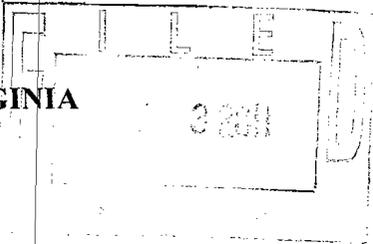


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JOHNSON CONTROLS, INC., YORK INTERNATIONAL CORPORATION, AND MORGAN KELLER, INC.,)

CASE NO.

Petitioners,)

11-1515

v.)

THE HONORABLE SUSAN B. TUCKER, Judge of the Circuit Court of Monongalia County,)

Respondent.)

PETITIONERS JOHNSON CONTROLS, INC.'S, YORK INTERNATIONAL CORPORATION'S AND MORGAN KELLER, INC.'S PETITION FOR A WRIT OF PROHIBITION

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Now come the Petitioners, Morgan Keller, Inc. (“Morgan Keller”), Johnson Controls, Inc. (“Johnson Controls”) and York International Corporation. (“York,” together with Johnson Controls, the “York Petitioners,” and together with Morgan Keller, “Petitioners”), by and through counsel, who petition this Court pursuant to Article VIII, Section III of the Constitution of West Virginia; West Virginia Code § 51-1-3 and § 53-1-1 *et seq.*; and Rule 14 of the Rules of Appellate Procedure to issue a writ of prohibition barring the Honorable Susan B. Tucker, Judge of the Circuit Court of Monongalia County, West Virginia, from conducting further proceedings involving Petitioners in the case styled as *Glenmark Holdings, LLC v. York International, et al.*, Case No. 11-C-325 (the “Civil Action”). As grounds for this writ, Petitioners submit that all claims brought by Plaintiff Glenmark Holdings, LLC (“Glenmark”) against the Petitioners in the Civil Action are subject to mandatory arbitration as a result of Glenmark’s respective contracts with Petitioners, and thus are barred by, among other things, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Accordingly, the Circuit Court lacks subject matter jurisdiction to proceed with the resolution of those claims.

In addition, the Circuit Court committed substantial and clear legal error in denying the Petitioners’ motions to compel arbitration and to stay pending arbitration. Glenmark’s claims against the Petitioners are clearly arbitrable under the Federal Arbitration Act. The Federal Arbitration Act provides for immediate appellate review of orders refusing a stay of litigation pending arbitration or denying a motion to compel arbitration. Granting the relief requested by Petitioners would be consistent with Congressional policy favoring arbitration, as adopted by this Court.

QUESTIONS PRESENTED

1. Whether Petitioners are entitled to enforce arbitration clauses contained within their agreements with Glenmark, when Glenmark asserted claims against Petitioners that Petitioners failed to perform their obligations under those agreements.
2. Whether the arbitration clauses contained within Petitioners' agreements with Glenmark are unconscionable when those agreements were negotiated by sophisticated commercial parties with substantial experience in real estate development or construction.
3. Whether Glenmark's claims against Petitioners are preempted by the Federal Arbitration Act.

STATEMENT OF THE CASE

A. Morgan Keller, Inc.'s Agreement and Glenmark's Claims

On August 1, 2003, Glenmark entered into an Agreement with Morgan-Keller, Inc. (the "Morgan Keller Agreement"), pursuant to which Morgan-Keller, as general contractor, agreed to construct the Suncrest Executive Office Plaza, also known as the United Center, in Morgantown, West Virginia (Complaint at ¶19 and Ex. B thereto; Appx. 3, 28.) The Agreement is an AIA Document A101-1997, Standard Form of Agreement Between Owner and Contractor. The Agreement incorporates by reference the General Conditions of the Contract for Construction, AIA Document A201-1997, attached to the Complaint as Exhibit C. (Appx. 46.)

Document A201-1997 contains an express arbitration clause which governs each of Glenmark's claims against Morgan-Keller in this case. Under the heading "**ARBITRATION**,"

Document A201-1997 states:

"4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2. Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3. A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.”

Paragraph 4.3.1 defines “Claim” as follows:

“Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.”

(A201-1997 at paragraph 4.3.1; Appx. 64.) According to Paragraph 13.1, the Agreement is to be governed by the law of the place where the project is located, and “Arbitration shall be held in Morgantown, West Virginia.” (A201-1997 at paragraph 13.1; Appx. 84.)

Despite expressly agreeing to arbitrate any claims it might have against Morgan-Keller, Glenmark filed its Complaint in the Civil Action on June 13, 2011, bringing causes of action for negligence, product liability, breach of contract, breach of Uniform Commercial Code warranties, and breach of implied warranty. (*See generally* the Complaint.). Although Glenmark pled each of its causes of action generally as to all Defendants, it is clear that each one of these claims against Morgan-Keller arises out of or relates to Glenmark’s contract with Morgan-Keller.

B. The York Petitioners' Agreement and Glenmark's Claims

In November of 2004, Glenmark and the York Petitioners entered into a Preventive Maintenance Agreement (the "York Agreement") for periodic inspections and routine maintenance to be performed on the HVAC system at the Suncrest Executive Office Plaza, also known as the United Center, in Morgantown, West Virginia. The York Agreement contains an express arbitration clause which governs each of Glenmark's claims in the Civil Action against York Petitioners. Under the heading "**DISPUTES, CHOICE OF LAW AND COSTS,**" the York Agreement states:

This contract shall be deemed to have been entered into and shall be governed by the laws of the Commonwealth of Pennsylvania. All claims, disputes and controversies **arising out of or relating to this contract, or the breach thereof, shall, in lieu of court action, be submitted to arbitration** in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and any judgment upon the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction. **The site of the arbitration shall be York, Pennsylvania,** unless another site is mutually agreed between the parties.

