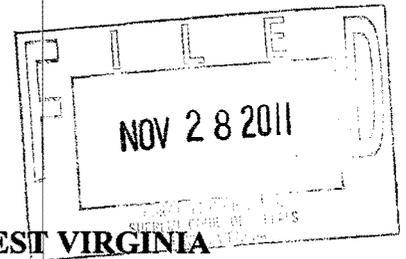


No. 11-1515



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL. JOHNSON CONTROLS, INC.,
YORK INTERNATIONAL CORPORATION, and MORGAN KELLER, INC.**

Petitioners,

v.

**THE HONORABLE SUSAN B. TUCKER, Judge of the Circuit Court of
Monongalia County, and GLENMARK HOLDING, LLC,**

Respondents.

**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF PROHIBITION**

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QUESTIONS PRESENTED

The questions presented for resolution by the Court are as follows:

1. Is prohibition appropriate where the Circuit Court had jurisdiction to make the challenged rulings and Petitioners have made no attempt to show that they could satisfy the five factors this Court has held are prerequisites to the issuance of a rule to show cause?

2. Did the Circuit Court correctly refuse to require Glenmark to arbitrate its claims against York International and Johnson Controls, Inc. where the arbitration provision relied upon was contained in a boilerplate addendum to a Preventive Maintenance Agreement that was signed several months *after* the defective HVAC system was manufactured and installed, did not encompass Glenmark's multiple claims against the companies but instead involved only preventive maintenance and specifically excluded unscheduled repairs, drastically restricted available damages, would not have allowed full adjudication of the parties' claims and defenses, and provided an escape clause from arbitration for York International's or Johnson Controls, Inc.'s own claims?

3. Did the Circuit Court correctly refuse to require Glenmark to arbitrate its claims against Morgan Keller, Inc. where the arbitration clause did not encompass Glenmark's multiple claims against Morgan Keller, was buried in a maze of fine print contained in a 44-page boilerplate addendum to the seven-page negotiated contract, would have required Glenmark to first submit its claims for resolution by a third-party architect who is also a defendant in the underlying case, would have curtailed the relief available to Glenmark at common law and resulted in a more complex and expensive procedure, would not have allowed full adjudication of the parties' claims and defenses, and was never raised by Morgan Keller, Inc. before the

underlying case was filed despite years of complaints and appeals from Glenmark concerning the defective HVAC system?

STATEMENT OF THE CASE

Petitioners have asked this Court to grant a writ of prohibition to prevent enforcement of rulings by Judge Susan B. Tucker of the Circuit Court of Monongalia County, West Virginia, refusing to compel arbitration of claims that Respondent Glenmark Holding, LLC (“Glenmark”) has brought against Petitioners Johnson Controls, Inc. (“Johnson”), York International Corporation (“York”), and Morgan Keller, Inc. (“Morgan Keller”).¹ After reviewing extensive briefing and hearing argument by counsel, Judge Tucker ruled that, under the circumstances presented, the arbitration clauses relied upon by Petitioners were invalid and unenforceable under West Virginia law and did not encompass the claims Glenmark alleged in its Complaint. (App. at 118, 125.)

As detailed below, Petitioners have not met the exacting criteria this Court has established to guide its discretionary decision whether to grant an extraordinary writ – discretion that the Court has now established by rule is to be “sparingly exercised.” W. Va. R. App. P. 16(a). In any case, the Circuit Court’s decision was a correct application of principles that Petitioners concede constitute settled law in this State. (Pet. at 7.) For these reasons, the Court should refuse to issue a rule to show cause and proceed no further in this matter.

The underlying case concerns a faulty heating, ventilation, and air conditioning (“HVAC”) system that was designed, selected, manufactured, installed, and serviced by

¹ The Petition was improperly styled, given the requirements of W. Va. R. App. P. 16(d). The proper style should be “State ex rel. Johnson Controls, Inc., York International Corporation, and Morgan Keller, Inc. v. The Honorable Susan B. Tucker and Glenmark Holding, LLC.”

Petitioners and other defending parties in the case below. (App. at 1-15.) The faulty HVAC system was designed for and installed at Glenmark's United Center building in Morgantown, where it repeatedly malfunctioned, operated inadequately, and intermittently failed catastrophically, causing property damage in areas adjacent to it. (App. at 9.) After years of frustrated attempts to obtain repair of the HVAC system, during which it sustained significant damages as a result of the system's inadequacy and its repeated failures, Glenmark brought the underlying lawsuit against Petitioners and other responsible entities on May 23, 2011. (App. at 297.) In addition to Glenmark's claims, several of the Defendants in the underlying case have filed cross-claims. (App. at 298-300.)

Petitioner York and its successor-in-interest Johnson manufactured major components of the HVAC system.² Glenmark has asserted claims against York/Johnson based on product liability and also sounding in negligence, breach of contract, breach of Uniform Commercial Code warranties, and breach of implied warranty. (App. at 8-15.) Petitioner Morgan Keller had originally contracted with Glenmark to construct the United Center building in accordance with plans and specifications provided by the involved architectural firm. (App. at 3.) Morgan Keller's contract with Glenmark made it responsible for acts or omissions by all agents or entities performing work on its behalf and required it to promptly correct non-conforming work. (App. at 4-5.)

Several months after the HVAC system that York/Johnson had designed and manufactured was installed at United Center, Glenmark entered into a Preventive Maintenance Agreement with York/Johnson that was separate and apart from York/Johnson's design and

² Because Johnson is a successor-in-interest to York, the two companies are referenced throughout this brief as "York/Johnson."

manufacture of the HVAC components and created additional obligations on the part of York/Johnson to conduct preventive maintenance of the HVAC system. (App. at 92-97.) It is this Preventive Maintenance Agreement, which was entered into months after the HVAC system was installed and the building was occupied, that York/Johnson now claims requires that all of Glenmark's claims against it, regardless of their nature or factual basis, be resolved in arbitration.

The Preventive Maintenance Agreement

By August, 2004, Glenmark had taken delivery of the United Center building and immediately began experiencing serious problems with the HVAC system. On December 7, 2004, Michael Saab, as Director of Property Management for Glenmark, signed the "Preventive Maintenance Agreement" with York/Johnson which obliged that company to provide "preventive maintenance and inspection services" on the rooftop HVAC units located at Glenmark's United Center building. (App. at 91-97). By its terms, the Preventive Maintenance Agreement encompassed only preventive maintenance and inspection services and expressly excluded "system repairs, parts installation or service calls made at the customer's request." (App. at 92.)

A boilerplate addendum to the Preventive Maintenance Agreement contained an arbitration clause stating, in part:

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. . . . The site of the arbitration shall be York, Pennsylvania. . . . In the event it becomes necessary for Company to incur any costs or expenses . . . to enforce any rights or privileges hereunder, Customer shall, upon demand, reimburse Company for all such costs and expenses (including, but not limited to reasonable attorney's fees).

(App. at 95.)

