

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0959

**Board of Trustees
of the Weirton Policemen's
Pension and Relief Fund,**

**Plaintiff Below,
Petitioner,**

v.

**The Jones Financial Companies, LLLP,
EDJ Holding Company, Inc.,
Edward D. Jones & Co., L.P., and
Curt Randy Grossman,**

**Defendants Below,
Respondents.**

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

The Circuit Court did nothing wrong. It found that the petitioner Pension Fund, through a dozen Trustees, accepted the Arbitration Agreement on more than ten different occasions; that the Arbitration Agreement is not procedurally or substantively unconscionable; and that the Arbitration Agreement is valid and enforceable. The Circuit Court applied the proper law and ordered the parties to arbitration.

The Pension Fund failed to meet its burden to establish that the Arbitration Agreement was unenforceable. Instead, the Pension Fund is attempting to inject some doubt about the propriety of the decision because it was issued in between the United States and West Virginia Supreme Court decisions in *Marmet* and *Brown II*. The Circuit Court's Order compelling arbitration does not rely on any points of law that were overturned by those cases and instead is based on principles that were affirmed throughout those cases, i.e, that common law contractual defenses may be applied to invalidate arbitration agreements. The Circuit Court was aware of the controlling law and explicitly held that the Arbitration Agreement was not procedurally or substantively unconscionable. There is nothing in the record before this Court that demonstrates that the Circuit Court clearly erred as a matter of law, and this Court should affirm the Circuit Court's decision.

A. Factual Background

1. The Parties

Respondent Edward Jones is a securities industry broker-dealer registered with the United States Securities and Exchange Commission. It is a Missouri partnership and is authorized to do business in West Virginia. Respondent Edward Jones Financial is the parent company of Edward Jones and is also a Missouri partnership. Respondent EDJ Holding

Company is affiliated with Edward Jones and Edward Jones Financial, and is a Missouri corporation. Respondent Grossman is an individual, a registered financial advisor, and was employed by Edward Jones in Pittsburgh, Pennsylvania. AR 3. Respondents Edward Jones, Edward Jones Financial, EDJ Holding Company and Grossman will be referred to as “Edward Jones.”

Petitioner Board of Trustees of the Weirton Policemen's Pension and Relief Fund (the "Pension Fund") is a pension fund created pursuant to West Virginia Code and Weirton City Ordinance. AR 3. Pursuant to West Virginia Code § 8-22-18, four elected individuals and the Mayor of Weirton are Trustees of the Pension Fund. Between 2006 and 2009, a dozen different individuals served as Trustees of the Pension Fund, including two different Mayors of Weirton. AR 61-80. By statute, the Trustees have a fiduciary duty to the Pension Fund.¹ The Trustees are permitted to contract with and delegate authority to professional investment advisors registered with the United States Securities and Exchange Commission.² The Trustees are monitored, assisted and overseen by the West Virginia Municipal Pensions Oversight Board, which may initiate and join legal actions on behalf of the Trustees or Pension Fund.³

2. The Brokerage Accounts and Arbitration Agreements

In 2006, the Pension Fund opened three different brokerage accounts with Edward Jones (accounts ending -317, -318, and -319). AR 26-28. As part of opening these accounts, the Trustees for the Pension Fund executed single page Fiduciary/Trust Account Authorization and

¹ See W.Va. Code §§ 8-22-17 (trustees are fund fiduciaries) and -18a (requiring the West Virginia Municipal Pensions Oversight Board to ensure that the Trustees are trained in ethics, fiduciary duties, and investment responsibilities).

² See W.Va. Code §§ 8-22-17 and -22.

³ See W.Va. Code § 8-22-18a. The West Virginia Municipal Pensions Oversight Board is not a party to the underlying action and did not file an *amicus curie* brief in this appeal.

Acknowledgement Forms (“Authorizations”) for each account. The initial Authorizations for each account were executed by the Honorable William M. Miller, Mayor of Weirton. AR 61-63.

Each single page Authorization states, in part, the following:

The Edward Jones Account Agreement and Disclosure Statement contains, on page 19, paragraph 2, a binding arbitration provision which may be enforced by the parties. By my/our signature(s) below, I/we have received a copy of this document including a schedule of fees and Edward Jones Privacy Notice and agree to its terms and conditions. I further understand that this document allows my investment representative to accept my/our verbal instructions to initiate and/or terminate the services described.

