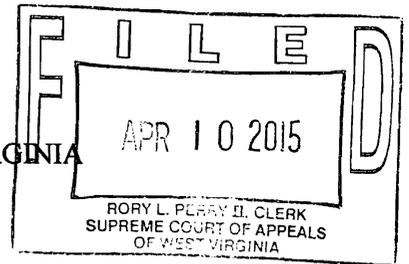


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET No. 14-1215

NAVIENT SOLUTIONS, INC.,  
FORMERLY KNOWN AS SALLIE MAE, INC.,  
DEFENDANT BELOW, PETITIONER

APPEAL FROM AN INTERLOCUTORY  
ORDER OF THE CIRCUIT COURT OF  
RALEIGH COUNTY (14-C-231(B))

v.)

JENNIFER ROBINETTE,  
PLAINTIFF BELOW, RESPONDENT

## Respondent's Brief

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SUPREME COURT OF APPEALS

NAVIENT SOLUTIONS, INC.,  
formerly known as Sallie Mae, Inc.,

DEFENDANT/PETITIONER

V.

APPEAL NO. 14-1215

JENNIFER ROBINETTE,

PLAINTIFF/RESPONDENT

**RESPONSE TO THE WRIT OF PROHIBITION**

This case and this proceeding arises out of Navient's business decisions regarding its student lending. Plaintiff filed the underlying case due to Navient's abusive and harassing debt collection activities. After the case was filed, Navient sought to invoke an alleged arbitration agreement, which Plaintiff had never seen, was not aware of, nor assented to previously. Navient asserts that its three page loan application, which alternates references between the 'contract' and the 'promissory note,' adequately refers to and incorporates by reference a specific document and/or terms.

References to a 'promissory note' do not provide an applicant with sufficient notice that terms waiving basic constitutional rights are included therein. The Circuit Court correctly determined that any agreement, including an arbitration agreement, requires mutual assent. The Circuit Court correctly applied common sense to find that the loan application was a separate document from the Promissory Note and that the arbitration provision was not adequately incorporated by reference into the loan application. This Court should uphold those findings.

**QUESTIONS PRESENTED**

Whether the Circuit Court was clearly erroneous when it ruled that two documents titled "Loan Application," which was numbered pages 1-3, and "Promissory Note," which was numbered pages 1-10, each with different purposes, and where the Plaintiff signed only the "Loan Application," and where the

“Loan Application” referred to the “Promissory Note,” are separate documents which have to be agreed to independently.

Whether the Circuit Court abused its discretion by finding that an arbitration clause creates separate and new obligations wholly apart from a “Promissory Note,” which solely governs the terms and repayment of a loan, and requires a clear and unmistakable reference to the arbitration terms and a manifestation of assent by both parties before a court will find an agreement to arbitrate.

### STATEMENT OF THE CASE

Plaintiff/Respondent Jennifer Robinette was subjected to severe debt collection harassment and abuse from Navient, including repeated calls to her home and work, demands that she take on a roommate, find a second job, or use other credit she had available to pay a debt to Navient. AR 4-8, 148-149.<sup>1</sup> Navient placed further calls to her mother, accusing her mother of ‘covering for’ her, and advising her mother that Ms. Robinette ‘was not taking care of her business.’ AR 4-8, 148-149. Navient further threatened Ms. Robinette that she needed to respond directly to Sallie Mae or ‘face the consequences.’ AR 4-8, 148-149. Navient’s only repayment option for Ms. Robinette was to allow her to make a \$900 monthly payment that would be applied only to interest and not reduce her principal balance. A.R. 5. Ms. Robinette spoke with Navient’s “customer advocate” whose only advice was to stop making payments in order to qualify for Navient’s assistance programs. A.R. 5. Seeking relief through alternative avenues, Ms. Robinette contacted the Consumer Financial Protection Bureau. A.R. 6. Navient refused to offer any relief in Ms. Robinette’s repayment in response to Ms. Robinette’s CFPB dispute. A.R. 6. Feeling overwhelmed, Ms. Robinette retained an attorney. After requesting that Navient contact her counsel, Navient did not relent in its constant debt collection. A.R. 6-7. After exhausting every alternative available to her, Ms. Robinette filed the underlying action on March 12, 2014. A.R. 3.