The Preventive Maintenance Agreement purported to shorten the statute of limitations for any claims to one year and require that they be arbitrated in York, Pennsylvania. (App. at 95.) It limited available damages to the sum of payments York/Johnson had received for preventive maintenance. (App. at 95.) It allowed for discovery, but limited the period for discovery to four months. (App. at 95.) It also purported to impose a “voluntary and knowing waiver” of all claims by any party who failed to abide by its limitations. (App. at 95.)

It is the arbitration clause in this Preventive Maintenance Agreement that York/Johnson relies upon for its allegation that all of Glenmark’s claims are subject to arbitration. (App. at 98-104.) Despite the fact that much of the wrongful conduct attributed to York/Johnson occurred before the Preventive Maintenance Agreement was even signed, and that very little of Glenmark’s claims relate to “maintenance,” York/Johnson nonetheless contends that the arbitration clause in the Preventive Maintenance Agreement requires arbitration of all Glenmark’s claims, regardless of their basis in law or fact.

By Order entered October 5, 2011, the Circuit Court denied York/Johnson’s motion to compel arbitration. (App. at 116-21). The Circuit Court quoted this Court’s directive in State of West Virginia ex rel. Dunlap v. Berger, 211 W. Va. 549 n.3, 567 S.E.2d 265 n.3 (2002), that “[a] pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced pursuant to the FAA only when arbitration, although a different forum with somewhat different and simplified rules, is nonetheless one in which the arbitral mechanisms for obtaining justice permit a party to fully and effectively vindicate their rights,” and held that in the unique circumstances presented by this case, arbitration would not serve that critical purpose. (App. at

118-19.) The Circuit Court wrote:

In this instance, application of the arbitration clause would permit neither the Plaintiff nor the Defendants to fully and effectively adjudicate their various claims and defenses. As to the Plaintiff, the limitations on liability set out in the Preventive Maintenance Agreement with respect to compensatory, special, indirect, consequential or incidental damages is contrary to the relief available to Plaintiff at common law. This unconscionable limitation on the amount and type of relief available to Plaintiff is compounded by the inequity that will result, should the Plaintiff be forced to pursue relief against some defendants in multiple forums. Given that arbitration would be insufficient to resolve all of Plaintiff's claims against all Defendants named in this action, and that the cross-claims filed by various Co-Defendants against Johnson Controls, Inc. would survive, an important policy underlying arbitration—namely speedy resolution of the conflict and conservation of the parties' resources—is not applicable in these circumstances. See, State of West Virginia ex rel. United Asphalt Supplies, Inc. v. Sanders, 204 W. Va. 23, 28, 511 S.E.2d 134, 139 (1998) (“ . . . a court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding. . .”). The Court finds persuasive Plaintiff's argument that it must be allowed to present evidence of each Defendant's role in the specification, selection, installation and maintenance of the subject HVAC system, so that the degree of each Defendant's contributing culpability can be considered and allocated. As a result, the Court finds that compulsory arbitration would result in an unnecessarily delayed “piecemeal” resolution of this conflict and the waste of judicial resources.

(App. at 119.)

The Circuit Court also held that application of the arbitration clause in the Preventive Maintenance Agreement to Glenmark's claims asserted in the underlying case would be “an improper extension of the parties' original agreement.” (App. at 120.) Citing Brown v. Genesis Healthcare Corp., Nos. 35494, 35546, 35635, slip op. at 37-38 (W. Va. June 29, 2011) (quoting State ex rel. City Holding Co. v. Kaufman, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004)), the Circuit Court echoed this Court's holding that “[p]arties to an agreement ‘are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.’” The Circuit Court wrote:

Based on the language contained within the Preventive Maintenance Agreement,

the only disputes subject to arbitration are those which arise under the Preventive Maintenance Agreement, namely disputes concerning “preventive maintenance and inspection services”. As a result, disputes arising from system repairs, parts installation, or service calls made at the customer’s request—which are expressly excluded from the scope of the agreement—were not considered by the parties to be arbitrable disputes at the time they entered into the contract. It would be an even further and more illogical overextension of the arbitration provision to apply it to specification, selection or installation of the HVAC system, all of which had occurred even before the Agreement was created. Because Plaintiff has pleaded multiple causes of action which do not fall within the narrow scope of the Preventive Maintenance Agreement, the arbitration clause therein cannot be extended to encompass all the Plaintiff’s claims against the various defendants.

(App. at 120.)

For those reasons, the Circuit Court denied York/Johnson’s motion to compel arbitration.

The Morgan Keller Contract

About two weeks after York/Johnson had filed their motion to compel arbitration in the Circuit Court, Morgan Keller filed its own motion to compel arbitration based on a provision contained in a lengthy boilerplate addendum to its construction contract with Glenmark. Glenmark and Morgan Keller had entered into the construction contract on August 1, 2003. (App. at 28.) The contract obligated Morgan Keller to construct the United Center building, in accordance with the plans and specifications provided by the project’s architect. (App. at 3-6.) The contract proper consisted of seven printed pages, but was supplemented by a 44-page addendum, titled “General Conditions of the Contract for Construction.” (App. at 4, 45-89.) The addendum was not drafted by either of the parties, but was a form document provided by the American Institute of Architects. (App. at 45.)

Roughly at the middle of the 44-page addendum was an arbitration clause with the heading “Resolution of Claims and Disputes.” (App. at 65-66.) The addendum contained a complicated method for resolving disputes arising from construction of the project. The method

for dispute resolution was to be triggered by the complaining party's submission of the claim to the project's architect for an initial decision. (App. at 21-22, 65-66.) This initial decision was required as a condition precedent to mediation, arbitration, or litigation. (App. at 21-22, 65-66.)

The provision also said, in pertinent part:

When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor.

(App. at 66.)

After submission of the claim to the architect, any claim arising out of or related to the contract was to be submitted to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. (App. at 66.) Claims not resolved by mediation were to be decided by arbitration. (App. at 67.) Ultimately, all demands for arbitration were required to "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..."

(App. at 67.)

In its motion to compel arbitration, Morgan Keller argued that all Glenmark's claims against it, regardless of their nature or factual basis, were subject to mandatory arbitration under this clause. (App. at 212-17.) Despite the fact that the arbitration clause would have required that Glenmark submit its claims for resolution by another entity Glenmark had sued in the underlying case – the architect who designed the United Center building – Morgan Keller made no offer to modify the arbitration provision in any way. (App. at 1-2.)

