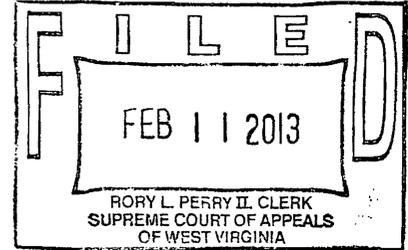


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Cara New, Plaintiff Below,
Petitioner**

vs.) No. 12-1371

**GameStop, Inc. d/b/a GameStop;
Aaron Dingess, individually; and,
David Trevathan, individually,
Defendants Below, Respondents**



PETITIONER'S BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENT OF ERRORS	5
II.	STATEMENT OF THE CASE.....	6
III.	SUMMARY OF ARGUMENT	8
IV.	STATEMENT REGARDING ORAL ARGUMENT and DECISION	9
V.	ARGUMENT	10
A.	STANDARD OF REVIEW.....	10
B.	THE CIRCUIT COURT CLEARLY ERRED IN FINDING THAT THE GAMESTOP ARBITRATION AGREEMENT IS A CONTRACT WHEN THE PLAIN LANGUAGE OF THE AGREEMENT STATES THAT IT IS NOT A CONTRACT	10
C.	IF GAMESTOP’S HANDBOOK IS DETERMINED TO BE A CONTRACT, THEN THE HANDBOOK IS AN UNCONSONABLE CONTRACT OF ADHESION BECAUSE IT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE	14
1.	The Circuit Court erred by finding that the arbitration requirements were not substantively unconscionable pursuant to this Court's rulings in <i>Brown I & Brown II</i>	15
2.	The Circuit Court erred by finding that the arbitration requirements were not procedurally unconscionable pursuant to this Court's rulings in <i>Brown I & Brown II</i>	20
VI.	CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Marmet Health Care Ctr., Inc. v. Brown</i> , 132 S. Ct. 1201, 563 U.S. (2012).....	8
<i>Brown v. Genesis Healthcare Corp.</i> , 729 S.E.2d 217 (W. Va. 2012).....	5, 8, 14-21, 24
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</i> , 194 W.Va. 770, 461 S.E.2d 516 (1995).....	10
<i>McGraw v. American Tobacco Company</i> , 224 W.Va. 211, 681 S.E.2d 96 (2009).....	10
<i>Brown v. Genesis Healthcare Corp.</i> , 228 W. Va. 646, 724 S.E.2d 250 (2011).....	5, 8, 14-16, 18, 20, 21, 24
<i>Long v. Long</i> , No. 11-0865 (W. Va. Supreme Court, June 8, 2012) (memorandum decision)	12
<i>Hatfield v. Health Management Assoc. of W. Va., Inc.</i> , 223 W. Va. 259, 672 S.E.2d 395 (2008).....	12
<i>Lee v. Lee</i> , 228 W. Va. 483, 721 S.E.2d 53 (2011).....	13
<i>State ex rel. Frazier & Oxley, L.C. v. Cummings</i> , 212 W. Va. 275, 569 S.E.2d 796 (2002).....	13
<i>Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.</i> , 186 W.Va. 613, 413 S.E.2d 670 (1991).....	15, 21
<i>Wilfong v. Chenoweth Ford</i> , 192 W. Va. 207, 213, 451 S.E.2d 773, 779 (1994)	17

<i>State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,</i> 228 W.Va. 125, 717 S.E.2d 909, 913 (2011)	17
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.,</i> 514 U.S. 52, 56 (1995)).....	17, 18
<i>Abramson v. Juniper Networks, Inc.,</i> 115 Cal.App.4th at 657, 9 Cal.Rptr.3d at 437.....	18
<i>Dumais v. American Golf Corp.,</i> 299 F.3d 1216, 1219 (10th Cir. 2002)	18, 19

PETITIONER, CARA NEW'S, BRIEF IN SUPPORT OF APPEAL

Comes now the Petitioner, Cara New, by and through her counsel, Richard W. Walters, Brian L. Ooten and the law firm of Shaffer and Shaffer, PLLC, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and presents her brief in support of her Petition for Appeal from the Order of the Logan County Circuit Court granting respondents' Motion to Dismiss that was entered on October 10, 2012.