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<sup>1</sup>References to the Appendix Record are set forth as “A.R. \_\_\_\_.”

Upon filing her complaint, Ms. Robinette was alerted to the existence of an alleged arbitration agreement for the first time. AR 149-150. When she was in graduate school, Ms. Robinette recalls being solicited by Navient via email for student loans. AR 149. Ms. Robinette completed the loan application online, printed the final page of the three page application to sign, and submitted her signature. AR 149. Navient admits that Ms. Robinette signed only the loan application. Petitioner’s Brief, 1. Ms. Robinette does not recall any loan application where Navient alerted her to the existence of an arbitration agreement contained inside the separate promissory note. AR 149, 156. Nothing on the face of the “Loan Application” warns the borrowers that Navient is attempting to bind them to an arbitration clause. Arbitration is not mentioned at all in the “Loan Application.” See e.g. A.R. 34.<sup>2</sup>

Navient filed its Motion to Compel Arbitration on May 30, 2014. Ms. Robinette timely filed her response on July 21, 2014, attaching an affidavit, “Loan Application” signature page, and “Promissory Note.” A hearing was held on August 18, 2014, wherein the Court denied Navient’s motion in a ruling from the bench. A.R. 179. The Court signed a written order memorializing its ruling on October 16, 2014. A.R. 220.

### **SUMMARY OF ARGUMENT**

This Court has made it clear that a Circuit Court should not grant a motion to compel arbitration absent a finding that an agreement to arbitrate exists. For an arbitration agreement to exist, the party seeking to compel arbitration must prove a contract exists and in doing so show mutual assent to the arbitration clause. Parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

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<sup>2</sup>Although Ms. Robinette signed multiple loan applications, the applications were all similar and this brief refers to the application on page 34 as indicative of all applications she signed.

The parties do not dispute the fact that the Promissory Note produced by Navient at the outset of this litigation contains an arbitration clause. The issue is whether Ms. Robinette assented to be bound.

The Circuit Court correctly found that Navient's Loan Application and Promissory Note are two separate documents. Petitioner notes that the Loan Application refers to the separate "terms and conditions set for in the Promissory Note." A.R. 34, 48, 62, 76, 90, 103, 118, Petitioner's Brief, 5. The Circuit Court made the factual finding that:

"These are the loan application and, on the third page of the loan application, we have her signature, and on that page there is a reference to something else, which is notice to the borrowers in the center column, '(a) Do not sign this before you read the Promissory Note...' If the Promissory Note and this [Loan Application] were all one piece of paper, it wouldn't have been done that way. These are separate documents and the Promissory Note is something that she committed herself to by reference..." A.R. 213.

The Circuit Court's factual finding is not clearly erroneous and is clearly supported by the evidence submitted.

Navient's argument that the arbitration clause is sufficiently incorporated by reference is based on the sentence in the signed contract which states: "I have read and agree to the terms of the Promissory Note accompanying this application." Petitioner's Brief, 11. From this, Navient argues that the Promissory Note is incorporated by reference. However, incorporation by reference requires the contract actually signed informs the parties that material terms are being incorporated. With respect to borrowers who signed the loan applications, the Circuit Court correctly found that the loan application incorporated a "Promissory Note," but not an arbitration clause. Moreover, the language printed on the contracts that were physically signed is insufficient because it refers to the term 'Promissory Note' as having been provided to the applicant. The term "Promissory Note" does not clearly and unmistakably indicate a document that includes an arbitration clause.

Further, Navient's Loan Application also references a "Contract," stating "**CAUTION - IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.**"

A. R. 34 (emphasis in original). Navient's alternating reference between a "Promissory Note" and "Contract" are confusing, misleading, and unfair. Because the loan application alternately mentioned a Promissory Note and a contract and never mentioned arbitration, Navient cannot meet the "clear and unmistakable writing" requirement.

The Promissory Note itself also fails the "clear and unmistakable writing" requirement as the contractual language contained inside appears to be a frequently asked questions guide that is hardly a "clear and unmistakable writing" sufficient to allow a court to find assent to material terms contained inside. Nothing on the loan application, which is the only document signed by Ms. Robinette, alerts the borrower to the nature of the obligations contained on the separate document, which she does not recall receiving. Navient has failed to show that it incorporated an arbitration agreement by reference.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent does not believe that oral argument is necessary. The legal principles actually at issue in this case are not novel. The Circuit Court made detailed factual findings. A review of the record is all that is necessary to establish that the findings are not clearly erroneous and are sufficient to support the Court's decision in this case.