By Order entered October 17, 2011, the Circuit Court refused to compel Glenmark to

arbitrate its claims against Morgan Keller. The Court held that under the unique circumstances presented by this case, application of the arbitration clause would result in a complex procedure that would fail to adjudicate the parties' claims. The Court wrote:

In this instance, application of the arbitration clause to these particular claims and defendants would defeat the policies supporting arbitration and would permit neither the Plaintiff nor the Defendants to fully and effectively adjudicate their various claims and defenses. The Court finds that the complex arbitration provision contained in the Agreement which requires the parties to mediate their dispute before arbitration would further frustrate a presumed advantage of arbitration, which is conservation of the parties' resources. Given the inability of an arbitrator to compel defendants outside this Agreement to participate in arbitration or to bind them to the results obtained therein, in addition to the outstanding cross-claims made by various defendants which would survive arbitration, arbitration could not result in the complete resolution of the claims brought by the parties. See, Brown v. Genesis Healthcare Corp., Nos. 35494, 35546, 35635, 2011 W. Va. LEXIS 61, *59 (W. Va. June 29, 2011) ("such [arbitration] agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract."). Plaintiff would, as a result, be required to undergo the unnecessary expenditure of its resources to pursue piecemeal relief. Moreover, given Morgan-Keller, Inc's failure to raise or invoke the arbitration provision upon prior notice of Plaintiff's dissatisfaction, its resort to that remedy at this time would be an unconscionable application of this provision. Additionally, the arbitration provision presumes to limit the relief available to Plaintiff at common law. 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.

(App. at 126.)

The Circuit Court also held, as it had in reference to the Preventive Maintenance Agreement, that the arbitration clause in the Morgan Keller addendum did not reach all claims Glenmark had asserted against Morgan Keller. It wrote:

Based on the language contained within the Agreement, the disputes subject to arbitration are those which arise out of or are related to the contract. This language, on its face, limits the arbitrable disputes to those concerning breaches of the contract itself, and it does not provide for arbitration of disputes which do not require interpretation of the contract terms. Plaintiff has pleaded in its Complaint multiple causes of action independent of its breach of contract claim including

negligence, product liability, breach of Uniform Commercial Code warranties, and breach of implied warranty. Because these claims arise independently of the Agreement and impose duties and obligations independent of those contained therein, the parties did not clearly and unmistakably agree to submit them to binding arbitration. Moreover, there are claims, crossclaims and related issues between and among parties to this case, who were not parties to any agreement to arbitrate their disputes. Therefore, the arbitration clause found within the Agreement cannot be extended to encompass the totality of all the claims among and between all the parties.

(App. at 127.)

For those reasons, the Circuit Court denied Morgan Keller's motion to compel arbitration.

* * * * *

On November 3, 2011, York/Johnson and Morgan Keller filed their Petition seeking a writ of prohibition from this Court barring the Circuit Court from enforcing its orders refusing to compel arbitration. The Court issued a Scheduling Order on November 4 directing Glenmark to respond to the Petition by November 28, 2011. For the reasons set forth *infra*, the Petition is without merit, and this Court should refuse to issue a rule to show cause.

SUMMARY OF ARGUMENT

Prohibition is inappropriate in this case. Petitioners can neither show that the Circuit Court acted without jurisdiction, nor meet any of the five criteria that guide this Court's decision whether to issue a rule to show cause. Moreover, the Circuit Court correctly applied the settled law of this State on the issue of whether the claims Glenmark brought against Petitioners should be subject to compelled arbitration based on the contract clauses on which Petitioners relied.

Petitioners premise their argument in favor of prohibition on the erroneous proposition that the FAA somehow revoked the Circuit Court's authority and deprived it of jurisdiction to

make any decisions of any kind concerning the propriety of mandatory arbitration in this case. (Pet. at 7-9, 21.) Their position is simple: because the FAA favors the enforcement of arbitration provisions, the Circuit Court was bound to send all claims against Petitioners to arbitration. (Pet. at 7-9.) Based on that unadorned premise they conclude that the Circuit Court was obligated to send all of Glenmark's claims against York/Johnson to arbitration, regardless of their nature or factual basis, based entirely on a provision in a Preventive Maintenance Agreement signed months after faulty equipment that York/Johnson manufactured had been installed at United Center. (Pet. at 9.) Similarly, they claim that the Circuit Court was bound to rule that a boilerplate provision in a 42-page fine-print addendum to a seven-page negotiated construction contract it had never raised before, now required Glenmark to arbitrate all claims against Morgan Keller. (Pet. at 8-9.)

What Petitioners miss is that this Court has held consistently that trial courts in this State play a critical role in determining whether an arbitration provision is valid and enforceable. The FAA does not require our trial judges to sit on their hands whenever a party alleges that contractual language requires arbitration. To the contrary, this Court has held that the Circuit Court must determine in the first instance whether an arbitration provision is valid and enforceable. Only after a reasoned analysis of the validity and enforceability of an arbitration provision can a Circuit Court determine whether the precise claims and disputes before it must be resolved through arbitration.

In this case, the Circuit Court conducted a thorough analysis of the clauses at issue and determined for reasons it discussed at length in its two memorandum opinions that the clauses upon which Petitioners rely were not sufficient to require that Glenmark's claims be arbitrated. As the Circuit Court held, the Preventive Maintenance Agreement relied upon by York/Johnson

expressly excluded the claims Glenmark has asserted against York/Johnson. It stated: "This agreement does not include system repairs, parts installation or service calls made at the customer's request." (App. at 92.) Certainly, nothing in the Preventive Maintenance Agreement reached Glenmark's claims against York/Johnson, which expressly involved the faulty design and manufacture of the HVAC system and the failure to repair the system when it immediately began to fail, and continued to do so thereafter. Glenmark did not assert a claim against York/Johnson for any alleged failure to perform regularly scheduled maintenance. Instead, as stated in Glenmark's Complaint, its claims derive from the catastrophic failures, breakdowns, and deficiencies of the HVAC system. (App. at 7.) Glenmark's claims also involve the selection, design, manufacture, and installation of the defective HVAC system, all of which necessarily pre-dated the Preventive Maintenance Agreement. (App. at 8-15.)

Even if the Preventive Maintenance Agreement had encompassed Glenmark's claims, it nonetheless is unconscionable under West Virginia law. The arbitration clause is classic fine-print boilerplate that attempts to change the venue for claims to York, Pennsylvania, limit substantially the scope of available discovery, curtail the statute of limitations for claims to one year, and dramatically restrict the available damages. (App. at 95.) The clause is contained at the bottom of a page titled "Terms and Conditions – Maintenance Contracts" which appears not in the body of the contract, but after the signature page. Although the arbitration clause purports to compel arbitration of claims against York/Johnson, York/Johnson's own claims under the Preventive Maintenance Agreement are excepted from the arbitration clause.

The Preventive Maintenance Agreement would require Glenmark to present its claims in a forum that could be far more expensive than civil litigation. Presumably, York/Johnson would claim that the provision requires that Glenmark pay all its costs and expenses incurred in

connection with the arbitration. The Preventive Maintenance Agreement also purports to restrict the relief available to an entity making a claim. The limitation of remedies imposed by the Preventive Maintenance Agreement would not afford Glenmark adequate relief as its actual damages incurred (and continuing) will certainly exceed the amount it has paid to York/Johnson for preventive maintenance services rendered under the Agreement.

The Circuit Court also held correctly that the arbitration provision in the Morgan Keller contract was invalid and unenforceable as applied to Glenmark's claims. The arbitration clause in the Morgan Keller Contract is buried on the 21st page of a 44-page pre-printed boilerplate addendum prepared not by either of the parties, but by the American Institute of Architects. (App. at 45-89.) The clause prescribes a complicated procedure for claims resolution that requires that claims be "referred initially to the Architect for decision" – a provision that would have required that Glenmark submit its claims for resolution by a party it sued in the underlying case – the architect that designed the United Center building.