I. ASSIGNMENTS OF ERROR

A. The Circuit Court improperly found that the arbitration requirements contained in respondent GameStop's handbook constituted an enforceable contract despite being contained in a handbook that clearly declared itself not to be a contract.

B. The Circuit Court erred by finding that GameStop's arbitration requirements were not substantively unconscionable pursuant to this Court's rulings in *Brown I & Brown II*, despite the fact that the arbitration provisions significantly reduced the petitioner's statute of limitations so that her claims would now be barred and despite the fact that the respondent could make unilateral changes to the arbitration provisions.

C. The Circuit Court erred by finding that respondent's arbitration requirements were not procedurally unconscionable pursuant to this Court's rulings in *Brown I & Brown II*, despite the fact that there was no meeting of the minds between the respondent and petitioner as petitioner was repeatedly advised that she was an at-will employee with no contract. In addition, the Circuit Court erred in determining that the arbitration provisions contained no unduly complex terms highlighted by the fact that the respondents themselves changed their own interpretation of the statute of limitations provisions of the agreement midway through litigation.

II. STATEMENT OF THE CASE

On September 9, 2011, the petitioner filed a Complaint in the Circuit Court of Logan County setting forth three separate counts of wrongful discharge, as well as allegations of sexual harassment; hostile work environment; intentional infliction of emotional distress; negligent infliction of emotional distress; and, violations of the West Virginia Wage Payment and Collection Act. (See Complaint at App. p.11).

In her Complaint, petitioner alleges that on March 29, 2009, she was hired by respondent GameStop as an assistant manager at GameStop's Logan, West Virginia retail store. When petitioner began her employment with the respondent she was given a "Store Associate Handbook." This handbook is well over 50 pages long and contains many of the policies and guidelines related to petitioner's employment with respondent GameStop.

At the time petitioner was hired, respondent Aaron Dingess was employed by GameStop as store manager of the Logan, West Virginia retail store and possessed direct supervisory control over the petitioner. At the time petitioner was hired, respondent David Trevathan was employed by GameStop as a district manager in the district where the Logan, West Virginia retail store was located. According to petitioner's Complaint, shortly after being hired by GameStop and throughout the course of petitioner's employment, respondent Dingess made inappropriate remarks, sexual innuendos, threats, temper tantrums and other offensive and intimidating comments to the petitioner because of her gender in front of other GameStop employees and the general public. (See Complaint at App. p. 12-13).

Petitioner further alleges that she reported Dingess's conduct to Trevathan, but despite his authority, Trevathan did nothing to stop the conduct of Dingess as described above and, upon information and belief, laughed about and/or encouraged such conduct. Further, respondent

Trevathan also made inappropriate remarks and unwelcome sexual advances toward the petitioner during her employment with GameStop. (See Complaint at App. p. 13).

Petitioner's Complaint also states that throughout her employment with GameStop, respondent Dingess tampered with petitioner's timesheets and otherwise required petitioner to work without pay. In December 2009, petitioner was demoted from her position as assistant manager to the position of senior game advisor because of her gender and/or in retaliation for reporting the conduct of respondent Dingess to respondent Trevathan, resulting in the loss of wages and certain fringe benefits, including, but not limited to, health insurance and paid time off. (See Complaint at App. p. 13-14).

Finally, petitioner alleges that between December 2009 and April 2010 respondent Dingess decreased petitioner's weekly hours of employment and eventually stopped scheduling her to work. The above referenced conduct on the part of respondents Dingess and Trevathan continued until on or about April 19, 2010, when petitioner was discharged from her position as senior game advisor and was asked to return her keys to respondent Dingess. (See Complaint at App. p. 14).

As a result of the conduct of the Respondents, as described above, petitioner filed a Complaint against the respondents with the United State Equal Employment Opportunity Commission (hereinafter "EEOC") on December 10, 2010. After conducting some investigation of her Complaint, the EEOC issued a Notice of Right to Sue to petitioner on June 13, 2011. (See Complaint at App. p. 14).

