va. 613, 614, 413 S.E.2d 670, 671 (1992).

In addition, the fact that an agreement "is a contract of adhesion does not necessarily mean that it is also invalid." *AT&T Mobility*, 226 W. Va. at 578, 703 S.E.2d at 549 (internal

quotation marks omitted). “Since the bulk of contracts signed in this country . . . are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable” and, accordingly, a “[f]inding that there is an adhesion contract is the beginning point for [the] analysis, not the end of it; . . . [a trial court must] distinguish[] good adhesion contracts which should be enforced from bad adhesion contracts which should not.” *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 557, 567 S.E.2d 265, 273 (2002) (internal quotation marks omitted).

The Circuit Court’s finding of procedural unconscionability cannot stand because it was based solely on the court’s conclusion that the Purchase Agreements were contracts of adhesion. This conclusion was both factually erroneous and legally inadequate. First, the Purchase Agreements were not contracts of adhesion. Respondents were not faced with a “take-it-or-leave-it” decision. *See* Supp. Response Br. at 10. Because they were buying a home, rather than a product or service of limited availability (such as nursing home services), Respondents had a wide range of choices. Many homes, both new and used, were available for sale from parties other than Richmond. Respondents therefore were not required to purchase a home from Richmond, and could engage in substantial comparison shopping. If they were dissatisfied with the terms of Richmond’s Purchase Agreement, they could have readily bought a home from another seller or have refused to accept the arbitration clause in their Agreement.

Second, the Circuit Court’s conclusion that an agreement can be found to be procedurally unconscionable *solely* because it is a contract of adhesion was contrary both to West Virginia law and to the court’s own acknowledgment that “not all adhesion contracts are invalid.” *See* Circuit Court Order at 15; Petition at 26-27. The court further erred by failing to conduct the fact-specific inquiry mandated by *Art’s Flower Shop*, to make any findings concerning the controlling factors identified in that decision, or to take any evidence on the issue of procedural

unconscionability. *See AT&T Mobility*, 226 W. Va. at 580, 703 S.E.2d at 551 (holding that trial court erred because it “made no findings as to the four-part test . . . articulated in *Art’s Flower Shop*”). The Circuit Court did not identify any evidence that there was a gross disparity in bargaining power as to *any* Signatory Respondent and Richmond, much less all of them. Indeed, the Respondents presented no evidence that any such disparity existed. Nor did the Respondents meet their burden of showing that they lacked ““meaningful alternatives”” to buying a home from Richmond; they plainly had such alternatives. *See State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005) (quoting Syl. Pt. 4, *Art’s Flower Shop*, 186 W. Va. 613, 413 S.E.2d 670).

Far from being at a bargaining disadvantage, Respondents had the opportunity to inspect their homes prior to closing, were not forced to buy a home from Petitioner, and had access to legal counsel and other experts who could advise them. *See* Supp. Br. at 18. Although Respondents assert that Petitioners’ showing “misguides the Court” (Supp. Response Br. at 9), they offer no evidence to support this assertion. For example, although Respondents contend that they were not represented by counsel at the time of the signing of the purchase agreements, that contention is unsupported by the record and (even if true) merely shows, by itself, only that Respondents chose not to retain their own counsel – not that there was a disparity in the bargaining process.<sup>5</sup> Respondents’ rationalization that they “would have been penalized with greater closing costs if they wished to use independent counsel” (*id.*) is a makeweight. Like any other service (including home inspections prior to closing), legal services cost money, and

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<sup>5</sup> It cannot be disputed that legal counsel was present when the Signatory Respondents closed on the purchase of their Richmond homes. Indeed, legal counsel is required to be present at a home closing under West Virginia law. The fact that the same attorney may at times have represented both Richmond and a homebuyer does not change the fact that counsel was involved and available to both parties. Respondents’ accusation that the presence of Richmond’s counsel at the closings on their homes was “intended to avoid independent analysis of the arbitration provision” (Supp. Response Br. at 9) is ridiculous, baseless, and insulting to the counsel involved.

incurring such costs is a typical part of the process of purchasing a home – not a “penalty.” In addition, Respondents offer no evidence that they were financially unable to afford independent counsel.