AR 61-63, emphasis in original. The accompanying Edward Jones Account Agreement and Disclosure Statement (“Account Agreement”), AR 30-60, provides, in part:

ARBITRATION AGREEMENT

This Agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:

1. All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

...

Any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents, and/or employees for me, to this Agreement, or to the breach thereof, or relating to transactions or accounts maintained by me with any of your predecessor or successor firms by merger, acquisition or other business combinations from the inception of such accounts shall be settled by arbitration in accordance with the rules then in effect of the Board of Directors of the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc. as I may elect.

AR 51, emphasis in original removed.

3. The Pension Fund Executed the Arbitration Agreement Dozens of Times

Trustees of the Pension Fund are elected on an annual basis, and every year the Trustees executed the Authorizations incorporating the Arbitration Agreement. In particular, the Trustees executed Authorizations as follows:

<u>Date of Authorization</u>	<u>Signatures on Acct ending with -319</u>	<u>Signatures on Acct ending with -318</u>	<u>Signatures on Acct ending with -317</u>
April 13, 2006	William M. Miller	William M. Miller	William M. Miller
Sept. 20, 2007	Mark Harris Steve DiBacco Ricky L. Grishkevich Joel S. Schreiner Eric Popish	Mark Harris Steve DiBacco Ricky L. Grishkevich Joel S. Schreiner Eric Popish	Mark Harris Steve DiBacco Ricky L. Grishkevich Joel S. Schreiner Eric Popish
Jan. 5, 2009	Eric Redish Rick Stead Mark Harris Joel Schreiner Eric Popish	Eric Redish Rick Stead Michael Payne Donald Kendrick Mark Harris Joel Schreiner Eric Popish	Mark Harris Joel Schreiner Eric Popish Eric Redish Rick Stead
Sept. 24, 2009	Mark Harris Eric Popish Eric Redish Rick Stead	Mark Harris Eric Popish Eric Redish Rick Stead Brian Bottay Michael Payne Donald Kendrick	Mark Harris Eric Popish Eric Redish Rick Stead

AR 62-80. By executing the Authorizations, each Trustee accepted the terms of the Arbitration Agreement on behalf of the Pension Fund. In total, the dozen Trustees, including two Mayors of Weirton, accepted the terms of the Arbitration Agreement on behalf of the Pension Fund on fifty occasions.

The Pension Fund maintained its accounts with Edward Jones for approximately four years. During that time, in addition to accepting and affirming the Arbitration Agreements, the Pension Fund engaged in trading activity, received account statements, communicated regularly with Edward Jones employees, including Respondent Grossman, and made a profit (notwithstanding the devastating impact of the 2008 financial crisis on virtually all American investors). AR 122. The Pension Fund and Edward Jones have not been involved in arbitration over any matters to date.

B. Procedural Background

1. Complaint and Motion to Compel Arbitration

On July 30, 2010, the Pension Fund filed a lawsuit against Edward Jones, contending that Edward Jones made improper investments and asserting claims for negligence per se, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. AR 2-8. On October 14, 2010, Edward Jones filed a Motion to Compel Arbitration and Stay the Action, seeking to compel the Pension Fund to arbitrate its claims pursuant to the Arbitration Agreement. AR 9-21. In support of its Motion, Edward Jones filed an Affidavit executed by Ray M. Shepard, which introduced the following documents into the record:

- a. Account statements for the three different accounts opened by the Pension Fund;
- b. The Account Agreement, which contained the Arbitration Agreement;
- c. Nineteen different Authorizations executed at various times by the 12 different Trustees.

AR 22-80.

On February 15, 2012, nearly sixteen months after Edward Jones filed its Motion to Compel Arbitration, the Pension Fund noticed the motion for a hearing. The hearing was subsequently rescheduled for May 4, 2012. AR 81-84.

