

**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**

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**PETITIONER'S REPLY BRIEF**

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## **PETITIONER, CARA NEW'S, REPLY BRIEF**

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 reply to Respondents' brief filed on March 27, 2013.

### **I. ARGUMENT**

#### **A. The Petitioner did not enter into a contract, of any kind, with GameStop.**

As set forth in Petitioner's Brief, a binding arbitration agreement cannot exist unless the court first establishes that a contract existed. In making such a determination, this Court has held that the arbitration agreement in question is treated no differently than any other contract. Thus, when looking at an arbitration clause to determine if it rises to the level of an enforceable contract, the arbitration clause is not elevated or given any special treatment.

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. Syllabus Point 7, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (hereinafter *Brown I*).

The Petitioner's first assignment of error is simply that the Circuit Court erred by finding that the arbitration portion of GameStop's Handbook rose to the level of an enforceable contract, despite the fact that the Handbook itself claims not to be a contract. In their brief, the Respondents mischaracterize Ms. New's argument. GameStop claims that "Ms. New argues that the circuit court's order compelling arbitration must be reversed because, in the absence of an employment contract, the parties could not have validly agreed to arbitrate." (See Respondents'

brief at p.9). This has never been Ms. New's argument. Despite Respondents' attempt to characterize it otherwise, Ms. New's argument is not that complicated. Ms. New is simply arguing that there is no enforceable arbitration contract because the alleged contract clearly states that it is not a contract. The arbitration provisions, which the Respondents want this Court to declare constitute a contract, contains the following language: **You do not have, nor does this Handbook constitute, an employment contract, express or implied.** Ms. New's argument is simply that the Circuit Court erred by declaring the arbitration provisions contained in the GameStop C.A.R.E.S. program to be a contract when it clearly states on its face that it is not a contract.

In her initial brief, Ms. New explains that the arbitration clauses are included as part of GameStop's Handbook. GameStop goes out of its way to make it clear that the arbitration clauses are part of the Handbook, not a separate contract. The Handbook and arbitration provisions are not two separate documents. The Circuit Court made the finding that the acknowledgment signed by Ms. New states that she "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. In fact, the arbitration clauses are discussed in the same paragraph of the Handbook where GameStop declares that Ms. New has no contract. (See Order Granting Respondent's Motion to Dismiss, Findings of Fact ¶ 5 at App. p. 2).

Despite Respondents' argument, Ms. New understands that it is possible to have a binding arbitration agreement while being an at-will employee. One does not have to have an

employment contract to be subject to binding arbitration. Likewise, Ms. New understands that she would not be permitted to take a Handbook that clearly states on its face that it is not a contract and successfully argue that it is. Similarly, Respondents cannot take the arbitration portion of a Handbook that clearly states it is not a contract and claim that it is.

As argued in Petitioner's brief, for GameStop to argue that the language in the Handbook stating that "[y]ou do not have, nor does this Handbook constitute, an employment contract, express or implied" does not apply to the entire Handbook creates, at best, 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 (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). The Handbook in question is well over 50 pages long and was obviously drafted by GameStop. The Handbook unambiguously states that it is not a contract. The fact that the respondents are able to create an argument that this statement only applies to a portion of the Handbook does not create an ambiguity. If the Court were to accept the Respondents' argument that "the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken" then, at best, the Respondents have created an ambiguity. Any ambiguity is to be

interpreted against the drafter, especially in contracts of adhesion, thus leading the Court to the conclusion that there is no valid contract for arbitration.

**B. As a Contract of Adhesion, GameStop's Handbook is subject to greater scrutiny by the Court to determine its conscionability.**

As delineated in Petitioner's brief, if the GameStop Handbook is determined to be a contract, then it is a contract of adhesion. Nowhere in Respondents' brief do the Respondents argue that the Handbook is not a contract of adhesion. Instead, the Respondents argue that Ms. New's "suggestion (at 20-21) that any contract of adhesion is procedurally unconscionable is simply wrong." (See Respondent's Brief at p.16). The problem here is that Ms. New does not make this argument or even suggest it at 20-21 or anywhere else in her brief. What Ms. New does establish is that the Handbook, if determined to be a contract, is a contract of adhesion. This is important because this Court has held 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." Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217 (2012) (hereinafter *Brown II*) citing Syllabus Point 18, *Brown I*.