## 2. Ambiguity

Contrary to Respondents’ argument, the Circuit Court erred by finding that the arbitration provision in Section 21(b) of the Purchase Agreements are unenforceable because the mediation provision in Section 21(a) is ambiguous. *See* Supp. Response Br. at 17-18; Circuit Court Order at 22-24. As a preliminary matter, the Respondents (like the Circuit Court) fail to recognize that the mediation provisions in Section 21(a) and the arbitration provisions in Section 21(b) are read together. *See* Petition at 3. Thus, any supposed ambiguity in the mediation provision could not affect the clear obligation to arbitrate set forth in Section 21(b).

Furthermore, the five references to court actions in Section 21(a) do not render Section 21 ambiguous. Although Respondents allege that these references “suggest[] that the homeowners may still retain the ability to vindicate their claims in court,” Supp. Response Br. at 18, the provisions of Paragraph 21 plainly indicate that the parties agreed to (1) mediate their disputes in the first instance, and (2) arbitrate if the mediation was unsuccessful. *See* Petition at 34-35. Moreover, the absence of any ambiguity is confirmed by the all-caps, independently-initialed “Notice” provision at the conclusion of Paragraph 21. This Notice provision demonstrates in the clearest possible terms that the parties agreed to arbitrate claims that arise under the Purchase Agreements. It is incredible to suggest that anyone could read and initial Paragraph 21 and still entertain any doubt whatsoever that they were agreeing to arbitrate and

waiving any right to go to court. Finally, even if the arbitration provision is ambiguous (and it is not), both state and federal law mandate that such ambiguity be resolved in favor of arbitration.<sup>6</sup>

### 3. Non-signatories

Petitioners have contended that the Circuit Court erred by holding that nonsignatories to the Purchase Agreements who seek to recover damages under those agreements (such as minor children whose parents signed the Purchase Agreements and subsequent purchasers who did not sign Purchase Agreements) are not bound by the arbitration provision. Petition at 35-39; Circuit Court Order at 24.<sup>7</sup> Although ordinarily a party may not be bound by an arbitration agreement that he or she did not sign, *see, e.g., State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 27, 511 S.E.2d 134, 138 (1998), clear exceptions to this rule exist, *id.* In particular, principles of equitable estoppel preclude a party who seeks to enforce a duty derived from a contract from simultaneously seeking to repudiate parts of the contract that he may dislike, such as an arbitration clause.<sup>8</sup>

Under these principles, the nonsignatory Respondents are bound to arbitrate their claims because they seek the benefit of the Purchase Agreements by asserting claims *under these agreements*, such as claims for breach of contract and breach of warranty. Simply stated, the

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<sup>6</sup> *See Wells*, 215 W. Va. at 693-94, 600 S.E.2d at 590-91 (“[t]he [Federal] Arbitration Act establishe[d] that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”) (first two alterations in original); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration”).

<sup>7</sup> Two Respondents, Norman and Karen Lihou, bought their property from an original purchaser. All of the other nonsignatory Respondents are minor children.

<sup>8</sup> *See, e.g., Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding that nonsignatory plaintiff paper company was equitably estopped from avoiding application of arbitration agreement because “[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]”) (second alteration in original) (quoting *Avila Group, Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)); *Jackson v. Iris.com*, 524 F. Supp. 2d 742, 749 (E.D. Va. 2007) (“Under the doctrine of equitable estoppel . . . , a party (or his agent) need not actually sign a contract in order to be bound by the contract’s arbitration clause so long as the party retains a ‘direct benefit’ of the contract.”).

nonsignatories cannot have it both ways; they cannot rely on the Purchase Agreements and, at the same time, avoid the arbitration requirements of those agreements.

Respondents contend that the nonsignatory Respondents are not bound by the arbitration provisions because the nonsignatories “are *not* pursuing breach of contract claims nor are they seeking contractual damages.” Supp. Response Br. at 19 (emphasis in original). This contention, however, is belied by the language of their own Complaint, in which *all* of the Respondents – including the Lihous and the minor children – assert precisely the same claims, including “breach of ... contract and/or warranty.”<sup>9</sup> Indeed, Respondents previously acknowledged that the Complaint makes no distinction between the claims of the signatories and the claims of the nonsignatories. Pet. Response at 42. Further, it is analytically clear that all of the claims of all of the plaintiffs derive directly from the performance – or alleged non-performance – of the Purchase Agreements. Absent the contract, there is no duty of any kind involved. Accordingly, the nonsignatory Respondents are bound by, and cannot avoid, the arbitration requirement of Paragraph 21(b) of the Purchase Agreement.