On May 2, 2012, without engaging in any discovery, the Pension Fund served its Objection to the Edward Jones' Motion to Compel.⁴ AR 85-103. The Pension Fund elected not to introduce any evidence into the record, such as an affidavit from one of its dozen Trustees. The Pension Fund provided no notice or disclosure that it intended to call any witnesses to testify at the hearing that it noticed, and the Pension Fund did not produce or disclose any exhibits that it intended to use at the hearing. On May 3, 2012, the Pension Fund served and filed a Supplement to its Objection. AR 104-113. Once again, the Pension Fund elected not to introduce any evidence into the record to support its challenge to the Arbitration Agreement.

2. Motion Hearing

On May 4, 2012, the Circuit Court held a hearing on the Motion the Compel. During the hearing, the Court noted that arbitration agreements could be attacked using common law contractual defenses, AR 146, line 22 to AR 147, line 3, but explicitly held that the Arbitration Agreement was not procedurally or substantively unconscionable, AR 149, lines 14-16. The Circuit Court noted that the Pension Fund offered no testimony to support its attack on the Arbitration Agreement, AR 147, lines 2-12, and the Pension Fund made no offer of proof of any evidence to support its argument that the agreement is unenforceable. Rather, when asked "what facts are you going to put on regarding this contract," the Pension Fund summarily stated that "it's both procedurally and substantively unconscionable." The Pension Fund did not proffer any evidence to support its conclusory statement. AR 149, lines 11-15.

⁴ While this document does not appear to be on the Clerk's certified docket sheet, it appears that the Court received the document and considered it in formulating its opinion. The document is part of the Appendix Record.

3. Order Compelling Arbitration

On June 18, 2012, the Court entered its Findings of Fact, Conclusions of Law, and Order that granted Edward Jones' motion and compelled arbitration ("Order Compelling Arbitration").

In it, the Court held, among other things, that

- a. the Pension Fund agreed to the terms of the Arbitration Agreement;
- b. the Pension Fund accepted the terms of the Arbitration Agreement for the three different accounts when it executed the Authorizations on March 27, 2006, August 20, 2007, February 3, 2009, September 28, 2009, October 2, 2009, October 8, 2009, and October 16, 2009. In total, the Pension Fund accepted the terms of the agreement on more than 10 different occasions;⁵
- c. the Pension Fund affirmed its acceptance of and agreement to the terms of the Arbitration Agreement;
- d. in light of the Pension Fund's multiple signatures to the Arbitration Agreement and its nearly four year relationship with Edward Jones, a valid arbitration exists; and
- e. the Arbitration Agreement is not procedurally or substantively unconscionable.

AR 121-26.

On August 15, 2012, the Pension Fund filed its Notice of Appeal, and on October 24, 2012, the Pension Fund served its Petitioner's Brief (Corrected). AR 127-54.

II. SUMMARY OF THE ARGUMENT

The Circuit Court properly held that the Arbitration Agreement is a valid and enforceable agreement. The Pension Fund, though its dozen Trustees, agreed to and accepted the terms of the agreement on more than ten different occasions over a four year period (counting each signature, the Pension Fund accepted the agreement fifty times). The Circuit Court determined

⁵ The Circuit Court appears to reference the seven different dates next to the Trustees' numerous signatures on the bottom of the Authorizations, though dates January 23, 2009, September 23, 2009, and October 20, 2009 are omitted. For ease of reference, Edward Jones refers to the date in the upper-right hand corner of the Authorizations, of which there are only four (April 13, 2006, August 20, 2007, January 5, 2009, and September 24, 2009). AR 61-80.

that over a four year period, the Pension Fund continued its relationship with Edward Jones and affirmed its acceptance of the agreement. In addition, the Circuit Court held that the Arbitration Agreement was not substantively or procedurally unconscionable. Nothing in the record establishes that the Circuit Court clearly erred in making these determinations.

The Pension Fund has the burden to establish that the Arbitration Agreement was invalid. The Circuit Court noted that the Pension Fund offered no testimony to support its challenge to the Arbitration Agreement, and the Pension Fund failed to make an offer of proof of any evidence to support its claim that agreement was unconscionable.