After a decision by the architect, but before proceeding to arbitration, the clause would have required that the parties submit to mediation under the AAA's Mediation Rules as a condition precedent to arbitration. (App. at 66-67.) When and if a claim finally makes it to the arbitration stage, it must be resolved under the AAA's Construction Industry Arbitration Rules – a different set of AAA rules than the York/Johnson Preventive Maintenance Agreement requires be applied. Additionally, the arbitration provision at issue purports to substantially limit the damages available to Glenmark at common law

Although Glenmark appealed to Morgan Keller repeatedly over several years in an effort to resolve the severe problems with the HVAC system, at no time did anyone from Morgan Keller suggest that there was a claim or dispute to be resolved through arbitration. Only

after nearly seven years, and Glenmark's resort to its civil remedies, did Morgan Keller assert that Glenmark had given up its right to seek civil redress, and is strictly limited to arbitration.

The Circuit Court correctly held that, for all these reasons, neither York/Johnson nor Morgan Keller were entitled to require Glenmark to submit its claims against them to arbitration. Petitioners have not shown that this case is appropriate for prohibition, and have presented no valid reason for this Court to disturb the Circuit Court's rulings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

According to W. Va. R. App. P. 18(a), oral argument is unnecessary when the dispositive issue has been authoritatively decided or the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Although Petitioners concede that this case involves only "settled law," (Pet. at 7), they nonetheless request oral argument. Glenmark believes that the briefs and record adequately demonstrate that this case is not appropriate for prohibition, and that oral argument would serve only to increase the costs without significantly aiding the Court's decisional process. In the event this Court elects to hear oral argument, Glenmark agrees that Rule 19 argument and resolution by memorandum decision would be appropriate.

ARGUMENT

- A. Because Petitioners Cannot Satisfy Any of the Factors This Court Has Determined Are Prerequisites for Extraordinary Relief, the Court Should Deny Their Petition for Writ of Prohibition.**

Standard of Review

This Court has established by rule that the "[i]ssuance . . . of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." W. Va. R. App. P. 16(a). In State ex rel.

Tucker County Solid Waste Authority v. W. Va. Div. of Labor, 222 W. Va. 588, 688 S.E.2d 217 (2008), the court applied the following standard to guide its decision whether to issue a rule to show cause upon a petition for writ of prohibition:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the overall economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 2, State ex rel. Tucker Co. Solid Waste Authority, 222 W. Va. 588, 688 S.E.2d 217 (quoting Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)).

The Court emphasized recently that a writ of prohibition should only be issued where the circuit court lacks jurisdiction or exceeds its legitimate powers:

A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code § 53-1-1.

Syl. Pt. 1, State ex rel. Nationwide Mut. Ins. Co. v. Karl, 222 W. Va. 326, 664 S.E.2d 667 (2008) (quoting Syl. Pt. 2, State ex rel Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977)).

The Court has devised a five-part test, established in State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996), for granting a writ of prohibition:

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises

new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syllabus point 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Syl. Pt. 1, State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 658 S.E.2d 728 (2008).

As discussed below, application of this test reveals that the Circuit Court’s rulings at issue do not entitle the Petitioners to extraordinary relief. Indeed, Petitioners cannot satisfy any of the five factors that guide the Court’s decision, and can make no serious argument that the Circuit Court lacked jurisdiction to make the challenged rulings. That being the case, the Court should refuse to issue a rule to show cause.

* * * * *

Not until the last three pages of their brief do Petitioners explain why they believe this Court should exercise its discretion to grant them extraordinary relief. (Pet. at 21-23.) They make no claim that they can satisfy the five elements this Court established in State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996), to guide the decision whether prohibition is appropriate. Indeed, they do not even cite or discuss those elements in their brief.

Rather, Petitioners argue that they are entitled to prohibition “as a matter of right” because Glenmark’s claims against them “are pre-empted by the Federal Arbitration Act (“FAA”).” (Pet. at 21.) They cite no authority for the proposition that the Circuit Court lacked jurisdiction to make the rulings at issue, an argument that is based on a faulty juxtaposition of the FAA’s limited preemption power and its effect on the jurisdiction of state courts to resolve claims under the FAA. The problem with Petitioners’ argument is that even if Petitioners were

correct that the FAA somehow preempted Glenmark's claims, that fact would not have deprived the Circuit Court of jurisdiction to decide whether the arbitration clauses upon which Petitioners relied were enforceable in the circumstances and on the claims at issue in this case. Thus, even if Petitioners were entirely correct, prohibition still would be inappropriate.

The FAA gives signatories to an arbitration agreement the right to have that agreement specifically enforced. But the FAA does not confer federal subject matter jurisdiction. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Absent federal question or diversity jurisdiction, a party who seeks to enforce an arbitration agreement under the FAA is bound to litigate in state court. *See Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268-69 (5th Cir. 1978). For that reason, most FAA claims and defenses are litigated in state courts.

Thus, even if Petitioners were correct that Glenmark's claims against them are "pre-empted" by the FAA (Pet. at 21), that fact would in no way have deprived the Circuit Court of jurisdiction to issue the rulings Petitioners challenge before this Court. The court in *Nelson v. Insignia/Esg, Inc.*, 215 F. Supp.2d 143 (D.D.C. 2002) rejected just such an argument. There, an employer moved to dismiss a former employee's race and sex discrimination claims, arguing that because the parties had entered into a binding arbitration agreement, the trial court "lack[ed] subject-matter jurisdiction as a result of the Federal Arbitration Act." *Id.* at 146. The court rejected the argument, holding that the applicability of the FAA did not affect its jurisdiction of the case. The court wrote:

[T]his Court finds that the FAA statutory scheme for assessing whether parties must submit their claims to arbitration necessarily confers jurisdiction on the Court to determine the enforceability of the agreement when "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue" In this case, the plaintiff has placed the arbitration agreement in issue

for this Court's determination and, thus, rather than divesting the Court of jurisdiction, the filing of this action actually conferred to the Court the obligation, pursuant to the FAA, to determine the enforceability of the agreement and decide whether arbitration should be compelled. Dismissal under Rule 12(b)(1) is therefore inappropriate.

Nelson, 215 F. Supp.2d at 146 (citation omitted) (quoting 9 U.S.C. § 4).

This Court also has made clear that a trial court plays a critical role in analyzing arbitration agreements that are subject to the FAA's provisions. In Brown v. Genesis Healthcare Corp., Nos. 35494, 35546, and 35635, slip op. at 37-38 (W. Va. June 29, 2011), the Court explained that a West Virginia trial court must apply state law principles that govern the formation of contracts in determining whether the parties agreed to arbitrate a certain matter. Our trial courts play a "gatekeeping" role in which they must analyze and decide, as a matter of law, whether an arbitration clause is valid and whether the claims averred by the plaintiff fall within its substantive scope before the clause is enforced. Id. at Syl. Pt. 5. This Court held in State ex rel. Dunlap v. Berger, 211 W. Va. 549, 555-56, 567 S.E.2d 265, 271-72 (2002), that "in addressing a motion to compel arbitration in the context of a civil action, it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties."