(York Agreement, Exhibit D to the Complaint, at p. 5; Appx. 95) (emphasis added).

Despite having contractually agreed to arbitrate any disputes with the York Petitioners, Glenmark filed the Civil Action, alleging that "Glenmark has necessarily suffered and incurred substantial unreimbursed expenses and losses related to repairs, replacements, modification, testing investigation and assessment of the HVAC system installed on the 'Suncrest Executive Office Plaza' building." (Complaint at ¶38; Appx. 7.) Glenmark alleges that the HVAC system suffered numerous "failures, inadequacies, breakdowns, and deficiencies," and that the York Petitioners failed to perform their obligations under the York Agreement by remedying the same. (See Complaint at ¶¶ 36-38; 59-68; Appx. 7; 11-12.) Although sounding in both contract and tort,

Glenmark's claims against the York Petitioners are based on Glenmark's allegations that the York Petitioners somehow failed to perform their obligations under the York Agreement.

C. Motions to Compel Arbitration and Subsequent Hearing

On July 29, 2011, in light of the clear and unambiguous arbitration provision contained in the York Agreement, the York Petitioners filed their *Motion to Compel Arbitration, for Dismissal, and in the Alternative to Stay Proceedings* (the "York Motion"). (A true and accurate copy of the York Motion is included at Appx. 98.) Morgan Keller similarly filed its Motion to Compel Arbitration, for Dismissal, and in the Alternative to Stay Proceedings and Joinder in Johnson Control's Motion Requesting Same Relief (the "Morgan Keller Motion," and together with the York Motion, the "Motions") on August 8, 2011. The Circuit Court heard oral argument on the Motions on September 8, 2011. On September 23, 2011, the Circuit Court's judicial clerk emailed counsel to advise that "[t]he Court has reviewed the pending Motions to Compel Arbitration, and it is this Court's ruling that those Motions are hereby denied for the reasons set forth in the Plaintiff's brief."

Glenmark's counsel prepared two Orders, which were approved and entered by the Circuit Court. (True and accurate copies of the Circuit Court's Orders are included at Appx. 116.) The Circuit Court denied both motions on the grounds that the arbitration provisions were both substantively and procedurally unconscionable, and that all of Glenmark's claims are not covered by the arbitration provisions.

SUMMARY OF THE ARGUMENT

Because the parties have contractually agreed to arbitrate the claims made subject of Glenmark's Complaint, the Circuit Court lacks jurisdiction to consider Glenmark's claims. Pursuant to the Federal Arbitration Act, arbitration is favored when the parties have agreed to

submit their claims to it. Since all of Glenmark's claims against each Petitioner arise out of or relate to Glenmark's agreements with Petitioners, those claims are subject to arbitration. (Part A).

The Circuit Court incorrectly decided that the arbitration clauses are unenforceable as unconscionable. Glenmark and Petitioners are sophisticated commercial entities with substantial experience in real estate development and construction projects, and as a result, Glenmark cannot claim to have been hoodwinked or otherwise deceived. Further, both agreements were negotiated agreements, and Glenmark certainly had the opportunity to negotiate a dispute resolution procedure other than arbitration if it so desired. That it did not do so does not make the arbitration clauses unconscionable; they are enforceable terms of the agreements, to which Glenmark agreed when it signed those agreements. (Part B).

Each of Glenmark's claims are subject to arbitration, then, because those claims arise out of or relate to the agreements at issue. Glenmark's claims against each Petitioner are based upon Glenmark's assertions that Petitioners owed Glenmark certain duties as a result of their relationship as contracting parties. Thus whether Glenmark is correct that it may assert tort claims in addition to contract claims as a result of Petitioners' supposed failure to fulfill their obligations is not important. What matters is that Glenmark asserts that those tort claims concern duties that Petitioners supposedly owed Glenmark, because Petitioners had contracted with Glenmark to provide certain services. As a result, all of Glenmark's claims arise out of or relate to the agreements at issue, and they are subject to arbitration. (Part C.)

Finally, because the Federal Arbitration Act controls and because those claims were subject to arbitration, the Circuit Court lacked subject matter jurisdiction to consider Glenmark's claims. For that reason, a writ of prohibition is Petitioners' only adequate remedy to enforce their

agreements with Glenmark and ensure that the parties' agreement to arbitrate their claims is enforced. (Part D).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request that the Court permit oral argument of the issues argued below. The arbitrability of claims made between sophisticated commercial entities who have knowingly agreed to arbitration has, of course, been decided by this Court. This case, therefore, involves an issue of settled—albeit misapplied—law. As such, Petitioners believe that the case is proper for Rule 19 argument and a memorandum decision or opinion.

ARGUMENT

This Court should issue a rule for the Respondent to show cause why a writ of prohibition should not be issued, and this Court should order that the Civil Action be stayed and/or dismissed pending results of arbitration, should Glenmark proceed in arbitration with its claims.