None of the cases cited by Respondents supports their position that the nonsignatories should not be bound by the arbitration provisions of the Purchase Agreements. *See* Supp. Response Br. at 20-21. Each of these cases is distinguishable either because it involved factual circumstances not present here (such as nursing home agreements, which present unique

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<sup>9</sup> *See* Complaint, ¶¶ 54, 71, 89, 105, 121, 137, 153, 169, 185, 201, 217, and “Wherefore” clauses (App. 0047, 0049, 0051, 0053, 0055, 0057-0058, 0060, 0062-0063, 0065, 0067-0068, 0070, 0072-0073, 0075, 0077, 0079-0080, 0082, 0084). Respondents have attempted to explain away this fact by asserting that “the contract claims are plead on behalf of the Respondents who are parties to the contract” – for example, that in alleging a breach of the Bergmans’ contract and/or warranty, Paragraph 71 of the complaint is really referring to a breach of the *parent’s* (i.e., Michelle Bergman’s) contract. Petition Response at 42. This argument is specious, since Paragraph 71 makes no such distinction and the “wherefore” clause of each Respondent’s claim simply alleges a “breach of warranty and/or contract” without making any distinction between the parents and children. Furthermore, Respondents do not even attempt to explain away the allegations of “breach of warranty and/or contract” by the Lihous (who bought their property from an original purchaser). *See* App. 0063.

concerns and are signed in a totally different context, *see* Supp. Br. at 3, 16-18), the assertion of *separate* claims by minors, or different contract language.<sup>10</sup>

In any event, whether or not Respondents have expressly asserted breach of contract claims or expressly requested contractual damages is beside the point. A nonsignatory is estopped from contesting the applicability of an arbitration clause in a contract when, as here, he or she seeks a direct benefit from the contract. *See* Petition at 36-37. There is no merit to Respondents' suggestion that a nonsignatory can be bound by an arbitration clause only if the nonsignatory asserts a claim for breach of contract or seeks contractual damages. Supp. Response Br. at 19. This Court imposed no such requirement in its only decision on the issue of whether nonsignatories can be bound by an arbitration clause. *See United Asphalt Suppliers*, 204 W. Va. at 27-28, 511 S.E.2d at 138-39. Indeed, a number of courts have required nonsignatories to submit all claims to arbitration even when they asserted non-contractual claims.<sup>11</sup>

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<sup>10</sup> *See, e.g., Slusher v. Ohio Valley Propane Servs.*, 177 Ohio App. 3d 852, 896 N.E.2d 715 (2008) (childrens' separate claim for negligence as result of injuries suffered in propane explosion in mobile home were not subject to arbitration; parent was merely representative for her children, and children were the real parties in interest with respect to their claims); *Flores v. Evergreen At San Diego*, 148 Cal. App. 4th 581, 586-89, 55 Cal. Rptr. 3d 823, 826-28 (2007) (wife's claim for negligence against nursing home was not subject to arbitration because husband, who signed nursing home admission agreement, did not have authority to act as wife's agent); *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395-97 (Mo. Ct. App. 2006) (daughter of nursing home patient who brought action against nursing home for wrongful death of mother was not bound by arbitration provision of nursing home contract signed by mother's granddaughter, since wrongful death claim did not belong to mother or to mother's estate); *Accomazzo v. CEDU Educ. Servs., Inc.*, 135 Idaho 145, 148, 15 P.3d 1153, 1156 (2000) (because of language of contract, child was not bound to arbitration clause).

<sup>11</sup> *See, e.g., Hojnowski v. Vans Skate Park*, 187 N.J. 323, 346, 901 A.2d 381, 394 (2006) (holding that "a parent's agreement to arbitrate is valid and enforceable against any *tort claims* asserted on a minor's behalf") (emphasis added). *See also, e.g. In re Golden Peanut Co., LLC*, 298 S.W.3d 629 (Tex. 2009) (employee's widow and children were bound by arbitration agreement to submit wrongful death claim to arbitration); *In re Weekly Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005) (arbitration clause was binding on deceased's child and therefore required arbitration of her personal injury action against builder to recover for asthma allegedly caused by dust from house repairs); *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392 (Fla. 2005) (parent's agreement in commercial travel contract to binding arbitration was enforceable against minor or minor's estate in tort action arising from contract); *Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004) (wife was bound by arbitration provision in contract signed by husband to arbitrate claims of gross negligence, intentional misrepresentation, grossly negligent misrepresentation, fraud, tortious breach of contract, and fraudulent concealment against termite company); *Associated Glass, Ltd. v. Eye Ten Oaks Investments, Ltd.*, 147 S.W.3d 507 (Tex. App. 2004) (nonsignatory was bound by arbitration provisions of subcontracts to arbitrate claims against subcontractors for breach of warranty, negligence, fraud, fraudulent

*Footnote continued on next page.*

Under the FAA, arbitration agreements are enforceable against nonsignatories where, as here, “‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract.” *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (citation omitted). Thus, the Circuit Court was wrong in refusing to require the nonsignatories to submit their claims to arbitration.