Earlier this week, this Court refused to issue a writ of prohibition and rejected a similar argument that attempted to curtail a trial court's review of an arbitration clause by restricting the court from considering any contract language other than that in the arbitration clause itself. State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders, No. 11-0770, slip op. at 14-16 (W. Va. Nov. 21, 2011). The Court held that the "particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." Id., slip op. at 15-16 (quoting Syl. Pt. 2,

Orlando v. Finance One of W. Va. Inc., 179 W. Va. 447, 369 S.E.2d 882 (1988)). The Court wrote:

Our state contract law requires a trial court examining the conscionability of an arbitration clause to weigh the fairness of the contract as a whole; all of the facts and circumstances peculiar to the entire contract must be taken into consideration. Section 2 of the FAA specifically *preserves* a trial court's ability to consider the enforceability of an arbitration provision under state law. Were we to adopt [Petitioners'] position, we would have to nullify the savings clause in Section 2, and find meaningless Congress's mandate that a trial court apply general principles of state contract law to determine the validity of an arbitration provision.

Richmond American Homes, No. 11-0770, slip op. at 16 (emphasis in original).

Although a writ of prohibition is the traditional remedy to challenge the actions of a trial court when that court acts without jurisdiction, the right to prohibition must be clearly shown before a petitioner is entitled to this extraordinary remedy. Norfolk Southern Railway Co. v. Maynard, 190 W. Va. 113, 120, 437 S.E.2d 277, 284 (1993). There has been no such clear showing here. Indeed, Petitioners' attempt to show that the Circuit Court lacked jurisdiction to make the rulings they challenge is based entirely on a misapprehension of law. As the Nelson court held, when a party raises the FAA as a claim or defense, that party necessarily *confers* jurisdiction on the Court to determine the enforceability of the alleged arbitration agreement. Nelson, 215 F. Supp.2d at 146. This Court has held that "the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." Syl. Pt. 3, Bd. of Educ. of the Co. of Berkeley v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (1977). Petitioners' argument that the Circuit Court lacked jurisdiction to issue the challenged rulings is incorrect.

Because Petitioners cannot support their claim that the Circuit Court acted without jurisdiction, they are bound to satisfy the five factors this Court has set forth to assist it in determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction. State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996). In determining whether to issue a writ of prohibition in cases where the lower court had jurisdiction to issue the challenged rulings but where it is claimed that the lower court exceeded its legitimate powers, this Court examines five factors:

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

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Not a single one of those factors favors Petitioners. Even if Petitioners were somehow entitled to the relief they seek in their Petition, they have another completely adequate remedy – direct appeal to this Court. Petitioners have made no attempt to show that direct appeal would not remedy the alleged wrong they have brought before this Court or that they have been damaged in a way that is not correctable on appeal. This alone provides the Court with a sufficient basis to refuse to issue a rule to show cause in this matter.

The Court should note that Petitioners make no claim that compelled arbitration would provide a more efficient resolution to the disputes between the parties in this case. That is because, as pointed out by the Circuit Court and conceded by counsel at oral argument on the

motions to compel arbitration, a compelled arbitration in this case would result in inefficient, piecemeal litigation. (App. at 151-57.) Judge Tucker questioned counsel about this at oral argument, stating that the fragmented litigation sought by Petitioners “flies in the face of the stated policy behind arbitration and the reason why arbitration is looked upon favorably, and that is to avoid large costs of litigation.” (App. at 151.) Counsel for Petitioners did not challenge the Circuit Court’s observation that arbitration of the claims in this case would be less efficient and more costly to the litigants, but instead argued that “the policy behind the [FAA] and enforcing arbitration agreements overrides considerations of efficiency and economy.” (App. at 154.)

This Court has made clear that “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers *and may not be used as a substitute for [a petition for appeal] or certiorari.*” Syl. Pt. 1, State ex rel. Wells v. Matish, 215 W. Va. 686, 600 S.E.2d 583 (2004) (emphasis and bracketed material in original) (quoting Syl. Pt. 1, Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953)). Here, by Petitioners’ own admission, arbitration would result in a less efficient and more costly resolution to this case, and Petitioners will have a direct appeal at the conclusion of the litigation to remedy any and all wrongs they claim in their Petition. That being the case, prohibition is inappropriate in this case.

As demonstrated *infra*, Petitioners have no legal right to the relief they seek and the Circuit Court’s orders at issue were not “clearly erroneous as a matter of law.” To the contrary, the rulings were in complete accord with this Court’s precedent. Petitioners have not claimed that the Circuit Court has “oft repeated” the error they claim or that it has manifested “persistent disregard” for procedural or substantive law. Petitioners have conceded that this case does not raise “new and important problems or issues of law of first impression.” To the contrary,

Petitioners state in their brief that this case involves only the application of “settled law.” (Pet. at 7.) Although they claim that the Circuit Court applied that settled law incorrectly, such an incorrect application of settled law – even if it had occurred – would not entitle the Petitioners to extraordinary relief.

For these reasons, the extraordinary relief Petitioners seek is inappropriate in this case. The United States Supreme Court has cautioned that “only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” Will v. United States, 389 U.S. 90, 95 (1967) (citation omitted). Petitioners have not come close to meeting the standard for prohibition as established by this Court. For these reasons, the Court should deny the Petition and proceed no further with this matter.

B. The Circuit Court Correctly Applied This Court’s Settled Precedent When It Held That the Arbitration Provisions upon Which Petitioners Rely Neither Encompass Nor Mandate Arbitration of Glenmark’s Claims.

Standard of Review

This Court held in State ex rel. Dunlap v. Berger, 211 W. Va. 549, 555-56, 567 S.E.2d 265, 271-72 (2002), that “in addressing a motion to compel arbitration in the context of a civil action, it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties.” The Court held this summer that even where a trial court determines that a valid arbitration agreement exists between the parties, it still must decide “whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. Pt. 5, Brown v. Genesis Healthcare Corp., Nos. 35494, 35546, and 35634 (W. Va. June 29, 2001). The trial court’s legal determinations made in the course of ruling on a motion to compel arbitration are

subject to *de novo* review in this Court. Dunlap at 556, 567 S.E.2d at 272.

* * * * *

Contrary to the position staked out by Petitioners, nothing in the FAA exempts arbitration clauses from the same analysis and interpretation to which other contractual provisions are subject. This Court warned in Brown that “the mantra that arbitration is always to be favored must not be mindlessly muttered”; a party must “clearly assent to arbitration before it can be forced into arbitration and denied access to the courts.” Brown, slip op. at 37 (quoting Hayes v. Oakridge Home, 908 N.E.2d 408, 417-18 (Ohio 2009) (Pfeifer, J., dissenting) and State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 204 W. Va. 23, 27-28, 511 S.E.2d 134, 138-39 (1998)). State law governs the determination of whether a party agreed to arbitrate a particular dispute. Brown, slip op. at 37-38. This Court wrote in Brown:

Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act’s goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, and nothing beats normal rules of contract law to determine what the parties’ agreement entails. “There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device.” Thus, while there is a strong and “liberal federal policy favoring arbitration agreements,” such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. “Allowing the question of the underlying validity of an arbitration agreement to be submitted to arbitration without the consent of all parties is contrary to governing law. It is also contrary to fundamental notions of fairness and basic principles of contract formation.”