A. The Federal Arbitration Act Controls the Enforceability of the Arbitration Clauses at Issue.

As a starting point, the Federal Arbitration Act applies to all contracts involving interstate commerce. *See* 9 U.S.C. § 2 (2011). The FAA creates a “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (“By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”) (emphasis in original). U.S. Supreme Court precedent expressly requires state courts to conform to the provisions of the Federal Arbitration Act. *See Southland Corp. v. Keating*, 468 U.S. 1 (1984).

Recently, this Court similarly addressed the purpose of the FAA when it held that arbitration is favored where the parties have contractually agreed to do so. *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 304-05 (W. Va. 2009). Indeed, the enforcement of contractual arbitration provisions is well-established West Virginia law:

Where parties to a contract agree to arbitrate either all disputes, or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, such provision is binding, and specifically enforceable, and all causes of action arising under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, into the award of the arbitrators.

Bd. of Ed. of the Cty. of Berkeley v. W. Harley Miller, Inc., 160 W. Va. 473, at syllabus 1 (W. Va. 1977); see also *State ex rel. Wells v. Matish*, 215 W. Va. 686 (W. Va. 2004) (concluding that arbitration provision in employment contract was valid and enforceable despite claims of unconscionability). “If it cannot be said ‘with positive assurance’ that a dispute is excluded from arbitration by a contractor’s arbitration clause, ***the doubt should be resolved in favor of an interpretation that submits the dispute to arbitration.***” *Local Union No. 637 v. Davis H. Elliot Co., Inc.*, 13 F.3d 129, 132 (4th Cir. 1993) (emphasis added) (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85).¹

1. *Glenmark’s Claims Against Morgan Keller are Subject to Arbitration.*

Glenmark’s claims against Morgan-Keller arise out of the contract between the parties, and therefore, are subject to arbitration. As stated above, the Morgan-Keller Agreement states

¹ The agreement between the York Defendants and Glenmark contains a clause that requires its terms to be decided under Pennsylvania law. Like West Virginia, Pennsylvania has a strong policy in favor of arbitration. Whether this Court applies West Virginia or Pennsylvania law the result is the same. Pennsylvania similarly favors enforcement of arbitration provisions to which parties have contractually agreed. See, e.g., *Keystone Technology Group, Inc. v. Kerry Group, Inc.*, 824 A.2d 1223 (Pa. Sup. 2003) (lower court erred in denying motion to compel arbitration filed by plaintiff, despite the fact that plaintiff first chose judicial forum); *Gaffer Ins. Co., Ltd. v. Discover Reinsurance Co.*, 936 A.2d 1109, 1113 (Pa. Sup. 2007) (“Our Commonwealth’s general policy toward arbitration is consistent with federal policy, as set forth in the Federal Arbitration Act, which applies to written arbitration agreements that are ‘part of a contract evidencing a transaction involving interstate commerce.’”)

that the parties agreed to arbitrate any dispute “arising out of or relating to the Contract.” (A201-1997 at paragraph 4.3.1; Appx. 64). Though Glenmark’s claims may be asserted as claims other than breach of contract, each of Glenmark’s claims arise out of the contract or relate to it, as discussed more fully below. As a result, each of its claims are subject to arbitration, and the Circuit Court lacks jurisdiction to hear its claims.

2. *Glenmark’s Claims Against the York Petitioners are Subject to Arbitration.*

The Agreement between the York Petitioners and Glenmark also contains an arbitration clause, which is subject to the FAA. As set forth above, the Agreement expressly states that any and all disputes between the parties “arising out of or relating to” the York Agreement “shall, in lieu of court action, be submitted to arbitration.” (York Agreement at p. 5; Appx. 95.) All of Glenmark’s claims against the York Petitioners arise out of or relate to the York Agreement, even though they may include claims other than for breach of contract. Therefore, all of Glenmark’s claims against the York Petitioners are subject to the arbitration provision contained in the York Agreement, and the Circuit Court lacks jurisdiction to hear the Civil Action.

B. The Arbitration Agreements at Issue are not Unconscionable.

Glenmark is a self-proclaimed sophisticated real estate holding company, which boasts “Over 25 Years of Excellence.” (See Transcript of September 8, 2011 hearing, included at Appx. 130, 138-139.) Nonetheless, Glenmark argued before the Circuit Court that it should not be bound by the arbitration provisions contained in its contracts with Petitioners because the arbitration provisions were both substantive and procedurally unconscionable. The Circuit Court adopted Glenmark’s argument, despite Glenmark’s failure to present any evidence regarding the factors to be considered in determining whether contractual provisions are unconscionable.

Just in the past few months, this Court addressed the doctrine of unconscionability in the case of *Brown v. Genesis Healthcare Corp.*, Case Nos. 35494, 35546, and 35635, 2011 W. Va. LEXIS 61 (W. Va. June 29, 2011). In that case, this Court set forth the factors for procedural and substantive unconscionability, **both** of which must be present to render a contract term unenforceable. *Brown*, 2011 W. Va. LEXIS at syllabus, ¶ 20. For procedural unconscionability, a court “is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract.” *Id.* at syllabus, ¶ 17. Procedural unconscionability results “in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction.” *Id.* Factors to be considered include: age; literacy; lack of sophistication; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract. *Id.* Because of these factors, “courts are more likely to find unconscionability in consumer transactions and employment agreements than in contracts arising in purely commercial setting involving experienced parties.” *Id.* at *90 and fn. 117.