The Pension Fund ignores the Circuit Court's findings of fact and conclusions of law in the Order Compelling Arbitration and instead attempts to muddy the waters using the timing of the decisions in *Brown I*, *Marmet*, and *Brown II*. Yet throughout those decisions, the controlling legal premises remained unchanged: the Circuit Court's inquiry is limited to determining whether a valid arbitration agreement exists, and arbitration agreements may be invalidated based on common law contractual defenses. The Circuit Court recognized these principles and properly held that the Arbitration Agreement is enforceable.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Edward Jones requests that this Court permit oral argument pursuant to Rule 19(a) of the West Virginia Rules of Appellate Procedure. The Circuit Court's Order Compelling Arbitration can be affirmed with the application of well-settled law to the Pension Fund's assignment of error, and this case is appropriate for a memorandum decision.

IV. ARGUMENT

A. Standard of Review

On appeal to this Court, this Court reviews *de novo* determinations about the validity of an arbitration agreement. *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, ___, 724 S.E.2d 250, 267-68, n.12 (2011) (“*Brown I*”), *vacated sub nom. on other grounds, Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (“*Marmet*”); *Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). In particular, this Court has held that

This Court will preclude enforcement of a circuit court’s order compelling arbitration only after a *de novo* review of the circuit court’s legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court’s order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional or common law mandate.

Brown I, 724 S.E.2d at 267-68.

Interpreting a statute presents a purely legal question subject to *de novo* review. Syllabus Point 1, *Fountain Place Cinema 8, LLC, v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011).

B. The Circuit Court Properly Determined that the Arbitration Agreement is Valid

Under the Federal Arbitration Act, 9 U.S.C. § 2, (the “Act”) a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract. Syllabus Point 6, *Brown I*; Syllabus Point 1, *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012) (“*Brown II*”). The Act, and United States Supreme Court precedent interpreting it, declares a national policy favoring arbitration.

See Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard, 568 U.S. ____ (November 26, 2012) (*per curiam*)(citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

This Court has articulated a two-part threshold inquiry for circuit courts to apply when ruling on a motion to compel arbitration under the Act: (i) whether a valid arbitration agreement exists between the parties; and (ii) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. Syllabus Point 2, *TD Ameritrade v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). The Pension Fund does not argue that the Circuit Court erred in its analysis related to the scope of the arbitration agreement, and thus the issue on appeal is limited to whether the Circuit Court properly determined that the Arbitration Agreement is valid and enforceable.

Here, the Circuit Court held that the Pension Fund accepted, agreed to, and affirmed the terms of the Arbitration Agreement, and that the Arbitration Agreement is valid and enforceable. In particular, the Circuit Court held that the Pension Fund accepted the Arbitration Agreement on more than ten different occasions over a four year period, and that in light of the Trustees' multiple signatures to the Arbitration Agreement and the Pension Fund's four year relationship with Edward Jones, a valid arbitration exists.

C. The Circuit Court Explicitly Held that the Arbitration Agreement was not Substantively or Procedurally Unconscionable

The Pension Fund's primary argument is that the Circuit Court erred by "refusing to determine whether the arbitration agreement was procedurally and substantively unconscionable." The Pension Fund's claim is contradicted by paragraph 9 of the Conclusions of Law in the Order Compelling Arbitration, in which the Circuit Court holds that "The Arbitration Agreement is not procedurally or substantively unconscionable." RA 125 ¶ 9. The

Circuit Court also stated this determination at the conclusion of the motion hearing. AR 161, lines 11-16. The Pension Fund simply ignores the Circuit Court's explicit determination on unconscionability.

The Pension Fund has the burden of proving that the arbitration agreement was unconscionable. *Brown I*, 724 S.E.2d at 284. Sixteen months after Edward Jones filed its Motion to Compel Arbitration, and without conducting discovery, the Pension Fund noticed the hearing on the motion. When asked during the hearing what facts the Pension Fund was going to present to support its claim of unconscionability, the Pension Fund failed to identify any evidence that support its unconscionability claim.

The Pension Fund also failed to make an offer of proof of any evidence to support its contention that the agreement is unconscionable. This Court has previously held that a failure to make a proper offer of proof prevents this Court from reviewing a related assignment of error. *See* Syllabus Point 1, *Horton v. Horton*, 164 W.Va. 358, 360, 264 S.E.2d 160, 162 (1980); Syllabus Point 8, *Torrence v. Kusminsky*, 185 W.Va. 734, 408 S.E.2d 684 (1991); Syllabus Point 3, *Blankenship v. Mingo County Economic Opportunity Com'n, Inc.*, 187 W.Va. 157, 416 S.E.2d 471 (1992); Syllabus Point 2 *Finley v. Norfolk and Western Ry. Co.*, 208 W.Va. 276, 540 S.E.2d 144 (1999). Here, the Pension Fund does not, because it cannot, point to any evidence that would lead to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that this matter be arbitrated.