Brown, slip op. at 36-37 (quoting Stone v. Doerge, 328 F.3d 343, 345 (7th Cir. 2003), Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985), and Luna v. Household Finance Corporation III, 236 F. Supp.2d 1166, 1173-74 (W.D. Wash. 2002)).

This Court echoed these principles earlier this week in State ex rel. Richmond American

Homes of W. Va., Inc. v. Sanders, No. 11-0770 (W. Va. Nov. 21, 2011). The Court held that “[t]he purpose of the [FAA] is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.” Id. at Syl. Pt. 2 (quoting Brown at Syl. Pt. 7).

1. The Circuit Court Correctly Ruled That the Preventive Maintenance Agreement Between York/Johnson and Glenmark Did Not Encompass Glenmark’s Claims Alleged in the Complaint.

In its Brown decision earlier this year, the Court reiterated the fundamental but often disregarded principle that in order to be subject to an arbitration clause, a claim or dispute must fall within the clause’s scope. “[P]arties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.” Brown, slip op. at 36 (quoting State ex rel. City Holding Co. v. Kaufman, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004)). “[T]he FAA does not require courts to enforce an arbitration clause when the parties never reached a ‘meeting of the minds’ about the clause.” State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders, No. 11-0770, slip op. at 1 (W. Va. Nov. 21, 2011). “When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.” Brown, slip op. at 37 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

Petitioners moved the Circuit Court to send all Glenmark’s claims, regardless of their nature or factual basis, to arbitration under language in the Preventive Maintenance Agreement. (Pet. at 4-5.) But the Circuit Court correctly held that “[b]ased on the language contained within

the Preventive Maintenance Agreement, the only disputes subject to arbitration are those which arise under the Preventive Maintenance Agreement, namely disputes concerning “preventive maintenance and inspection services.” (App. at 120.)

According to the fine-print boilerplate on page 5 of the Preventive Maintenance Agreement, arbitration is required for any claim, dispute, or controversy “arising out of or relating to this contract, or the breach thereof.” (App. at 95.) Thus, only claims arising out of the obligations set forth in the Preventive Maintenance Agreement are subject to the arbitration clause. The Preventive Maintenance Agreement expressly states: “This agreement does not include system repairs, parts installation or service calls made at the customer’s request.” (App. at 92.) Because the Agreement only obligated York/Johnson to perform regularly scheduled maintenance on Glenmark’s HVAC system, only disputes which arise from York/Johnson’s failure to perform regularly scheduled maintenance are even conceivably subject to arbitration under the provision. The Preventive Maintenance Agreement does not involve the defects, deficiencies and repeated failures of the HVAC system which are the basis for Glenmark’s claims. That being the case, the arbitration provision within the Preventive Maintenance Agreement does not extend to those claims.

Glenmark’s claims derive from the catastrophic failures, breakdowns, and deficiencies of the HVAC system. (App. at 7.) Even though Glenmark paid for regularly scheduled maintenance by York/Johnson under the Preventive Maintenance Agreement, Glenmark was repeatedly required to contact those companies to request and pay for assistance with and attempted repair of the system. (App. at 7.) Glenmark’s claims also involve the selection, design, manufacture, and installation of the defective HVAC system, all of which necessarily pre-date the Preventive Maintenance Agreement. (App. at 8-15.)

The sum total of Petitioners' attempt in this Court to show that the arbitration clause at issue encompasses Glenmark's claims consists of a bullet-pointed list of references in the Complaint to the Preventive Maintenance Agreement (along with several paragraphs that do not mention it at all). (Pet. at 20-21.) Presumably, Petitioners hope the Court will conclude that because Glenmark referred to the Preventive Maintenance Agreement in the Complaint, its claims must derive from that Agreement. But a more-than-cursory reading of the Complaint demonstrates that Glenmark's references to the Preventive Maintenance Agreement were to alert the parties that it has suffered damages for unscheduled repairs and modifications to the HVAC system, despite the fact that it dutifully paid annually for proper preventive maintenance services to be provided by the system's manufacturer, York/Johnson. York/Johnson's liability to Glenmark arises from the fact that it designed, manufactured, and failed to repair a faulty HVAC system for which Glenmark paid a significant portion of the price of construction of United Center, not that it failed to show up for the maintenance dates it promised under the Preventive Maintenance Agreement, for which Glenmark paid \$3,500 to \$4,000 a year. (App. at 94.)

Based upon the express language of the Preventive Maintenance Agreement, arbitration would only be required for any claim Glenmark had against York/Johnson for failure to perform the regularly scheduled preventive maintenance. For the Circuit Court to have held that the arbitration language in the Preventive Maintenance Agreement encompassed and required arbitration of Glenmark's claims against York/Johnson as set forth in the Complaint would have required it to extend the parties' agreement by construction or implication, something this Court has expressly forbidden. Brown, slip op. at 37-38, 46 (quoting State ex rel. City Holding Co. v. Kaufman, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004) and Daimler Chrysler Corp. v. Franklin, 814 N.E.2d 281, 285 (Ind. App. 2004)).

The Circuit Court correctly held:

[D]isputes arising from system repairs, parts installation, or service calls made at the customer's request – which are expressly excluded from the scope of the agreement – were not considered by the parties to be arbitrable disputes at the time they entered into the contract. It would be an even further and more illogical overextension of the arbitration provision to apply it to specification, selection or installation of the HVAC system, all of which had occurred before the Agreement was created. Because Plaintiff has pleaded multiple causes of action which do not fall within the narrow scope of the Preventive Maintenance Agreement, the arbitration clause therein cannot be extended to encompass all the Plaintiff's claims against the various defendants.

(App. at 120.)

The Circuit Court correctly held that the arbitration clause in the Preventive Maintenance Agreement did not encompass Glenmark's claims against York/Johnson. Petitioners have presented this Court with no valid reason to disturb the Circuit Court's ruling. For these reasons, the Court should refuse to issue a rule to show cause and should proceed no further in this matter.

2. The Circuit Court Correctly Held That the Arbitration Clauses at Issue Are Procedurally and Substantively Unconscionable.

This Court has made clear that nothing in the FAA overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement. Brown at Syl. Pt. 9; Syl. Pt. 3, State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders, No. 11-0770 (W. Va. Nov. 21, 2011). “An analysis of whether a contract term is unconscionable involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.” Brown at Syl. Pt. 13 (quoting Syl. Pt. 3, Troy Mining Corp. v. Itmann Coal Co., 176 W. Va. 599, 346 S.E.2d 749 (1986)). “A determination of

unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’” Brown at Syl. Pt. 14 (quoting Syl. Pt. 4, Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of W. Va., Inc., 186 W. Va. 613, 413 S.E.2d 670 (1991)). The FAA permits a court to refuse enforcement of an arbitration agreement to the extent “such grounds . . . exist at law or in equity for the revocation of any contract.” Richmond American Homes, No. 11-0770, slip op. at 13 (quoting 9 U.S.C. § 2).