On September 9, 2011, petitioner filed her Complaint with the Circuit Court of Logan County. In response, on January 5, 2011, each respondent filed a "Motion to Dismiss Pending Mandatory Arbitration." (See App. p. 23, p. 33 & p. 43). Petitioner filed her response on

February 13, 2011, respondents' replied on February 23, 2011. (See App. p. 53 & p. 56). On February 23, 2012, petitioner filed a supplemental response alerting the Circuit Court to the United States Supreme Court's ruling in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203, 563 U.S. (February 21, 2012). (See App. p. 95). On June 27, 2012, a hearing was held before the Honorable Roger L. Perry during which the Court ordered additional briefing on the arbitration issue in light of the West Virginia Supreme Court's ruling in *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217 (W. Va. June 13, 2012) (*Brown II*).

Following additional briefing, the Court issued its "Order Granting Respondents' Motion to Dismiss" on October 10, 2012. It is from this Order that petitioner appeals.

III. SUMMARY OF ARGUMENT

The sole issue before the Court is whether the Circuit Court erred by finding that the GameStop arbitration provisions constitute an enforceable contract. Petitioner argues that the arbitration agreement is not enforceable for a variety of reasons.

An arbitration agreement, by its very nature, is a contract. Most of the recent arbitration litigation has involved whether such a contract is enforceable or unconscionable and thus unenforceable. However, before that analysis can be undertaken, it must first be established that a contract exists. GameStop's arbitration agreement is contained within its own handbook which clearly states that it is not a contract. If the handbook and arbitration provisions contained therein are not a contract, then there is no need to determine if it is unconscionable. If the document containing the agreement is not a contract, petitioner cannot be held to its terms and conditions and the Circuit Court's ruling must be reversed.

Petitioner maintains that even if GameStop's arbitration agreement does constitute a contract, it is both substantively and procedurally unconscionable and thus, unenforceable. From a substantive standpoint, the arbitration agreement substantially shortens the petitioner's statute of limitations. Under the arbitration agreement, petitioner's claims, that were timely brought under West Virginia's statute of limitations, would be barred under GameStop's statute of limitations. In addition, GameStop reserves the right to unilaterally change its arbitration agreement, a provision that has regularly been upheld as substantively unconscionable.

Finally, the arbitration agreement is also procedurally unconscionable. At the time of entering the agreement, petitioner was unemployed and had only a high school education. Nonetheless, she was required to enter into a voluminous, complex agreement with the world's largest video game and entertainment software retailer in order to secure employment in Logan County. Not only was the petitioner in an incredibly unfair bargaining position, she was required to execute an agreement with unduly complex terms. The terms of the agreement are so complex, that GameStop's own attorneys claim not to have understood their meaning, changing their own interpretation of crucial terms midway through the underlying litigation.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in Rule 18(a) as all parties have not waived oral arguments and petitioner believes that the decisional process would be significantly aided by oral argument. In addition, as this case involves assignment of error in the application of settled law it should be set as a Rule 19 argument. Finally, the petitioner believes that this case is appropriate for a memorandum decision.

V. ARGUMENT

A. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." (Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). In addition, "[t]his 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." (Syllabus Point 4, *McGraw v. American Tobacco Company*, 224 W. Va. 211, 681 S.E.2d 96 (2009)).

B. The Circuit Court clearly erred in finding that the GameStop arbitration agreement is a contract when the plain language of the agreement states that it is not a contract.

The Supreme Court of Appeals of West Virginia has repeatedly held that arbitration agreements are to be treated no differently than any other contract. In fact, in Syllabus Point 7 of *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (hereinafter *Brown*) this Court held that:

The purpose of the Federal Arbitration Act, 9 U.S.C. § 2, 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.

Thus, in order to maintain an enforceable arbitration agreement there must first and foremost be an enforceable contract. Respondent GameStop clearly and unequivocally advised petitioner, in

the Handbook itself, that the GameStop Handbook is not a contract. In addition, the Circuit Court held that the arbitration agreement was part of the Handbook.

In its Order, the Circuit Court made the following findings of fact:

In connection with her employment, Petitioner received a comprehensive GameStop Store Associate Handbook which includes a detailed description of GameStop C.A.R.E.S. program. The Handbook includes a statement that it is “intended to answer most of your questions, explain our important policies and provide guidelines on our Company standards and expectations.” Handbook, pg. 1. The handbook also states that Petitioner’s employment was “at-will” and that “in deciding to work for the Company, you must understand and accept these terms of employment.” *Id.* pg.6. (See Order Granting Respondent’s Motion to Dismiss, Findings of Fact ¶ 4 at App. p. 2).