With respect to the decision, a simple order denying the rule to show cause or a brief memorandum decision is all that is necessary in this case.

#### **ARGUMENT**

##### **Standard of Review**

Generally, when reviewing a circuit court's decision, the Court must apply a three-part standard of review:

Challenges to the findings and conclusions of the circuit court require a two-prong deferential standard of review. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly

erroneous standard. Questions of law are subject to a de novo review. Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

*Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011).

Navient's assignment of error concerning the Circuit Court's finding of fact regarding whether the loan application and promissory note are separate documents must be reviewed under a clearly erroneous standard. Navient's assignment of error regarding the Circuit Court's final order denying arbitration must be reviewed under an abuse of discretion standard. *See Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011).

This case is not an appeal of a Motion to Dismiss, which would make it subject to a *de novo* review. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013) (finding "[w]hen an appeal from an order denying a motion dismiss is properly before this Court, our review is de novo.") In this matter, both parties submitted evidence beyond that contained in the pleading. "Only matters contained in the pleading can be considered on a motion to dismiss, and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment if there is no genuine issue as to any material fact in connection therewith." *See West Virginia Rules Civ.Proc.*, Rules 12(b), 56; *Poling v. Belington Bank, Inc.*, 529 S.E.2d 856, 207 W.Va. 145 (1999) (overruled only insofar as to allow a Court to review exhibits attached to a complaint without converting the review to a Rule 56 standard). Navient only requested that the Circuit Court action be stayed and not dismissed. A.R. 18. Because this is not an appeal of a motion to dismiss, this Court must apply the deferential standards of review granted to the Circuit Court's findings and conclusions.

**I. CIRCUIT COURT WAS NOT CLEARLY ERRONEOUS IN FINDING THAT 'LOAN APPLICATION' WAS A SEPARATE DOCUMENT FROM THE 'PROMISSORY NOTE.'**

Navient's first assignment of error contends that the Circuit Court was 'factually incorrect' in its findings. Petitioner's Brief, 8-9. As stated above, "the circuit court's underlying factual findings are

reviewed under a clearly erroneous standard.” Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). This Court has a limited basis to overturn a reasoned factual finding, holding “a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).” Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996); Syl. Pt. 2, *in part, Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

The Circuit Court correctly found that Navient’s Loan Application and Promissory Note are two separate documents. Petitioner notes that the Loan Application refers to the separate “terms and conditions set for in the Promissory Note.” A.R. 34, 48, 62, 76, 90, 103, 118, Petitioner’s Brief, 5. Navient erroneously argues that despite the new page numbering, the entirely new document headings, and the lack of any signatures, the new page 1 is “unquestionably part of the same document as the application.” Petitioner’s Brief, 9.

The Circuit Court made the factual finding that:

“...the loan application and, on the third page of the loan application, we have her signature, and on that page there is a reference to something else, which is notice to the borrowers in the center column, ‘(a) Do not sign this before you read the Promissory Note...’ If the Promissory Note and this [Loan Application] were all one piece of paper, it wouldn’t have been done that way. These are separate documents and the Promissory Note is something that she committed herself to by reference...” A.R. 213.

The Circuit Court further found: “there’s...ten pages of something, but those ten pages begin on Page 1, which is actually the fourth page of the exhibit. So the [pages] that precedes Page 1 is logically a different thing.” A.R. 212-213.

The Circuit Court’s findings are “plausible in light of the record viewed in its entirety.” Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).” Syl. Pt. 1, *State ex rel.*

*Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996); Syl. Pt. 2, *in part, Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Navient's strained interpretation of the Loan Application and Promissory Note is unsupported with any legal citations. This Court cannot conclude that the Circuit Court was clearly erroneous in finding that the Loan Application and Promissory Note were separate documents.