Substantive unconscionability involves unfairness in the contract itself, “and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party.” *Id.* at ¶ 19. Although the factors to be weighed in determining substantive unconscionability vary with the content of the agreement, “courts should consider the commercial reasonableness of the contract terms, the allocation of the risks between the parties, and public policy concerns.” *Id.*

This Court also recently held that a Circuit Court addressing claims of unconscionability is **required** to make findings based on the four-part test as articulated in *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co.*, 186 W. Va. 613 (1991). *State ex rel. AT&T*

Mobility, LLC v. Wilson, 226 W. Va. 572, 580 (W. Va. 2010) (as to arbitration provision in consumer contract, trial court improperly denied motion to compel arbitration without addressing factors in *Art's Flower*). The Circuit Court below failed to make the required findings here.

1. *Morgan Keller's Arbitration Agreement is Neither Procedurally nor Substantively Unconscionable.*

The Morgan-Keller Agreement, and the arbitration clause contained within it are not unconscionable. First, it is noteworthy that the Morgan-Keller Agreement is an AIA document. The American Institute of Architects (“AIA”), in cooperation with owners, contractors, material suppliers, and various associations, has created its set of standards for agreements used by entities in construction projects. As all consensus documents do, the AIA documents set forth the uniform terms and conditions, with any project-specific terms to be negotiated by the parties. *See e.g., Nelson-Salabes, Inc. v. Morningside Dev.*, 284 F.3d 505, 510, n. 2 (4th Cir. 2002) (discussing the AIA set of documents generally); *see also*, American Institute of Architects, Contract Documents, *available at*: <http://www.aia.org/contractdocs/index.htm>.

Importantly, the documents are created in such a way as to make negotiating the terms easy. For example, the Morgan-Keller Agreement notes at the top that it is the “electronic format” of that document, meaning that the parties were able to access the document—and each of its terms—electronically and add to, change, or delete any terms that they so desired. It is for that reason that the Morgan-Keller Agreement contains underlining: those are terms that have been added by the parties.

Indeed, it is noteworthy that paragraph 13.1 of A201-1997 contains the following insertion by one of the parties: “Arbitration shall be held in Morgantown, West Virginia.” (A201-1997 at paragraph 13.1; Appx. 84). In other words, it is not the case at all that the Morgan-Keller Agreement was an adhesion contract that Glenmark could either accept or reject.

It is a document prepared by a community of individuals for use in just this type of project, and in a form that is widely accepted and widely used, and it was tailored precisely to this project where the parties felt it necessary. Had Glenmark disagreed with the dispute resolution clauses, it needed only to propose changes to them.

Because the documents are so widely-accepted and well-understood, the State of West Virginia even requires their use in certain situations. The School Building Authority requires, as a condition of funding county school projects, that the contracts used during the project contain certain forms and terms and conditions drawn directly from the AIA documents and encourages the use of the AIA forms when possible. School Building Authority, Policies and Procedures Handbook at 87, *available at*: <http://www.wvs.state.wv.us/wvsba/hottopix/topixdef.htm>. Similarly, the Attorney General's Office approves contract forms for use by state agencies, and the AIA documents are required of state agencies entering into construction contracts, with certain conditions as approved by the Attorney General's Office. That is, State agencies are encouraged—if not required—to use the same document that Glenmark criticizes here, and Glenmark's argument that the contract was one of adhesion is without merit.

Second, the Court's conclusion that the Morgan-Keller Agreement created an overly complex process that was unfair to Glenmark is misguided. Glenmark obviously does not assert that the process was unusually unfair to Glenmark; it could not because Morgan-Keller would have been required to follow that same process if it had a claim against Glenmark. Instead, Glenmark argued—and the Court agreed—that Glenmark should not be required to follow a process that defeats the purpose of arbitration by increasing the costs associated with it by requiring pre-arbitration mediation.

Setting aside the fact that contracting parties are certainly permitted to agree to a seemingly-inefficient process for various reasons, on the very same day as the oral argument on the Motions to Dismiss, Glenmark then requested—and the Circuit Court ordered—that the parties attempt mediation of the case before litigation. In other words, while finding that requiring the parties to submit to mediation before arbitration was unconscionable, the Circuit Court also found that requiring the parties to submit to mediation before litigation was not. The distinction between arbitration and litigation in that context is unclear to Morgan-Keller.

Third, the conclusion that the arbitration clause was unconscionable because of limitations contained in the remainder of the Agreement is confusing. The Circuit Court concluded that “effective forfeiture of certain damages and other losses arising out of or relating to the contract renders this provision unconscionable and unenforceable, because it does not allow for effective vindication of the Plaintiff’s claims.” (Order at 4; Appx. 126). Nothing in the arbitration clause of the Morgan-Keller Agreement precludes Glenmark from bringing any claim that it has against Morgan-Keller. The only limitation upon any such claim arising out of or relating to the Agreement is that the claim must be submitted to the architect, then mediated, then arbitrated.

It appears, therefore, that the Court is referring to paragraph 4.3.10 (Appx. 65), a mutual waiver of consequential damages. That paragraph is not related to the arbitration provision. As a result, even if the claims are litigated, Morgan-Keller will still argue that Glenmark is not entitled to seek consequential damages, because that is what Glenmark agreed to before construction began. It is apparent that Glenmark now asserts that this provision is particularly unfair to Glenmark, but again, this is a provision that was clearly in the contract when it was

signed, and Glenmark certainly had the opportunity to review and remove it if it so desired. That it did not is not a reason to void the arbitration clause.