The Court also made the finding that the petitioner signed an acknowledgment stating that petitioner had “received a copy of the GameStop Store Associate Handbook, including the GameStop C.A.R.E.S. Rules for Dispute Resolution.” (See Order Granting Respondent’s Motion to Dismiss, Findings of Fact ¶ 6 at App. p. 3). Based upon the evidence and arguments made by GameStop the Circuit Court correctly found that the GameStop arbitration agreement was included in and was a part of the GameStop Handbook. The Circuit Court also correctly found that the GameStop Handbook contains a “disclaimer” that states the following;

The Company reserves the right to modify, suspend or eliminate any or all, or any part of, the policies, practices and benefits set forth in this Handbook, or in any other document, at any time, without prior notice, except for GameStop C.A.R.E.S. Rules for Dispute Resolution. **You do not have, nor does this Handbook constitute, an employment contract, express or implied.** Your employment is not confined to a fixed term and may be ended by either you or GameStop, Inc. at any time for any reason. All terms and conditions of employment are subject to change without notice, other than C.A.R.E.S Rules for Dispute

Resolution.¹ (See Order Granting Respondent's Motion to Dismiss, Findings of Fact ¶ 5 at App. p. 2) (**emphasis added**).

While the Circuit Court found that the “handbook as a whole does not constitute a contract of employment...” it also found that “[t]he ‘disclaimer’ as contained in the GameStop, Inc. Store Associate Handbook specifically excepts the GameStop C.A.R.E.S. program from its coverage.” (See Order Granting Respondent's Motion to Dismiss, Conclusions of Law ¶ 8 at App. p. 5-6). The disclaimer clearly states that the Handbook does not constitute a contract. The disclaimer goes on to notify the employee that GameStop is free to change the terms any time it wants, with the exception of the arbitration program. The exception is there because GameStop claims that it will provide 30 days notice before it will make changes to its arbitration program. The exception only relates to changes made to the Handbook, not that the arbitration agreement was being exempted from the disclaimer. The disclaimer does not state that the Handbook is not a contract of employment, except for the arbitration provisions. The Circuit Court's ruling ignores the plain language of the Handbook and violates years of case law regarding contract construction.

“West Virginia law is clear that it is not the right or province of the court to alter, pervert, or destroy the clear meaning and intent that the parties expressed in the unambiguous language of their written agreement.” *Long v. Long*, No. 11-0865 (W. Va. Supreme Court, June 8, 2012) (memorandum decision) citing *Hatfield v. Health Management Assoc. of W. Va., Inc.*, 223 W. Va. 259, 672 S.E.2d 395 (2008). When an alleged contract states on its face in unambiguous language that **“you do not have, nor does this Handbook constitute, an employment contract, express or implied”** a court does not have the right to “alter, pervert or destroy the

¹ While the disclaimer implies that the arbitration provisions cannot be changed, according to GameStop's Handbook, “GameStop may from time to time modify or discontinue GameStop C.A.R.E.S. by giving covered employees thirty (30) calendar days notice;...” (See *C.A.R.E.S. Program* at p. 3 at App. p. 209).

clear meaning.” GameStop cannot pick and choose which parts of the Handbook it wants to be construed as a contract and which parts it does not.

When a Handbook clearly states on its face that it is not a contract, this Court has had little problem upholding that the Handbook is not a contract. For GameStop to argue that the statement that “[y]ou do not have, nor does this Handbook constitute, an employment contract, express or implied” does not apply to the entire Handbook, at best, creates an ambiguity that must be interpreted in favor of the petitioner. “Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” Syllabus Point 3, *Lee v. Lee*, 228 W. Va. 483, 484, 721 S.E.2d 53 (W. Va. 2011) citing Syllabus Point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002).