## **II. NAVIENT DID NOT ADEQUATELY INCORPORATE THE ARBITRATION PROVISION BY REFERENCE.**

Under the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), the authority of a trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. See Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). Courts use state law principles to evaluate the issues of whether an arbitration agreement was validly formed and whether the claims asserted fall within the scope of the arbitration agreement. See, e.g., *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909, 917-18 (2011). It is axiomatic that a proposal or offer must contain the material terms that are being proposed or offered. Obviously, a party cannot mutually assent to terms of which it is unaware or which are not communicated to the party. There is no presumption that an arbitration agreement was formed, and there is no policy in favor of enforcing arbitration until and unless a court finds that there is an agreement to arbitrate. See *Granite Rock v. International Broth. Of Teamsters*, 561 U.S. 287, 302 (2010) (explaining that the “presumption in favor of arbitration” only applies after “a judicial conclusion that arbitration of a particular dispute is what the parties intended”); *BCS Ins. Co. v. Wellmark, Inc.*, 410 F.3d 349, 352 (7<sup>th</sup> Cir. 2005) (explaining federal policy favoring arbitration only relevant if parties agreed to arbitrate).

Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586,

593 (2013). “Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.” Syl. pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) (“*Brown I*”), overruled on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam). Importantly, “[n]othing in the Federal Arbitration Act ... overrides normal rules of contract interpretation.” Syl. pt. 9, in part, *Brown I*, 228 W.Va. 646, 724 S.E.2d 250. Rather, the purpose of the Act “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.” Syl. pt. 7, in part, *id.*, Syl. Pt. 3, *State ex rel AMFM, LLC v. King*, 230 W.Va. 471 (W.Va. 2013).

This Court has emphasized:

Thus, to be valid, an arbitration agreement must conform to the rules governing contracts, generally. We long have held that “ [t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.’ Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926).” Syl. pt. 3, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012). Accordingly, to be valid, the subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; and (4) mutual assent. *Id.* Absent anyone of these elements, the Arbitration Agreement is invalid. Syl. Pt. 4, *State ex rel AMFM, LLC v. King*, 230 W.Va. 471 (W.Va. 2013).

In the matter of an arbitration clause incorporated by reference, the West Virginia Supreme Court held:

In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

Syl. Pt. 2, *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586, 589 (2013); see also *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, Slip Copy, 2013 WL 1150490 (4<sup>th</sup> Cir. (W.Va.) 2013) [(“Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.”) (citing, *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir.2003); 11 Williston on Contracts § 30:25 (4th ed.2011)(“As long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference . . .”)(emphasis added)]. See also, *Waldron v. Goddess*, 461 NE2d 273 (N.Y. 1984)(internal citations omitted)(“It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent “evidence which affirmatively establishes that that parties expressly agreed to arbitrate their disputes. . . . The agreement must be clear, explicit and unequivocal or subtlety. . . .”). Under these guidelines, Navient cannot show that Ms. Robinette agreed to be bound by reference to the material contractual provision of arbitration.

**1. Arbitration is a material term to any contract and requires a showing of specific assent.**

The Circuit Court did not abuse its discretion when it found that arbitration is a material term that requires a manifestation of a meeting of the minds:

“[the] promissory note had a section in it that went well beyond the scope of a promissory note. There was no warning to the Plaintiff..on page 3 of the application that the promissory note...included something other than a promissory note. And so the Court finds...that the Plaintiff was not warned of, was not advised of, and there was no meeting of the minds as to the inclusion of an arbitration agreement, which is a wholly separate animal in the text of the promissory note... A.R. 215-216.

Arbitration is a material term precisely because when a person is compelled to pursue her or his claims through arbitration rather than the civil justice system, they necessarily lose their right to have a trial of their claims to a jury. Losing the right to a jury trial is a serious event, easily enough to qualify as

“material.” The West Virginia Constitution, Article III, § 17 protects the right of the people to open access to the courts to seek justice, and states:

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

Further, Article III, § 13 of the West Virginia Constitution, which preserves the right of the people to a jury trial over any controversy, states:

In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons.

See also, Rule 38(a) of the Rules of Civil Procedure (“The right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate.”).