The Circuit Court correctly determined that the arbitration clauses Petitioners sought to enforce in the underlying case were unconscionable, both procedurally and substantively. Procedural unconscionability equates to “the lack of a meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print[.]’” Brown, slip op. at 55-56 (quoting Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995)). Procedural unconscionability involves a “variety of inadequacies, such as . . . literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.” Id. (quoting Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88, 96 (N.J. 2006)). Moreover, procedural unconscionability often begins with a contract of adhesion. Brown, slip op. at 57-58. This Court held in Brown that a contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person. Id.

Substantive unconscionability occurs when the contract itself is unfair or one-sided as to

lead to absurd results. Brown, slip op. at 61. In determining whether a contract is substantively unconscionable, courts should consider: “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.” Id. at 61-62. This Court has emphasized that “[a] pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced pursuant to the FAA only when arbitration, although a different forum with somewhat different and simplified rules, is nonetheless one in which the arbitral mechanisms for obtaining justice permit a party to fully and effectively vindicate their rights.” State of West Virginia ex rel. James Dunlap v. Berger, 211 W. Va. 549, 556 n.3, 567 S.E.2d 265, 272 n.3 (2002). “Even if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim.” Id. (quoting Floss v. Ryan’s Family Steak House, Inc., 211 F.2d 306, 313 (6th Cir. 2000)).

- i. **The Arbitration Provision in the York/Johnson Preventive Maintenance Agreement Did Not Encompass Glenmark’s Claims, Dramatically Limited the Scope of Claims and Available Damages While Excepting York/Johnson’s Own Claims from Arbitration, and Created an Expensive and Burdensome Procedure That Would Have Made It Impossible for Glenmark to Obtain Just Remedies for Its Claims.**

The arbitration clause in the York/Johnson Preventive Maintenance Agreement is classic fine-print boilerplate that attempts to change the venue for claims to York, Pennsylvania, limit substantially the scope of available discovery, curtail the statute of limitations for claims to one year, and dramatically restrict the available damages. (App. at 95.) The clause is contained at the bottom of a page titled “Terms and Conditions – Maintenance Contracts” which appears not in the body of the contract, but after the signature page. Presumably, the “terms and conditions”

page was tacked onto the back of all York/Johnson's maintenance agreements after the negotiable terms of the agreements were complete.

The fundamental unfairness of the provision is perhaps best demonstrated by the fact that the Company's own claims under the Preventive Maintenance Agreement are excepted from the arbitration clause. The clause states, "Actions by the Company to collect monies due under this contract may be brought in any court of competent jurisdiction in lieu of arbitration." (App. at 95.)

The Preventive Maintenance Agreement would require Glenmark to present its claims in a forum that could be far more expensive than civil litigation. The arbitration clause in the Preventive Maintenance Agreement requires that arbitration be conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). (App. at 95.) The filing fee alone for Glenmark's claim would be \$6,200. Standard Fee Schedule, AAA Procedures for Large, Complex Commercial Disputes (effective June 1, 2010), available at <http://www.adr.org/sp.asp?id=22440#A&>. Presumably, York/Johnson would claim that the provision requires that Glenmark pay all its costs and expenses incurred in connection with the arbitration. The provision states: "In the event it becomes necessary for Company to incur any costs or expenses in the collection of monies due from Customer, *or to enforce any rights or privileges hereunder*, Customer shall, upon demand, reimburse Company for all such costs and expenses (including, but not limited to, reasonable attorney's fees)." (App. at 95 (emphasis added)).

The Preventive Maintenance Agreement also purports to restrict the relief available to an entity making a claim. It provides that "[i]n no event shall Company's liability for direct or compensatory damages exceed the payments received by Company from Customer under this

contract, nor shall Company be liable for any special, indirect, consequential, or incidental damages of any nature. The foregoing limitations on damages shall apply under all theories of liability or causes of action, including but not limited to contract, warranty, tort (excluding obvious negligence) and strict liability. . .” (App. at 95.) The limitation of remedies imposed by the Preventive Maintenance Agreement would not afford Glenmark adequate relief as its actual damages incurred (and continuing) will certainly exceed the amount it has paid to York/Johnson for preventive maintenance services rendered under the Agreement.

The Circuit Court held that, in light of these provisions, the arbitration language relied upon by York/Johnson is both procedurally and substantively unconscionable. The Court wrote:

[T]he limitations on liability set out in the Preventive Maintenance Agreement with respect to compensatory, special, indirect, consequential or incidental damages is contrary to the relief available to Plaintiff at common law. This unconscionable limitation on the amount and type of relief available to Plaintiff is compounded by the inequity that will result, should the Plaintiff be forced to pursue relief against some defendants in multiple forums. Given that arbitration would be insufficient to resolve all of Plaintiff’s claims against all Defendants named in this action, and that the cross-claims filed by various Co-Defendants against Johnson Controls, Inc. would survive, an important policy underlying arbitration—namely speedy resolution of the conflict and conservation of the parties’ resources—is not applicable in these circumstances. See, State of West Virginia ex rel. United Asphalt Supplies, Inc. v. Sanders, 204 W. Va. 23, 28, 511 S.E.2d 134, 139 (1998) (“ . . . a court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding. . .”). The Court finds persuasive Plaintiff’s argument that it must be allowed to present evidence of each Defendant’s role in the specification, selection, installation and maintenance of the subject HVAC system, so that the degree of each Defendant’s contributing culpability can be considered and allocated. As a result, the Court finds that compulsory arbitration would result in an unnecessarily delayed “piecemeal” resolution of this conflict and the waste of judicial resources.

(App. at 119.)

ii. **The Arbitration Provision in the Morgan Keller Contract Established an Unfairly Complicated and Expensive Procedure Designed to Dissuade Claimants, Required Resolution of Glenmark's Claim by a Party It Has Sued, and Did Not Encompass Claims Glenmark Has Stated against Morgan Keller.**

The arbitration clause in the Morgan Keller Contract is buried deep within a 44-page pre-printed boilerplate addendum prepared not by either of the parties, but by the American Institute of Architects. (App. at 45-89.) The addendum was not part of the seven-page contract proper that was negotiated and signed by the parties, but was appended to the contract following the signature page (App. at 28-34.) The addendum provides a fine example of the “maze of fine print” decried by this Court in Brown, slip op. at 56 (quoting Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) and Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

On the twenty-first page of this maze resides the arbitration clause relied upon by Morgan Keller. (App. at 65.) The clause prescribes a complicated procedure for claims resolution that requires that claims be “referred initially to the Architect for decision” – a provision that would appear to make little sense in this context except when one considers that the addendum’s boilerplate language was drafted by the American Institute of Architects rather than by Morgan Keller or Glenmark. (App. at 65.) Once the architect issues a written decision, a party has 30 days to demand arbitration. (App. at 66.)