As this Court stated in *Lee v. Lee*, 228 W. Va. 483, 487, 721 S.E.2d 53 (W. Va. 2011):

[I]n case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it.” *Henson v. Lamb*, 120 W. Va. 552, 558, 199 S.E. 459, 461-62 (1938). In other words, the ambiguous terms should be construed in such a manner as to effectuate the intention of the parties, but where the evidence pertaining to the parties' intent conflicts, the ambiguous terms should be construed against the party who drafted the document. See Syllabus Point 4, *National Mut. Ins. Co. v. McMahan & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), overruled on other grounds by *Potesta v. U.S. Fidelity & Guaranty Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998) (holding that ambiguous terms in insurance contracts are strictly construed against the insurance company and in favor of the insured); Syllabus Point 3, *West Virginia Dept. of Highways v. Farmer*, 159 W. Va. 823 226 S.E.2d 717 (1976) (holding that where an ambiguity exists in a deed, the language of such deed will be construed most strongly against the grantor).

Petitioner believes that the statement in the Handbook that it is not a contract is about as clear and concise as a Handbook can be. GameStop's arguments cannot change the fact that the Handbook clearly states that petitioner has no employment contract with GameStop. At best, GameStop is attempting to create an ambiguity, but any such ambiguity must still be interpreted against GameStop as the drafter of the Handbook. Either way, the Circuit Court erred in determining that parts of the Handbook constitute a contract and parts of the Handbook do not.

C. If GameStop's Handbook is determined to be a contract, then the Handbook is an Unconscionable Contract of Adhesion because it is both procedurally and substantively unconscionable.

When evaluating an arbitration agreement to determine if it is enforceable, the court must determine if the contract in question is a contract of adhesion and whether the contract is unconscionable. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. 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." Syllabus Point 6, *Brown II* citing Syllabus Point 18, *Brown I*. If the GameStop Handbook is a contract, it is certainly a contract of adhesion.

The GameStop Handbook was given to the petitioner to review at the beginning of her employment. (See Order Granting Respondent's Motion to Dismiss, Findings of Fact ¶ 4 at App. p. 2). The petitioner was then instructed to sign an acknowledgment that she had received the Handbook from GameStop. There was no opportunity or ability on the part of the petitioner

to negotiate the terms of the Handbook. She either signed the acknowledgment or quit her job. (See Order Granting Respondent's Motion to Dismiss, Conclusions of Law ¶ 9 at App. p. 6).

After determining that the Handbook is a contract of adhesion, the next step is for the court to determine if this contract of adhesion is unconscionable. "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 petitioner, and 'the existence of unfair terms in the contract.'" Syllabus Point 6, *Brown I* citing Syllabus Point 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W. Va. 613, 413 S.E.2d 670 (1991). The West Virginia Supreme Court has broken the determination of unconscionability into two components, procedural unconscionability and substantive unconscionability.

"A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syllabus Point 9, *Brown I* citing Syllabus Point 20, *Brown II*. As set forth below, the GameStop arbitration provisions are both procedurally and substantively unconscionable.

1. The Circuit Court erred by finding that the arbitration requirements were not substantively unconscionable pursuant to this Court's rulings in *Brown I* & *Brown II*.

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The

factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, 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." Syllabus Point 12, *Brown II* citing Syllabus Point 19, *Brown I*.

While the entire GameStop agreement is drafted for the protection of the employer, there are two specific substantive provisions that absolutely render the arbitration agreement unconscionable. First, if enforced, the GameStop arbitration agreement would bar the petitioner from pursuing her claims against GameStop in state court or even before an arbitrator. Petitioner's claims have all been timely pled pursuant to the applicable statute of limitations for claims under the West Virginia Human Rights Act and the West Virginia Wage Payment and Collection Act. However, if GameStop's arbitration agreement is upheld, petitioner will be forever barred from bringing these claims.

Prior to filing her Complaint with the Circuit Court, the petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC). (See Order Granting Respondent's Motion to Dismiss, Findings of Fact ¶ 7 at App. p. 3). According to GameStop's arbitration agreement, "if you have pursued a claim with the EEOC or an equivalent state agency, you must file your Notice of Intent to Arbitrate within 95 days after the date on the 'Notice of Right-to-Sue' letter.'" (See GameStop's Arbitration Agreement at p. 7, App. p. 213). The petitioner filed her complaint with the Circuit Court after the 95 day period referenced in the arbitration agreement but prior to the expiration of her statutorily guaranteed state statute of limitations. The Circuit Court found that "[c]ontrary to the terms of the GameStop C.A.R.E.S. Program, Petitioner failed to prosecute her claims within 90 days (as required by Title VII) or 95 days (as

required by the C.A.R.E.S. Program)....” (See Order Granting Respondent’s Motion to Dismiss, Findings of Fact ¶ 10 at App. p. 4).