D. The Circuit Court did not Misapply the Law

In an attempt to get around its failure to meet its burden on unconscionability, the Pension Fund alleges that the Circuit Court was "blinded by the glare" of the United States Supreme Court's decision in *Marmet* and disregarded the applicable law, and that the

“proceedings below were fraught with incorrect legal conclusions.” Pension Fund Brief at 3 and 10. However, the Pension Fund fails to actually identify any legal conclusions that it claims are incorrect. Nowhere in its Brief does the Pension Fund reference the actual Order Compelling Arbitration. The Order, and its findings of fact and conclusions of law, appear to play absolutely no part in the Pension Fund’s appeal.

The Circuit Court applied the proper law. It limited its review to the validity of the Arbitration Agreement and determined that it was valid and enforceable. During the motion hearing, the Court noted that, notwithstanding *Marmet*, common law contractual challenges could be made to the Arbitration Agreement and that the Pension Fund produced no evidence to support its unconscionability claim.

As this Court has noted, the impact of *Marmet* is limited. In *Marmet*, the United States Supreme Court invalidated Syllabus Point 21 of *Brown I*, which held that Congress did not intend for arbitration agreements to be governed by the Federal Arbitration Act when those arbitration agreements were adopted prior to an occurrence of negligence and require questions about negligence to be submitted to arbitration. *Brown II*, 729 S.E.2d at 224-25. The United States Supreme Court explicitly remanded the cases in *Marmet* for a determination of whether the agreements were unenforceable under state common law principles. *Marmet*, 132 S.Ct. at 1204. In *Brown II*, upon consideration of *Marmet*, this Court reaffirmed all of the other points of law in *Brown I*.

In this matter, the Circuit Court did not rely upon or reference Syllabus Point 21 of *Brown I* in making its decision. In accord with the principle that arbitration agreements are subject to common law contractual challenges, the Circuit Court explicitly held that the Arbitration Agreement was not unconscionable.

E. The Pension Fund's Remaining Arguments Must Be Rejected

The Pension Fund's remaining arguments (adhesion contract, knowing waiver of rights, public policy violation, and ambiguity, *see* Pension Fund Brief at 15-19), repeat, predominately verbatim, the arguments it made to the Circuit Court in its Objection. These arguments ignore the principle that the Circuit Court is limited to a threshold inquiry when ruling on a motion to compel arbitration, i.e., determining whether a valid arbitration agreement exists between the parties and whether the claims asserted by the plaintiff fall within the substantive scope of the agreement. Syllabus Point 2, *TD Ameritrade*. In particular, the Pension Fund's contentions that it did not make a knowing and intelligent waiver of its rights, that the arbitration agreement violates public policy, and that the terms of the agreement are ambiguous, were not appropriate threshold issues for the Circuit Court to consider.

The Pension Fund's argument that enforcement of the Arbitration Agreement would violate a public policy must be rejected for another reason. The Pension Fund argues that the Arbitration Agreement applies Missouri law and contravenes public policy by prohibiting the State of West Virginia, through the application of its laws, from protecting the integrity of its policeman's publically funded pensions. This argument is substantially similar to Syllabus Point 21 of *Brown I*, which this Court overruled in *Brown II*. In addition, in *Brown I*, this Court held that a categorical rule, or declaration of public policy, that arbitration agreements are not enforceable is improper. Syllabus Point 8, *Brown I*. Yet this is precisely how the Pension Fund is asking this Court to rule. Such categorical rejection of arbitration agreements is barred by *Brown I*, *Brown II*, and *Marmet*. In addition, in the United States Supreme Court's recently issued decision in *Nitro-Lift Technologies, L.L.C.*, the United States Supreme Court re-affirmed the principle that it is for an arbitrator to decide in the first instance whether the substantive non-

arbitration provisions of an agreement are valid under state law. *Nitro-Lift Technologies, L.L.C.*, 568 U.S. at ____.⁶

Finally, the Pension Fund argues that the Arbitration Agreement should not be enforced because it is a contract of adhesion. However, a contract of adhesion is not unenforceable merely because of its adhesive nature. *Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, ___, 729 S.E.2d 808, 821 (2012). A determination that an agreement is a contract of adhesion is the beginning point for analysis of procedural unconscionability, not the end of it. *Brown I*, 724 S.E.2d at 286.