Before proceeding to arbitration, however, the parties must submit to mediation under the AAA’s Mediation Rules as a condition precedent to arbitration. (App. at 66-67.) When and if a claim finally makes it to the arbitration stage, it must be resolved under the AAA’s Construction Industry Arbitration Rules – a different set of AAA rules than the York/Johnson Preventive

Maintenance Agreement requires be applied. (App. at 67, 95.) The filing fee required by the AAA for arbitration under the Construction Industry Arbitration Rules for arbitration of Glenmark's claims would be \$6,200. Standard Fee Schedule, AAA Construction Industry Arbitration Rules (effective June 1, 2010), available at <http://www.adr.org/sp.asp?id=22004#standard>.

The byzantine procedure required by the arbitration clause in the Morgan Keller contract surely is intended to dissuade a party with claims from pursuing relief. In the context of this case, the required procedure would mandate that Glenmark submit its claim against Morgan Keller for initial resolution by the architect on the United Center project – *who also is a Defendant in the underlying case.*

Additionally, the arbitration provision at issue purports to substantially limit the damages available to Glenmark at common law. Section 4.3.10 provides:

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons. . . .

(App. at 65.)

This attempt at limiting the remedies available at common law further renders this section of the addendum substantively unconscionable. Glenmark will prove substantial damages as a result of Morgan Keller's conduct which necessarily includes losses and damages the arbitration clause purports to exclude. (App. at 9, 11-14.)

If Morgan Keller intended to assert "arbitration" as the exclusive forum for resolution of the HVAC issues, it should have done so long ago. When the initial problems with the HVAC

system occurred, Glenmark appealed, in writing and orally, to both KA, Inc. (the project's architect) and Morgan Keller, among others, for relief. It should be undisputed that the architect and Morgan Keller, in addition to other Defendants in the underlying case, made representations that the system could be repaired or modified to meet the needs of the building. Glenmark relied on these ongoing representations over several years. At no time did anyone from Morgan Keller suggest that there was a claim or dispute to be resolved through arbitration. If Morgan Keller wanted to submit the matter to arbitration, it should have followed the procedure set forth in the contract and notified Glenmark of its desire to do so. Instead, the evidence will show that Glenmark was placated with temporary repairs and insufficient modifications which never effectively resolved the system's failure to support the needs of the building. Only after nearly seven years, and Glenmark's resort to its civil remedies, did Morgan Keller assert that Glenmark had given up its right to seek civil redress, and is strictly limited to arbitration. That amounts to an unconscionable assertion of an unconscionable provision. Indeed, Morgan Keller's assertion of the arbitration clause under these circumstances is so belated and misplaced that the Company must be regarded as having waived its right to assert any claim to arbitration. In other words, Morgan Keller is estopped from asserting that matters it has never before regarded or treated as arbitrable, must now be so treated by the courts.

The Circuit Court held that, in the circumstances presented by this case, the arbitration clause in the Morgan Keller Contract was invalid and unenforceable. It wrote:

In this instance, application of the arbitration clause to these particular claims and defendants would defeat the policies supporting arbitration and would permit neither the Plaintiff nor the Defendants to fully and effectively adjudicate their various claims and defenses. The Court finds that the complex arbitration provision contained in the Agreement which requires the parties to mediate their dispute before arbitration would further frustrate a presumed advantage of arbitration, which is conservation of the parties' resources. Given the inability of

an arbitrator to compel defendants outside this Agreement to participate in arbitration or to bind them to the results obtained therein, in addition to the outstanding cross-claims made by various defendants which would survive arbitration, arbitration could not result in the complete resolution of the claims brought by the parties. See, Brown v. Genesis Healthcare Corp., Nos. 35494, 35546, 35635, 2011 W. Va. LEXIS 61, *59 (W. Va. June 29, 2011) (“such [arbitration] agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.”). Plaintiff would, as a result, be required to undergo the unnecessary expenditure of its resources to pursue piecemeal relief. Moreover, given Morgan-Keller, Inc’s failure to raise or invoke the arbitration provision upon prior notice of Plaintiff’s dissatisfaction, its resort to that remedy at this time would be an unconscionable application of this provision. Additionally, the arbitration provision presumes to limit the relief available to Plaintiff at common law. 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.

(App. at 126.)

The Circuit Court also held, as it had in reference to the York/Johnson Preventive Maintenance Agreement, that the arbitration clause in the Morgan Keller addendum did not reach all claims Glenmark had asserted against Morgan Keller. It wrote:

Based on the language contained within the Agreement, the disputes subject to arbitration are those which arise out of or are related to the contract. This language, on its face, limits the arbitrable disputes to those concerning breaches of the contract itself, and it does not provide for arbitration of disputes which do not require interpretation of the contract terms. Plaintiff has pleaded in its Complaint multiple causes of action independent of its breach of contract claim including negligence, product liability, breach of Uniform Commercial Code warranties, and breach of implied warranty. Because these claims arise independently of the Agreement and impose duties and obligations independent of those contained therein, the parties did not clearly and unmistakably agree to submit them to binding arbitration. Moreover, there are claims, crossclaims and related issues between and among parties to this case, who were not parties to any agreement to arbitrate their disputes. Therefore, the arbitration clause found within the Agreement cannot be extended to encompass the totality of all the claims among and between all the parties.

(App. at 127.)

* * * * *

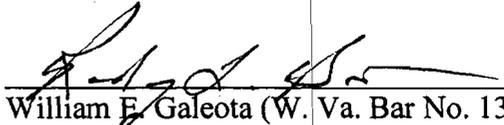
Unlike the situation this Court addressed in State ex rel. Clites v. Clawges, 224 W. Va. 299, 303-07, 685 S.E.2d 693, 697-71 (2009), where the party seeking to enforce an arbitration agreement had made concessions and stipulations altering the scope of the arbitration clause to make it fair and acceptable to the trial court, neither York/Johnson nor Morgan Keller have made any concession or offer of stipulation concerning any of the unconscionable provisions in the arbitration clauses on which they rely. The Circuit Court correctly determined that under the circumstance presented by this case, neither arbitration clause was valid and enforceable under West Virginia law. The Circuit Court's rulings were thorough and set forth clearly the basis for the Court's conclusion.

Petitioners have presented no valid basis for this Court to bar enforcement of the Circuit Court's rulings. For these reasons, the Court should refuse to issue a rule to show cause and proceed no further in this matter.

CONCLUSION

For all these reasons, Glenmark requests that this Court: 1) refuse to issue a rule to show cause; and 2) issue an order denying the Petition.

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CERTIFICATE OF SERVICE

I certify that, on the 23rd day of November, 2011, in accordance with the provisions of W. Va. R. App. P. 37, I served a copy of the foregoing "Response in Opposition to Petition for Writ of Prohibition" on the following persons by first-class United States mail, postage-prepaid:

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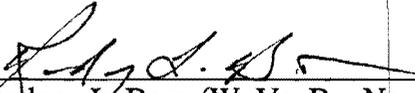
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