2. *The York Petitioners' Arbitration Agreement is Neither Procedurally nor Substantively Unconscionable.*

In the Civil Action, Glenmark argued that its agreement with the York Defendants is both procedurally and substantively unconscionable. It is neither. Rather, it is an enforceable agreement, negotiated and executed by sophisticated commercial parties. The factors set forth by this Court in the recent *Brown* decision make this clear. Neither age nor literacy are at issue, because here we are dealing with two commercial entities, not individuals. Nor has Glenmark claimed to have a “lack of sophistication.” As Counsel for York explained at the hearing before the Circuit Court, Glenmark’s website boasts that it has “Over 25 Years of Excellence,” and holds over *\$90 million in assets and over 610,000 square feet of owned properties.* (See selections from Glenmark’s website, included at Appx. 194.) Indeed, Glenmark holds itself out to be comprised of a “devoted team of brilliant professionals,” including Michael J. Saab, its Director of Construction-Northern Division & Director of Property Management, who signed the York Agreement on behalf of Glenmark. (*Id.*)

At the hearing before the Circuit Court, Glenmark presented no evidence on the litany of factors for a determination of unconscionability. Rather, Glenmark claimed that the arbitration provision was “hidden within the overall Agreement and substantially restricts the relief which Glenmark can seek for its damages.” (Glenmark’s Response to the York Motion, included at Appx. 199.) Glenmark argued that the provision is unconscionable because it “appears on the fifth page of the Agreement after the space for the customer’s signature,” and that it makes the provision “appear inconsequential or not worth reading.” (*Id.*, emphasis in original.)

However, on Page 4 of the York Agreement, directly above Mr. Saab's signature, the York Agreement states: "This Agreement is subject to the terms and conditions on the next page." (York Agreement at p. 4; Appx. 94.) Despite this clear language, Glenmark argued that it "might be expected to sign on page four of the Agreement, without going on to examine the terms and conditions contained in the following pages." (Glenmark's Response at p. 5; Appx. 203.) But, Glenmark failed to present any evidence of whether that actually occurred. Mr. Saab did not appear or otherwise offer affidavit evidence on the issue. Furthermore, even if Glenmark chose not to review the very next page, which contains the arbitration provision, it is still bound by it. *See State ex. rel. Center Designs, Inc. v. Henning*, 201 W. Va. 42, 46 (W. Va. 1997) (party bound by terms of arbitration provision in contract "in spite of the fact that he apparently did not read it in detail"). Glenmark's claim that the arbitration provision at issue is procedurally unconscionable because it appears after the signature page is without merit, as Mr. Saab, one of Glenmark's self-described "brilliant professionals," signed the York Agreement immediately below the express statement that the agreement was subject to the terms and conditions on the next page.

The fact that the York Agreement is not procedurally unconscionable is enough to defeat Glenmark's claim, as both procedural *and* substantive unconscionability are required to void the York Agreement. *See Brown*, 2011 W. Va. LEXIS at syllabus, ¶ 20. In any event, the York Agreement is not substantively unconscionable either. Glenmark claims that the arbitration provision is substantively unconscionable because of the limitation of liability clause also located on page five of the York Agreement. That provision provides that the York Petitioners "shall not be liable for personal injuries or property damage arising from causes beyond [their] control or without [their] fault or negligence." (York Agreement at p. 5; Appx. 95.) Furthermore, the York

Agreement provides that the York Petitioners' liability for damages shall not exceed the payments received by them pursuant to the York Agreement. (York Agreement at p. 5; Appx. 95.) Glenmark claims such limitations render *the arbitration provision* substantively unconscionable. It does not. The limitation of liability provision stands on its own, and would remain *regardless* of whether the matter remains in the Circuit Court or is arbitrated pursuant to the terms of the York Agreement. Glenmark cannot circumvent the arbitration provision by complaining that other portions of the York Agreement are somehow improper. Glenmark may make those arguments to the panel of arbitrators assigned to this matter if it chooses to do so. Either way, that provision has no bearing on the enforceability of the arbitration clause.

Respondent denied the Motions without conducting the analysis required by *AT&T Mobility*, and was not presented with any evidence whatsoever as to whether the arbitration provision at issue is unconscionable. The Circuit Court did not consider such evidence, because no evidence of unconscionability was presented and none exists. Glenmark is a sophisticated commercial party which executed a commercial contract negotiated at arms' length with the York Petitioners. As this Court held in *Brown*, it is unlikely that such a commercial contract is procedurally or substantively unconscionable. *See Brown*, 2011 W. Va. LEXIS at *90.

Apparently recognizing the likely futility of attempting to do so, Glenmark's counsel did not offer any evidence of the alleged unconscionability of the York Agreement. Mr. Saab was not present to introduce any testimony that he was unfairly duped when he executed the York Agreement on Glenmark's behalf. Because the Circuit Court failed to find that any of the requirements for unconscionability exist, as explicitly required by this Court, it was error to deny the York Motion.