⁶ While the Pension Fund does not assert that Missouri law applies, if it did apply, the end result would be the same. Missouri courts are obligated to apply federal law in deciding a motion to compel arbitration under the FAA, and opinions of the United States Supreme Court concerning the FAA are binding precedent. *Kansas City Urology, P.A. v. United Healthcare Services*, 261 S.W.3d 7, 11 (Mo. App. W.D. 2008)(citations omitted).

Under Missouri law, the initial analysis is limited to the same threshold questions as under West Virginia law: whether a valid arbitration agreement exists and if so, whether the specific dispute falls within the scope of the agreement. *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006)(citations omitted). The usual rules of state contract law apply. *Id.*

As under West Virginia law, adhesion contracts under Missouri law are not automatically unenforceable; a proponent must also show that an adhesion contract is unconscionable. *Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989). Missouri law imposes a high burden to invalidate a contract based upon unconscionability. Only contracts that are “unexpected and unconscionably unfair are held to be unenforceable.” *Id.* Most importantly, Missouri requires both procedural and substantive unconscionability to invalidate a contract, and the failure to establish any procedural unconscionability bars invalidating an arbitration agreement. See *Funding Systems Leasing Corp. v. King Louie Intern., Inc.*, 597 S.W.2d 624 (Mo. App. W.D. 1979); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 310 (Mo. App. W.D. 2005). Moreover, a party seeking to invalidate the terms of an arbitration agreement bears the burden of proof. *Paine Webber, Inc. v. Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995); *Green Tree Fin. Corp.-Ala v. Randolph*, 531 U.S. 79, 91 (2000).

A Missouri intermediate appellate court has held that, applying Missouri law, “standing alone, an agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair, and a provision so requiring is not unenforceable on the basis that it is a contract of adhesion. Provided that an average, reasonable person would reasonably expect that the dispute at issue, arising from the agreement, might be resolved through arbitration rather than litigation, the arbitration provision is not unreasonably unfair.” *Whitney*, 173 S.W.3d at 310-11 (internal citations and quotations omitted).

The Pension Fund has the burden of establishing unconscionability. *Brown I*, 724 S.E.2d at 284. It has failed to identify any terms that are oppressive or proffer any evidence that the Arbitration Agreement is procedurally unconscionable, and the Circuit Court's Order does not identify any inequities in the agreement. There is no basis for this Court to determine that the Arbitration Agreement is procedurally unconscionable. *See Johnson Controls, Inc.*, 729 S.E.2d at 821-22.

V. CONCLUSION

There is no evidence before this Court that leads to the inescapable conclusion that the Circuit Court clearly erred when it determined that the Arbitration Agreement was not procedurally or substantively unconscionable. It is respectfully requested that the Court affirm the Findings of Fact, Conclusions of Law, and Order entered June 18, 2012, by the Circuit Court that granted Edward Jones' motion to compel arbitration and ordered the parties to arbitration.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Board of Trustees
of the Weirton Policemen's
Pension and Relief Fund,**

Plaintiff Below, Petitioner,

v.

DOCKET NO. 12-0959

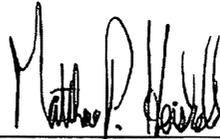
**The Jones Financial Companies,
LLLP; EDJ Holding Company, Inc.;
Edward D. Jones & Co., L.P.; and
Curt Randy Grossman,**

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I certify that service of the foregoing **RESPONDENTS' BRIEF** has been made upon counsel of record by placing a true copy thereof in the regular course of the United States Mail, postage prepaid, on this 10th day of December, 2012, addressed as follows:

Teresa C. Toriseva, Esq.
Toriseva Law
1446 National Road
Wheeling, WV 26003
Counsel for Petitioner



Matthew P. Heiskell (WVSB #10389)