**C. This Court’s Decision in *Brown v. Genesis Healthcare Corporation* Confirms The Foregoing Analysis And Provides No Basis for Invalidating the Arbitration Provisions at Issue Here.**

Petitioners argued (Supp. Br. at 15-22) that this Court’s recent decision in *Brown v. Genesis Healthcare Corp.*, No. 35494 (W. Va. June 29, 2011), available at 2011 WL 2611327, further supports their position because it confirms the primacy of the FAA in the arbitration context, the FAA’s mandate that arbitration agreements be enforced according to their terms, and that the FAA applies in state court proceedings such as this one. *See, id.* slip op. at 29-30, 35, 45-46. In addition, Petitioners contended that none of this Court’s specific holdings in *Brown* with respect to the nursing home contract provisions at issue there apply to this case. This Court’s holdings and analysis in *Brown* are limited to the unique concerns that are raised by executory personal services contracts signed during the nursing home admission process, and do not extend to the much different home purchase contracts that are at issue here.

Respondents do not dispute the primacy of federal law in this context, the fact that the FAA applies to this state court action, or that this Court’s holdings in *Brown* are expressly limited to the nursing home admission process and tailored to the specific issues that arise in that unique context. They contend, however, that these holdings should be extended to situations involving allegations of negligence in the building of a home, as here, based on this Court’s

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concealment, and negligent misrepresentation); *Cross v. Carnes*, 132 Ohio App. 3d 157, 167-69, 724 N.E.2d 828, 835-36 (1998) (because parents signed agreement with arbitration clause, minor’s claims of defamation and fraudulent concealment against television show producers must be submitted to arbitration).

statement in *Brown* 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 to be submitted to arbitration, to be governed by the Federal Arbitration Act.” *Id.* slip op. at 73; *see* Supp. Response Br. at 5-7. This argument is flawed for several reasons. As an initial matter, as Petitioners previously argued (Supp. Br. at 20-22), this Court’s decision in *Brown* should not be extended outside the nursing home context because the comprehensive and unqualified language of the FAA – which by its terms applies to “any” written arbitration provision in a contract involving commerce, *see* 9 U.S.C. § 2 – provides no indication that Congress intended to exclude from the scope of the statute 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. 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. Supp Br. at 21 n.12. The logical reading of *Brown* is that it carves out a very narrow exception applying to executory contracts requiring that personal care services be provided in the future, the negligent provision of which are alleged to have caused personal injury or wrongful death.

Respondents have no response to this analysis. They do not – and cannot – dispute that the text of the FAA does not exclude or exempt arbitration agreements that encompass claims based on negligent conduct or for personal injuries. They also do not address the numerous federal and state decisions cited by Petitioners that have applied the FAA to such claims and, in some cases, expressly rejected the argument that the FAA does not apply to cases involving personal injury claims. *Id.* Respondents assert that the U.S. Supreme Court has never addressed the application of the FAA in the context of a personal injury claim, which would include claims

for (*inter alia*) physical injury, infliction of emotional distress, defamation, and employment discrimination. Supp. Response Br. at 7. This is incorrect. Several of the U.S. Supreme Court's FAA cases have involved claims of employment discrimination – a classic tort that is considered a type of personal injury claim. The Court has held that such claims are arbitrable.<sup>12</sup> These decisions plainly reject the notion that the FAA does not extend to personal injury claims. Certainly there is yet no decision that excepts such claims from the FAA's scope.