When looking to determine if an arbitration contract is unconscionable and thus unenforceable, the Court looks at both procedural 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*. Because we are dealing with a contract of adhesion the Court will scrutinize these issues more closely.

**1. The GameStop arbitration clauses are substantively unconscionable pursuant to this Court's rulings in *Brown I* & *Brown II*.**

As both parties have acknowledged, there are two specific portions of the GameStop Handbook that should be examined to determine if it is unconscionable: 1) the Handbook's limitation on the petitioner's statute of limitations and 2) the fact that the Handbook, including the arbitration clause, can be changed by GameStop.

In their reply, the Respondents argue that this Court does not have the authority to determine if the GameStop Handbook limits the petitioner's statute of limitations. According to the Respondents, statute of limitations "is not an issue this Court need, or can, decide." (See Respondents' Brief at p.21). The Respondents could not be further off base with this argument. Limitation of an individual's statutory rights is precisely the type of issue the circuit court needs to evaluate when determining if an arbitration agreement is unconscionable.

"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)).

In *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 559-60; 567 S.E.2d 265, 275-76

(2002), this Court made the following observation:

... in fidelity to the approach that we have long taken in this area, we recognize and hold that exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

This Court has consistently held that arbitration agreements that deny individuals of statutory rights are unconscionable and thus, unenforceable. It is patently absurd for Respondents to argue that this Court lacks the authority to look at GameStop's Handbook to determine if Ms. New's statutory rights are being denied by GameStop's arbitrary statute of limitations.

In addition, the Respondents state that they have clarified their position on what claims are barred by GameStop's Handbook. "In light of Ms. New's argument below that her state-law claims were barred, GameStop clarified that "[i]he only claim barred is a claim under federal law[.]" (See Respondents' Brief at fn. 3) (emphasis in the original). There are two problems with Respondent's "clarification." First, this is not a clarification, but rather a change in position.

When this litigation began, Respondents argued 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**). At the

time that the Respondents made this argument, Ms. New had only presented state law claims. State law claims that the Respondents argued were barred by the GameStop Handbook. Ms. New has a statutory right to bring her state law claims under the West Virginia Human Rights Act, within two years of when they accrued. As confirmed by the Respondents, GameStop's Handbook prevents Ms. New from exercising her statutory rights of bringing her state law claims and thus, the arbitration provisions are unconscionable and unenforceable.

The second problem with Respondents change in position is that it does not change what the Handbook actually states. The GameStop Handbook states that Ms. New's claims are time barred and the Circuit Court agreed. 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 Respondent can argue that they are now only barring Ms. New's federal claims, not her state claims; however, this Handbook currently applies to every employee in this state. GameStop will continue to interpret its own Handbook in whatever manner best protects its interests. If Ms. New had gone straight to arbitration, GameStop would certainly have argued that her claims were barred, like it did before the Circuit Court. If GameStop is permitted to change its interpretation now, the message the Court is sending is that GameStop can interpret its Handbook how it wishes and if or when it is challenged it can then change its interpretation to comply with state law. Under such a scenario, only employees who are willing to spend years challenging the unenforceable aspects of GameStop's Handbook will be permitted to bring all their statutory claims.

The second reason why the GameStop Handbook is substantively unconscionable is because of GameStop's ability to unilaterally change the program. The Respondents argue that GameStop does not have such a right because any changes require a 30 day notice. However, despite the claim of a 30 day notice period, the GameStop Handbook makes it clear that any dispute is governed by the procedures in place when the change is announced, not 30 days later. As explained in Ms. New's previous brief, the GameStop Handbook states that, "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 30 days from the announcement.

However, regardless of when the changes go into effect, the fact that GameStop can make significant changes and/or cease the program at will, makes it substantively unconscionable. First, the program is in place to force employees to go through arbitration and forgo the court system. GameStop argues that it too, is required to go through the arbitration process. However, in the rare event that GameStop actually wants to bring suit against one of its employees, it can simply dispense with the program, wait 30 days, and bring suit against the employee. The 30 day change provision is not mutual.