The West Virginia Supreme Court has consistently held that a Right-to-Sue letter from the EEOC does not limit an individual’s two year statute of limitations under the Human Rights Act. “Since a person who chooses to file a discrimination complaint pursuant to the Act in circuit court has a two year period in which to file suit, it would be preposterous for this Court to rule that just because that individual initially filed a complaint with the EEOC, she no longer can avail herself of this two-year limitations period. Accordingly, we hold that the statute of limitations referred to in West Virginia Code § 5-11-13(b) is a 2-year period of limitations rather than a 180-day period.” *Wilfong v. Chenoweth Ford*, 192 W. Va. 207, 213, 451 S.E.2d 773, 779 (1994).

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party..." Syllabus Point 12, *Brown II*. It is difficult to imagine a more overly harsh effect than a complete and permanent bar of the petitioner’s claims. While this Court has recognized the recent trend to uphold arbitration agreements, this Court has clearly stated its unwillingness to do so if upholding the agreement strips a weaker party of rights provided to him or her by common law or statute. “This Court is conscious of the 'ancient judicial hostility to arbitration' that the FAA was intended to correct, and the courts of this State are not hostile to arbitration or to adhesion contracts. We are hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute." *Brown II* citing *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909, 913 (2011) (citing *Mastrobuono v. Shearson Lehman*

Hutton, Inc., 514 U.S. 52, 56 (1995)). If upheld, the GameStop arbitration agreement totally and absolutely strips the petitioner of her right to bring her statutory claims. Such a blatant limitation on petitioner's statutory rights renders the GameStop arbitration agreement substantively unconscionable and, therefore, unenforceable.

The second provision that renders the GameStop arbitration agreement substantively unconscionable deals with GameStop's ability to unilaterally change the terms and conditions of the arbitration agreement. Pursuant to GameStop's arbitration provisions, GameStop can make unilateral changes to the arbitration agreement by simply giving thirty (30) days notice. These changes include the ability to modify or discontinue the program in its entirety. "GameStop may from time to time modify or discontinue GameStop C.A.R.E.S. by giving covered employees thirty (30) calendar days notice; however, any such modification or rescission shall be applied prospectively only." (See GameStop Arbitration Agreement at p. 3, App. p. 209).

In *Brown I* and *Brown II* this Court did not have the opportunity to identify every element of an arbitration agreement that would cause it to be substantively unconscionable. However, while setting out the framework for circuit courts to follow, this Court did identify a few key elements that render arbitration agreements substantively unconscionable. One of these concepts is the concept of bilaterality. "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *Brown II* citing *Abramson v. Juniper Networks, Inc.*, 115 Cal.App.4th at 657, 9 Cal.Rptr.3d at 437. See also *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory"). Unlike GameStop, the petitioner in the case at bar has no right to modify or discontinue the arbitration agreement with or without notice.

The Circuit Court improperly ignored this clear precedent, setting forth its reasoning in paragraph 17 of its “Conclusions of Law.”

Petitioner argues that the contract is substantively unconscionable because GameStop has the ability to unilaterally change the contract. However, Petitioner’s argument fails because the Court finds the language is contrary to this allegation. GameStop, Inc. *cannot change the terms of the program without giving employees 30 days notice and that any change will only be prospective.* See *C.A.R.E.S. Program* at p. 3. (See Order Granting Respondent’s Motion to Dismiss, Conclusions of Law ¶ 17 at App. p. 8).

The fact that GameStop is required to provide 30 days notice does not mean that GameStop does not have the unilateral right to change the program. GameStop can unilaterally change the program after it provides 30 days notice. As pointed out by the 10th Circuit in *Dumais* and acknowledged by this Court in *Brown II*, GameStop’s unfettered right to alter the arbitration agreement in the case at bar creates an illusory contract.