C. Glenmark's Claims "Arise Out of or Relate To" the Agreements.

Each of Glenmark's claims against Petitioners arise out of or relate to the respective contracts which contain mandatory arbitration provisions. Where a contractual arbitration provision governs the parties' relationship, all claims arising out of or relating to the performance of that contract are subject to arbitration. *State ex rel. Wells v. Matish*, 215 W. Va. 686, 693-94 (W. Va. 2004) (expressly rejecting plaintiff's contention that his public policy claim was not covered by the arbitration provision in his employment contract because, among other things, the provision stated that "any dispute" arising "between the parties as a result of the employment contract or [plaintiff's] employment" shall be subject to the "sole and exclusive remedy of binding arbitration"); *see also Shaddock v. Christopher J. Kaclik, Inc.*, 713 A.2d 635, 637 (Pa. Sup. 1998) (holding that "arising out of, or relating to" language necessitated a finding that all of a party's claims were subject to arbitration, regardless of whether the claims sounded in tort or contract – "That is, if the claim arises out of, or relates to, the building contract or the purported breach thereof, the moving party's sole forum is compulsory arbitration."). All of Glenmark's claims against Petitioners "arise out of or relate to" the parties' contracts.

1. *Glenmark's Claims Against Morgan Keller*

Though the Complaint attempts to couch them otherwise, the claims made in the Complaint certainly arose out of or relate to the contract. It is undisputed in this case that the only relationship that Morgan-Keller had with Glenmark was as general contractor to Glenmark for the purposes of construction of the Suncrest Executive Office Plaza. Analyzed with that understanding, Glenmark's claims against Morgan-Keller arise out of or relate to the contract, because each claim asserts that Morgan-Keller failed in some respect as to the obligations that it was required to complete pursuant to the contract.

Glenmark's first claim is for negligence in construction of the building. Glenmark claims that the defendants owed various duties to Glenmark beyond what is stated in the contracts, but "arising from their roles and relationships with Glenmark and with one another." (Complaint at ¶42; Appx. 8.) Though Glenmark asserts that the existence of a contract does not foreclose a negligence claim, it is also clear from its pleading that even it concedes that, for example, duties owed to Glenmark by Morgan-Keller arise from Morgan-Keller's status as the general contractor. As such, that negligence claim relates to the Morgan-Keller Agreement, because that Agreement creates that relationship and establishes not only the obligations that are owed to Glenmark but also what duties and responsibilities Morgan-Keller has. Whether the claim is a viable claim is a different question than whether that claim relates to the contract; because it is related, the claim is subject to arbitration.

Glenmark's second claim is for product liability, particularly with respect to the installation of the HVAC system. As with its negligence claim, Glenmark asserts as a part of this claim that the contract required the parties—Morgan-Keller included—to provide an HVAC system free from defects and suitable for use. (Complaint at ¶51; Appx. 9.) Again, if Glenmark has a viable claim for product liability against Morgan-Keller, that claim exists only because Morgan-Keller's obligations under the contract included providing an HVAC system. As a result, that claim is related to the contract and is subject to arbitration.

Glenmark's third claim is for breach of contract. There can be no dispute that this claim relates to the Morgan-Keller Agreement—to the extent the claim is asserted against Morgan-Keller. As such, this claim certainly is subject to arbitration.

The fourth claim is for breach of the Uniform Commercial Code's warranties, and the fifth claim is for breach of the warranty of good workmanship. Though Glenmark does not cite

particular Code provisions, in its fourth claim, it asserts claims for breach of the implied warranty of merchantability and fitness for a particular purpose. First, the Supreme Court has held that “it is implicit in a building contract that the work will be done in a workmanlike manner and that the structure will be reasonably fit for its intended use.” *Elkins Manor Assocs. v. Eleanor Concrete Works*, 183 W. Va. 501, 508, 396 S.E.2d 463, 470, n. 13 (1990). As such, to the extent there is such a claim, it is because it is implied in the contract. Certainly a term implied in the contract is related to the contract and is subject to arbitration.

Second, the Court has also held that the need to bring UCC warranties as claims in a situation in which there is a construction contract is not critical. *Elkins Manor Assocs. v. Eleanor Concrete Works*, 183 W. Va. 501, 508, 396 S.E.2d 463, 470, n. 13 (1990). The reason for this is simple: the Court has already held that various warranties are implied in construction contracts, and there is no need to impose the UCC warranties as well. Thus “there is a presumption that the sales provisions of the UCC will not apply to a building construction contract unless the party seeking a UCC right is able to demonstrate substantial justification for its use.” *Id.*

Finally, even to the extent those claims are viable and the UCC warranties are imposed, they are imposed on Morgan-Keller’s obligation under the contract to build a building. They are related to the contract, and would be subject to arbitration, just as the remainder of Glenmark’s claims would be.

2. Glenmark’s Claims Against the York Petitioners

All of Glenmark’s claims against the York Petitioners – whether based in tort or in contract – arise out of or relate to the York Petitioners’ alleged non-performance under the York Agreement. Throughout its Complaint, Glenmark references the York Agreement as the basis for its claims against the York Petitioners, including, without limitation:

- ¶ 36 – “On November 18, 2004, Glenmark entered into a separate ‘Preventive Maintenance Agreement’ ...”;
- ¶ 37 – “...Glenmark has met its obligations under that agreement...”;
- ¶ 38 – “Despite the existence of the Preventive Maintenance Agreement, for which Glenmark gave valuable consideration and with which it has faithfully complied, Glenmark has necessarily suffered and incurred substantial unreimbursed expenses and losses...”;
- ¶ 46 – “All the Defendants breached their duty of care to Glenmark in that they failed to deliver a building with a properly functioning HVAC system...”;
- ¶ 62 – “The previously identified ‘Preventive Maintenance Agreement’ entered into between York and Glenmark, and assumed by Johnson Controls as successor-in-interest to York, is a binding and enforceable contract.”;
- ¶ 63 – “Glenmark fulfilled all of its obligations to all of Morgan Keller, KA, Inc., York, and Johnson Controls under the terms of those contracts, including payments for properly submitted and approved pay applications in accordance with the contract terms, and payments in accordance with the Preventive Maintenance Agreement.”;
- ¶ 64 – “The failures of the Breach of Contract Defendants to complete and perform their contracts under the terms agreed upon by all parties are material breaches of each and all of the contracts.”;
- ¶ 65 – The failures of the Breach of Contract Defendants to properly design, specify, install, maintain, repair and/or correct the HVAC system on the “Suncrest Executive Office Plaza” building are material breaches of the contracts.
- ¶ 66 – The failures of the Breach of Contract Defendants to properly design, specify, install, maintain, repair and/or correct the HVAC system on the “Suncrest Executive Office Plaza” building are material braches (*sic*) of those Defendants’ joint and several duties to complete the building in a workmanlike manner.
- ¶ 67 – As a consequence of the Contract Defendants’ failures and breaches of their contract obligations, and to perform in accordance with the terms of their contracts, and their other wrongful acts, the HVAC system on the “Suncrest Executive Office Plaza” building must be replaced and/or repaired before the building will have a properly functioning HVAC system.
- ¶ 68 – Glenmark has been injured by these breaches of contract and has incurred damages, including but not limited to, the substantial cost of repair, expenses stemming from property damage in the areas adjacent to the HVAC system, lost profits, lost rental value of the building itself in a competitive market, loss of

tenant goodwill, lost opportunity, damage to its reputation, annoyance, and inconvenience, and will continue to suffer injury and damages into the future.

(Appx. 6-12.) Indeed, each and every one of Glenmark's claims against the York Petitioners arise out of, and surely relate to, the York Agreement. Glenmark simply alleges that the York Petitioners failed to perform their obligations to provide maintenance services under the York Agreement. As such, all of Glenmark's claims arise out of and relate to the York Agreement, and the Circuit Court lacks jurisdiction to hear those claims.

D. Because Glenmark's Claims are Pre-Empted by the Federal Arbitration Act, Petitioners are Entitled to a Writ of Prohibition as a Matter of Right.

West Virginia Code §53-1-1 provides that the extraordinary writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In this instance, Petitioners submit that the Circuit Court of Monongalia County does not have jurisdiction of the subject matter constituting Plaintiff's claims against them because these claims are pre-empted by the Federal Arbitration Act ("FAA"). *See State ex rel. McCormick v. Hall*, 146 S.E.2d 520, 521 (W. Va. 1966) (finding writ of prohibition to be a matter of right where Circuit Court was without subject matter jurisdiction because of void indictment). Moreover, in the case of *Hinkle v. Black*, 262 S.E.2d 744 (W. Va. 1979), wherein this Court set forth rules for the awarding of writs of prohibition, the Court noted that, "[O]bviously, there are prohibition proceedings which come squarely within the classic definition of when the inferior court has no jurisdiction of the subject matter in controversy' . . ." *Id.* at 748.

Preemption of Glenmark's common law and statutory claims against Petitioners by the FAA causes this case to fall within this "classic definition," thereby entitling Petitioners to a writ of prohibition as matter of right. *See Little v. Dow Chemical Co.*, 559 N.Y.S.2d 788 (N.Y.

Sup.Ct. 1990) (to raise the preemption issue is to challenge the Court's competence to entertain a certain kind of case which essentially raises a question of subject matter jurisdiction). *See also National R. R. Passenger Corp. v. Florida*, 929 F.2d 1532, 1537 (11th Cir. 1991), citing *Texas Employers' Ins. Ass'n. v. Jackson*, 862 F.2d 491, 498 (5th Cir. 1988).

In addition, a writ of prohibition is the proper remedy where a court has subject matter jurisdiction, but "exceeds its legitimate powers." W.VA. CODE § 53-1-1. Consequently, this Court has recognized in numerous cases that a writ of prohibition was the appropriate remedy even where a court had jurisdiction of the subject matter in controversy. *See, e.g., State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (W.Va. 1993); *State Farm Mutual Automobile Insurance Company v. Stephens*, 425 S.E.2d 577 (W.Va. 1992).

Here, the circuit court in the Civil Action committed a substantial, clear legal error in denying Petitioners' motions, as discussed above. Commission of such an error has been recognized by this Court as an appropriate basis for the issuance of a writ of prohibition in precisely such an instance. *See State ex rel. Ranger Fuel Corporation v. Lilly*, 267 S.E.2d 435 (W. Va. 1980). In *Ranger Fuel*, this Court, acting under its original jurisdiction, issued a rule to show cause why a writ of mandamus (treated as writ of prohibition) should not be awarded to compel the circuit judge to grant specific performance of an arbitration agreement and to stay proceedings pending the outcome of the arbitration. In awarding the writ, the Court noted:

The award of a writ of prohibition in this case falls squarely within the parameters of our decision in *Hinkle v. Black*, W.Va., 262 S.E.2d 744 (1979). The error of the respondent judge in failing to grant the motion seeking specific performance of the arbitration clause and a stay of the civil proceedings was a substantial, clear-cut, legal error. There was then, and is now, no

factual dispute to hamper disposition by way of prohibition. There is a high probability that the trial court will be completely reversed on appeal of this matter. The realtors have no other adequate remedy, and to compel them to proceed through the trial process and then appeal to this Court would be inefficient, and a waste of the time and resources of the circuit court and of this Court. This type of error is precisely the type which we intended to reach by prohibition as defined in Black, *supra*.