"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.

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 GameStop arbitration requirements are procedurally unconscionable pursuant to this Court's rulings in *Brown I* & *Brown II*.**

As set forth in Petitioner's previous brief, there are two significant reasons why the GameStop Handbook is procedurally unconscionable: 1) the relative position of the parties, including the adequacy of the bargaining position; and, 2) unduly complex contract terms.

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). At the time of her offer of employment from GameStop, Ms. New was an unemployed 27 year old high school graduate living in Logan County. GameStop is a multi-million dollar international corporation. Ms. New was given a 50 page Handbook and told to sign it if she wanted employment. There was no negotiation. The parties could not have been further apart

from the stand point of bargaining position and there were no meaningful alternatives available for Ms. New.

In addition, when the complex terms, as discussed in this brief and previous briefs, are added to the equation, the GameStop Handbook is clearly procedurally unconscionable. The Respondents have repeatedly referred to GameStop's Handbook as a "simple contract." If the Handbook was such a simple contract, then GameStop's own attorneys should not have so much difficulty interpreting it. Furthermore, if the GameStop Handbook were so "simple", it would not have taken countless briefs below and an appeal to this Court to establish what it means. As previously documented, the Respondents' attorneys have repeatedly changed their interpretation of the Handbook. First, they claimed that all of Ms. New's claims were barred<sup>1</sup> and then they claimed that none of her claims were barred.<sup>2</sup> Finally, at this level, they have claimed that only her federal claims are barred.<sup>3</sup> It is disingenuous for Respondents to argue that there are no complex terms in the Handbook when the company responsible for its drafting struggles to comprehend its terms.

## II. CONCLUSION

While this Court has certainly permitted arbitration contracts in employment settings, it has also stated its concerns with doing so. "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

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<sup>1</sup> **The time period within which she [petitioner] was required to file her claim has now expired.**" (See Respondents' Reply in Support of Respondents' Motion to Dismiss at pg.3, at App. p. 58) (**emphasis added**). **"Petitioner failed to do so, and her claims are therefore barred."** (See Respondents' Reply in Support of Respondents' Motion to Dismiss at pg. 2, at App. p. 57) (**emphasis added**).

<sup>2</sup> "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).

<sup>3</sup> "[t]he only claim barred is a claim under federal law[.]" (See Respondents' Brief at fn. 3) (**emphasis in the original**).

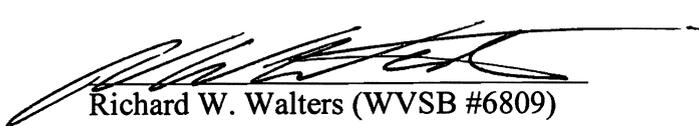
S.E.2d 217, 227 (2012), citing *Brown I*, at 724 S.E.2d 250, 285 (**emphasis added**). When two equal parties sit down and knowingly negotiate an employment contract and agree to arbitration the court should uphold such a contract.

However, when an at-will employee is given a handbook with no opportunity to negotiate its terms, the Court should be very suspect of any alleged arbitration agreement. When the handbook proceeds to claim that it is not a contract; then proceeds to limit the employee's claims; allows the employer to modify or cancel the arbitration agreement at its discretion; and, contains terms that are subject to multiple interpretations, this Court should not hesitate to deem it unconscionable and thus 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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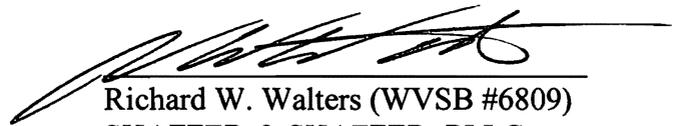
**CERTIFICATE OF SERVICE**

I, Richard W. Walters, counsel for petitioner, hereby certify that I have this 15<sup>th</sup> day of April, 2013, served a copy of the foregoing **“Petitioner’s Reply Brief”** upon counsel of record by depositing same in the United States Mail, postage prepaid, an envelope addressed as follows:

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