In addition, as the Circuit Court notes, the GameStop arbitration program claims that any change is prospective. However, according to the arbitration program, the changes are only prospective to pending grievances. “An employee shall complete the processing of any dispute pending in GameStop C.A.R.E.S. at the time of an announced change, under the terms of the procedure as it existed when the dispute was initially submitted to GameStop C.A.R.E.S.” (See *C.A.R.E.S. Program* at p. 3 at App. p. 209). Thus, if a dispute arose before the “announced change,” but had not yet been submitted, then the dispute is subject to the unilateral changes made by the respondent GameStop. Thus, from a practical standpoint there is not a 30 day notice requirement on GameStop. Once GameStop “announces” a change, the change is applied to any dispute filed after that point, not thirty days from the announcement.

Regardless of the effect of the change or notice required, GameStop is still the only party permitted to make any changes to the arbitration “contract” and is able to do so without the agreement or approval of any other party alleged to be bound by the arbitration provisions. This Court has repeatedly and consistently held that such terms render an arbitration agreement unconscionable.

2. The Circuit Court erred by finding that the arbitration requirements were not procedurally unconscionable pursuant to this Court's rulings in *Brown I* & *Brown II*.

In *Brown I* and *Brown II* this Court explained in detail what constitutes procedural unconscionability:

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract. Syllabus Point 10, *Brown I* citing Syllabus Point 17, *Brown II*.

“Age, literacy, or lack of sophistication of a party”; the petitioner was 27 years old with a high school diploma and unemployed. (See Plaintiff’s Second Supplemental Response to Defendants’ Motion to Dismiss Pending Mandatory Arbitration at App. p. 7). The petitioner’s work history up to this point in her life consisted primarily of working at a local gas station with a couple other part time jobs.² The petitioner was given a copy of the GameStop Handbook and

² Petitioner is aware that these facts had been argued before the Circuit Court but that the parties have not yet engaged in discovery and that the respondents have not had an opportunity to depose the petitioner. In *Brown II* this

told to sign an acknowledgement that she had received the Handbook. (*Id.* at App.7-8). There was “no real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction.” The petitioner was aware of the fact that she was an “at-will” employee who had no contract of employment. She was never advised that she was entering into any contract simply by signing an acknowledgement that she had received a copy of GameStop’s Handbook.

This Court made it clear in *Brown I* and *Brown II* that these types of factors were fatal to the enforcement of an arbitration agreement. In fact, the court specifically referenced employment agreements when discussing these factors. “Considering factors such as these, courts are more likely to find unconscionability in consumer transactions and **employment agreements** than in contracts arising in purely commercial settings involving experienced parties.” *Brown II*, 729 S.E.2d 217, 227 (2012), citing *Brown I*, at 724 S.E.2d 250, 285 (**emphasis added**).

When it came to GameStop’s arbitration agreement there was no “bargaining process.” Petitioner was an unemployed 27 year old seeking employment with a multi-million dollar international corporation. She possessed no bargaining position whatsoever. Procedural unconscionability focuses on “... the relative positions of the parties, the adequacy of the bargaining position, [and] the meaningful alternatives available to the petitioner...” Syllabus Point 6, *Brown I* citing Syllabus Point 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W. Va. 613, 413 S.E.2d 670 (1991).

In addition, “unduly complex contract terms” contained in an arbitration agreement should be considered by a court when determining if the contract is procedurally unconscionable.

Court stated that in some circumstances parties may have to engage in discovery to establish the circumstances under which an alleged contract was entered into. At this point, the petitioner does not believe discovery is necessary as there is ample evidence, based upon the arbitration provisions alone, to hold them unenforceable.

In the case at bar, the Circuit Court concluded that petitioner “signed a contract that was void of any complex terms.” (See Order Granting Respondent’s Motion to Dismiss, Conclusions of Law ¶ 21 at App. p. 9). As stated above, the Circuit Court found that the petitioner did not comply with the terms of the GameStop arbitration program because she did not file her dispute within the 95 days set forth in the C.A.R.E.S. program. (See Order Granting Respondent’s Motion to Dismiss, Findings of Fact ¶ 10 at App. p. 4). For the first nine months of this litigation, respondents represented to the Circuit Court that because petitioner did not submit her dispute within the 95 days, her claims were barred. After nine months of maintaining this position, the respondents changed their interpretation of the arbitration program and argued that “A two year limitations period applies to all of the claims asserted in her complaint now pending before this court.” (See Respondents’ Second Supplemental Memorandum in Support of Their Motion to Dismiss Pending Mandatory Arbitration at pg. 9, at App. p. 120).