The West Virginia Supreme Court has recognized the importance of this right, stating, ‘[c]ourts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right.’” *Brown I* at p. 12 (citing Syllabus Point 2, *State ex rel. May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964)). See also, *Norfolk and Western R. Co. v. Sharp*, 183 W.Va. 283, 285, 395 S.E.2d 527, 527 (1990) (“[A]s with all basic constitutional rights, any waiver must be based on an informed and knowing decision.”)(emphasis added)). The *Brown I* Court went on to say,

We held in *Woodruff v. Board of Trustees of Cabell Huntington Hospital*, 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984), that Article III of the West Virginia Constitution contains ‘inherent rights, of which members of society may not by contract divest themselves,’ and that our Constitution is ‘more stringent in its limitation on waiver [of fundamental constitutional rights] than is the federal constitution.’ However, we have only found the freedoms of speech and press under Article III, § 7, and the rights to assemble, associate, and petition under Article III, § 16, to be such ‘inherent rights.’ The parties have not argued, and we do not decide, whether the rights to trial by jury under Article III, § 13 and to open access to the courts under Article III, § 17 are inherent rights that members of society may not by contract divest themselves.”

By agreeing to arbitrate, a party waives many of the procedural, substantive, and constitutional rights available to him or her under State law. An arbitration clause can be nothing other than ‘material.’ This conclusion is supported by the repeated insistence of various courts that arbitration not be imposed except where both of the parties assent. See e.g. *Barkley v. Pizza Hut of America, Inc.*, 2014 WL 3908197 (M.D. Fla. Aug 11, 2014) (refusing to compel arbitration for employees when employer could not produce the purportedly signed agreements); *Barrow v. Dartmouth Housing Nursing Home, Inc.*, 14 N.E.3d 318 (Mass. Ct. App. 2014) (refusing to compel arbitration when 97 year old woman’s son signed agreement, who was not a power of attorney, guardian, or conservator, and when arbitration was not required for admission to the nursing home); *Basulto v. Hialeah Automotive*, No. SC09-2358, 141 So.3d 1145 (Fla. 2014) (monolingual Spanish speakers were not bound to arbitrate provision provided entirely in English and where employees did not understand arbitration provision); *Bellemere v. Cable-Dahmer Chevrolet, Inc.* 423 S.W.3d 267 (Mo. Ct. App. 2013) (refusing to compel arbitration where the contract, by its terms, required a signature by a representative of a car dealership in order to bind either party, the lack of that signature meant that no contract was formed for lack of mutuality); *In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. C-12-md-2330 EMC, 2014 WL 1338474 (N.D. Cal. Mar. 28, 2014) (court rejected a non-party’s attempt to invoke arbitration on equitable estoppels grounds); *Jay Wolfe Used Cars of Blue Springs, LLC v. Jackson*, No. WD76644, 2014 WL 606335 (Mo. Ct. App. Mar. 25, 2014) (court refused to enforce arbitration agreement between Jay Wolfe, LLC and the plaintiffs because plaintiffs agreed to arbitration with the separate entity ‘Jay Wolfe Used Cars of Blue Springs’); *Kulig v. Midland Funding, LLC*, No. 13 Civ. 4715 (PKC), 2013 WL 6017444 (S.D.N.Y. Nov. 13, 2013) (third party debt collector failed to prove the existence of an arbitration agreement under either Delaware or New York law by presenting an exemplary cardmember agreement that was dated after the plaintiff ceased using her credit card and finding that plaintiff’s maintenance of a balance on her credit card after the date of the new

agreement did not constitute “use” and therefore assent to the arbitration provision contained therein); *Larkin v. New Century Auto Sales Inc.*, No. 12-13917, 2014 WL 29119, 2014 U.S. Dist. LEXIS 350 (E.D. Mich. Jan. 3, 2014) (arbitration clause did not comply with Michigan law and court held “that where there is no valid arbitration agreement, there can be no federal preference to compel its enforcement”); *Martin v. Wells Fargo*, No. C 12-06030 SI, 2013 WL 6236726 (N.D. Cal. Dec. 12, 2013) (court held that Wells Fargo had not met its burden of proving the existence of an arbitration agreement by only offering evidence that the plaintiff was amongst a list of consumers Wells Fargo had targeted to mail a billing insert that included an arbitration provision and because Wells Fargo’s reservation of the right to amend the “charges, fees, or other information” contained in the plaintiff’s 1987 disclosure statement did not include a right to add an arbitration provision); *Nguyen v. Barnes & Noble, Inc.*, No. 12-56628, 2014 WL 4056549 (9th Cir. August 18, 2014) (no constructive notice of the arbitration agreement despite a conspicuous hyperlink on every page of the website that was in close proximity to other relevant buttons a user must click on because the website did nothing to prompt the user to demonstrate assent to the terms and conditions); *Reimann v. Brachfeld*, No. RG10529702 (Cal. Sup. Ct. Aug. 2, 2013) (court declined to enforce an arbitration clause where a debt collection agency could not properly authenticate what it offered into evidence as a sample cardmember agreement); *Walton v. Johnson*, 66 A.3d 782 (Pa. Super. Ct. May 7, 2013) (court denied the hospital’s motion to compel arbitration because agreement signed by patient’s mother and held that there was no agency relationship between the patient and her mother at the time the mother signed the agreement).