Respondents' assertion (Supp. Response Br. at 6) that some arbitration groups, such as the American Arbitration Association ("AAA"), refuse to arbitrate certain, unspecified types of personal injury claims has no bearing on how the FAA should be construed. These arbitration groups, many of them for-profit companies, are free to pick and choose the categories of arbitration services that they provide, and their business choices cannot define the scope or limits of the FAA. In this regard, Respondents neglect to mention that the AAA's exclusion is limited to health care claims "involving individual patients without a post-dispute agreement to arbitrate" and that it was adopted by the AAA "[a]s a result of a review of its caseload in the health care area." AAA, *Healthcare Policy Statement* (2007), available at <http://www.adr.org/sp.asp?id=32192>. This policy statement expressly notes that the AAA "continue[s] to administer pre-dispute agreements to arbitrate in *all areas outside of the health care field*, as long as there are appropriate due process safeguards as defined by the courts." *Id.*

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<sup>12</sup> See, e.g., *Circuit City Stores*, 532 U.S. at 122-24 (state law claim of employment discrimination by sales counselor was arbitrable; "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (claim brought under Age Discrimination in Employment Act was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application).

(emphasis added). Accordingly, the AAA policy would not bar it from arbitrating the disputes at issue in this case.<sup>13</sup>

In any event, Respondents do not dispute any of Petitioners' analysis demonstrating that the unique and compelling circumstances that are present in the nursing home admission context are irrelevant to a home purchase. No West Virginia public policy would trump the parties' agreements to arbitrate in the residential purchase agreements at issue here. It is undisputed that all of the home purchasers inspected their homes prior to closing. At the time buyers enter into a contract to purchase a home from Richmond, as is true of many large builders, the homes are either complete, partially complete, or not yet started. The purchase contract, which contains the arbitration provision, is for the future delivery of a home, and requires performance by both parties prior to consummation of the purchase (the closing). Among other things, the buyer must obtain financing for the purchase, and the seller must complete, if necessary, and present the home to the purchaser. In the case of a completed home, the home is already built at the time of contracting, and any negligence associated with the construction of the home would have occurred by the time of contracting. With respect to other homes, at the time of contracting the disputed items may or may not have been installed, in whole or in part, depending upon the stage of construction. The quality of construction and any negligence in the building of the home would certainly be apparent at the inspection held prior to closing. Because the contract with Richmond clearly contemplates the purchase of a home, and the arbitration provision applies to

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<sup>13</sup> In addition, the arbitration of personal injury claims is a flourishing line of business for many arbitration groups. JAMS, for example, which describes itself as "the largest private alternative dispute resolution (ADR) provider in the world," see <http://www.jamsadr.com/aboutus/overview/>, has a practice group devoted to the arbitration of personal injury and tort disputes, including cases involving medical malpractice, products liability, and toxic torts, and touts the fact that its neutrals "have devoted much of their careers to helping clients mediate and arbitrate claims arising from personal injury and tort disputes." See <http://www.jamsadr.com/personal-injury-tort-practice/>. Nothing on the JAMS website suggests that it limits its arbitration services for personal injury claims to situations where the arbitration agreement was entered into *after* the personal injury occurred.

any claims related to the construction of the home, the closing is the relevant time frame for determining when the contract was fulfilled. At the time of contracting, the contract evidences, in essence, promises from Richmond to sell the property and the purchaser to buy it, if all conditions are met.

Parties who sign admission agreements with nursing homes to provide entirely future critical health care services to their loved ones are therefore much differently situated from parties who purchase completed residential real estate. Parties sign nursing home admission agreements in a crisis atmosphere with few or even no options, and often without the ability to fully accept and understand the quality of services they will be receiving. By contrast, purchasers of homes (such as Respondents here) have many other options and an abundance of information about these options. When they make their final decision to purchase the home at the closing, they have had a full opportunity to inspect the final product – radon resistant construction elements and all – and thus to know what they are getting when they walk away from the table. This presents precisely the sort of arms-length commercial transaction where the FAA compels state courts to enforce a parties' agreement to arbitrate their claims, and this Court should do so here.

### **III. CONCLUSION**

For the foregoing reasons and for those previously stated in the Petition and Petitioners' supplemental brief, 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 Respondents 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.,**

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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 25 August 2011 service of the foregoing *Supplemental Reply 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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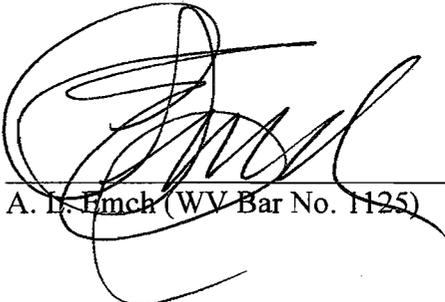
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