The respondents have admitted in pleadings filed with the Circuit Court that they too are confused by the language contained in the GameStop arbitration program and are uncertain as to how it should be interpreted. In its “Reply in Support of Respondent’s Motion to Dismiss” GameStop stated that “[i]t is undisputed that, contrary to the mandates of the Arbitration Agreement, Plaintiff failed to prosecute her claim as required under the GameStop C.A.R.E.S. program, and instead filed her Complaint with this court on or about December 2, 2011. **The time period within which she [petitioner] was required to file her claim has now expired.**” (See Respondent’s Reply in Support of Respondents’ Motion to Dismiss at pg.3, at App. p. 58) (**emphasis added**). GameStop further explained that “the terms of the GameStop C.A.R.E.S. program mandate that if the employee files a charge with the Equal Employment Opportunity Commission (permitted under GameStop C.A.R.E.S.), the employee must then file his or her

claim under the GameStop C.A.R.E.S. process within 95 days of action by EEOC. **Petitioner failed to do so, and her claims are therefore barred.**” (See Respondent’s Reply in Support of Respondents’ Motion to Dismiss at pg. 2, at App. p. 57) (**emphasis added**).

When petitioner pointed out to the Circuit Court that by barring the petitioner’s claims, the respondents themselves rendered the arbitration agreement unconscionable, the respondents responded by claiming that petitioner’s assertion that her claims were barred under the arbitration agreement “is *simply false*.” (See Respondents’ Second Supplemental Memorandum in Support of Their Motion to Dismiss Pending Mandatory Arbitration at pg. 8, at App. p119) (*emphasis in the original*). The respondents went on to argue that “[a] two year limitations period applies to all of the claims asserted in her complaint now pending before this court.” (Id. at pg.9, App. p. 120). After originally arguing that the arbitration agreement bars petitioner’s claims, the respondents then claimed that petitioner’s claims are not barred and that petitioner’s counsel made a “*simply false*” assertion to the court by arguing that they were. If the respondents are unable to consistently interpret their own arbitration agreement then they certainly cannot expect the petitioner to either.

In the middle of litigation, the respondents changed their position and began interpreting the arbitration agreement in the complete opposite direction. The respondents are certainly permitted to revisit the arbitration agreement and decide that they have been misinterpreting a key provision. However, they cannot do so and also claim that petitioner “signed a very simple and straightforward document.” (Id. at pg.5, App. p. 116). If the terms were not “unduly complex” then the respondents would not have needed nine months to properly interpret them. The petitioner, with her high school education, was certainly not given nine months to consider the arbitration agreement before she signed it. Procedural unconscionability is only one of the

two factors the court must consider when determining the unconscionability of an arbitration agreement. Nonetheless, it is a factor that clearly weighs in favor of the petitioner and heavily against the respondent.

IV. CONCLUSION

First, because there is no contract between the petitioner and GameStop, the Court need go no further in its analysis of the arbitration clause in the case at bar. Because there is no contract, there is no enforceable arbitration agreement. However, if this Court finds that a contract exists between the petitioner and GameStop, then the analysis turns to the unconscionability of the arbitration provisions.

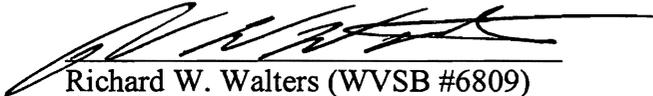
"A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syllabus Point 9, *Brown II* citing Syllabus Point 20 *Brown I*. As set forth above, the GameStop arbitration agreement is both procedurally and substantively unconscionable. While this Court has suggested using a "sliding scale" when deciding whether an arbitration agreement contains enough procedural or substantive unconscionability, such an approach is unnecessary in the case at bar as either prong alone would be sufficient to render the agreement unconscionable. Because the agreement is unconscionable, arbitration is unenforceable.

WHEREFORE, petitioner requests that this Honorable Court reverse the Circuit Court's Order granting defendants' Motion to Dismiss and remand this matter to the Circuit Court to proceed on its merits.

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CERTIFICATE OF SERVICE

I, Richard W. Walters, counsel for petitioner, hereby certify that I have this 11th of February, 2013, served a copy of the foregoing "**Petitioner's Brief**" upon counsel of record by hand delivery to the following:

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