Id. at 437.

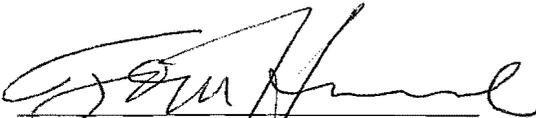
Similarly, allowing the circuit court in the Civil Action to proceed with the instant action in the face of the overwhelming weight of contrary legal authority would produce severe inefficiencies with respect to the resources of the litigants, lawyers and the State's court system, and Petitioners have no other adequate remedy. *See Hinkle*, 262 S.E.2d at 749 (noting that a realistic definition of the "adequacy" of other remedies, including appeal, includes a recognition that "part of adequacy has to do with expense and time"). *See also C&P v. Ashworth*, 438 S.E.2d 890, 894 (W. Va. 1993). Because of the high probability that the case would be overturned on appeal with respect to FAA preemption of Glenmark's claims against Petitioners, forcing Petitioners to endure prolonged litigation would serve no useful purpose and would result in a waste of the resources of the judiciary and litigants. *See McClanahan*, 189 W. Va. 296 (decision whether to grant a rule to show cause for writ of prohibition based on, among other things, the "economy of effort and money among litigants"). Therefore, in order to prevent a waste of resources, a writ of prohibition should be issued.

CONCLUSION

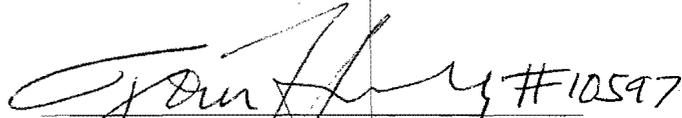
For the foregoing reasons, Petitioners respectfully request this Court to issue a rule, returnable at such a date and time as the Court may fix, and require the Respondent to show cause why a Writ of Prohibition should not be awarded in accordance herewith. Further, in

accordance with West Virginia Code § 53-1-9, Petitioners request that the Court issue an order suspending the Civil Action sought to be prohibited until the final decision on the writ. Finally, the Petitioners request that, after the Respondent has had an opportunity to show cause, that a Writ of Prohibition be awarded to the Petitioners, prohibiting the Honorable Judge Susan B. Tucker, Circuit Court Judge for the Circuit Court of Monongalia County, from conducting any further proceedings in the Civil Action pertaining to Plaintiff Glenmark Holding, LLC's claims against the Petitioners, and award such other relief as the Court may deem just and proper.

Respectfully submitted,


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNSON CONTROLS, INC., YORK)	
INTERNATIONAL CORPORATION,)	CASE NO.
AND MORGAN KELLER, INC.,)	
)	
Petitioners,)	
)	
v.)	
)	
THE HONORABLE SUSAN B. TUCKER,)	
Judge of the Circuit Court of Monongalia)	
County,)	
)	
Respondent.)	

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF Kanawha, To-Wit:

I, Charles M. Love, III, counsel for Defendant, Johnson Controls, Inc. and York International, being duly sworn, depose and say that I have read the foregoing *Petition For A Writ Of Prohibition* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge and belief.

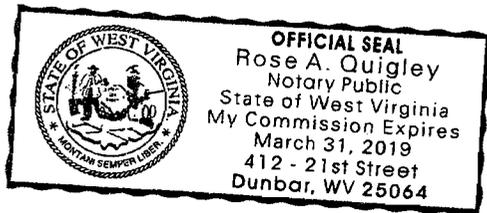
Charles M. Love, III #10597
For Charles M. Love, III

My Commission Expires: 3-31-2019

Taken subscribed and sworn to before me this 3rd day of November, 2011.

Rose A. Quigley
NOTARY PUBLIC

[SEAL]



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNSON CONTROLS, INC., YORK)
INTERNATIONAL CORPORATION,) CASE NO.
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)
Petitioners,)
)
v.)
)
THE HONORABLE SUSAN B. TUCKER,)
Judge of the Circuit Court of Monongalia)
County,)
)
Respondent.)

CERTIFICATE OF SERVICE

I, Charles M. Love, III, counsel for Defendant, Johnson Controls, Inc. and York International, do hereby certify that I have served the foregoing **PETITIONERS JOHNSON CONTROLS, INC.'S, YORK INTERNATIONAL CORPORATION'S AND MORGAN KELLER, INC.'S PETITION FOR A WRIT OF PROHIBITION** this 3rd day of November, 2011, by forwarding a true and exact copy of the same, via United States mail, postage pre-paid to the following:

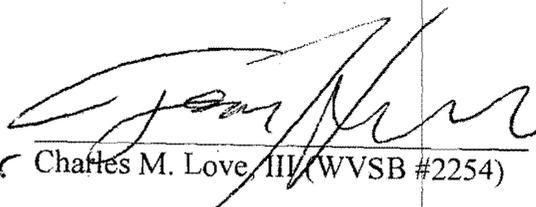
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