In essence, Navient asks the Court to find that when it asks borrowers to agree to one thing, it actually means something else entirely. Borrowers agree to repay a student loan when signing a ‘Promissory Note.’ Arbitration is something else entirely. The loan application makes no mention of arbitration. This is not how contracts are formed in West Virginia. Material terms must be disclosed.

Both parties must manifest their agreement to these material terms. Otherwise, there is no meeting of the minds.

Because arbitration is a material term that is different from an agreement to repay a loan, Navient must show that Ms. Robinette specifically assented to be bound by arbitration. However, Navient does not require a signature, initials, or any manifestation that the borrower assents to the material terms, which are contained in a separate document. Although Ms. Robinette signed the loan application, she did not receive notice of material terms of the agreement that Navient now seeks to assert. Navient never mentions arbitration on any document Ms. Robinette signed. Because it did not obtain manifested assent to the material term, Navient cannot now enforce this material term.

**2. Navient did not make a clear and unmistakable reference to any arbitration provision.**

Here, the loan application references an attached promissory note. A.R. 34. However, such a brief mention of the other document simply is not a sufficient reference to the promissory note to fulfill the proper standard. See *U-Haul*, 752 S.E.2d at 598. The reference to the Promissory Note is quite general with no detail provided to ensure that borrowers were aware that an arbitration provision was included in the Promissory Note. See *Id.* Although Navient claims that the notice alerting borrowers of the promissory note is conspicuous, the reference to the note is buried in small typeface in a subparagraph in a middle column midway down the final page of a three page application. A.R. 34, 48, 62, 76, 90, 103, 118. Navient did not make the reference stand out in bold face or larger, legible fonts. *Id.* In fact, the only language that does contain bold, all caps typeface refers to "THE CONTRACT," which is never otherwise mentioned. *Id.* "THE CONTRACT" is not identified on the Loan Application and only creates uncertainty as to which document what the Loan Application refers. Navient's alternating referral to a "Promissory Note" and a "CONTRACT" show that the reference was not clear and unmistakable. See *U-Haul*.

Nothing on the loan application alerts borrowers to the nature of the obligations contained inside. The parties' assent to all material contractual terms must be unmistakable. Syl. Pt. 2, *U-Haul; Nguyen v. Barnes & Noble*, 763 F.3d 1171, 1177 (9<sup>th</sup> Cir. 2014) (court found hyperlinks at bottom of webpages where consumers not required to click insufficient to show assent, stating "consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound"). Furthermore, Navient is not entitled to the benefit of any doubt – borrowers are so entitled. See, *Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996) (holding that ambiguous contract provisions, especially those having the qualities of contracts of adhesion, are to be construed against the drafter). Navient did not make a reference to a "Promissory Note and Arbitration Agreement." Navient's alternate references to a "Promissory Note" and "CONTRACT" do not sufficiently indicate that an arbitration agreement will be contained therein. Ms. Robinette's signature merely constituted her assent to the terms of the loan repayment.

In the similar circumstance of a 'Clickwrap Agreement,' users must have "(i) had reasonable notice of the terms of a clickwrap agreement and (ii) manifested assent to the agreement." *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28-30 (2d Cir. 2002). Not only must a user receive reasonable notice of an agreement, but also the user must separately assent to those terms. In 'clickwrap' agreements, courts typically require a website to include an extra box that a user must check to show assent to any additional terms and conditions. *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 238 (E.D. Pa. 2007). This requirement protects users who may have no reason to suspect that they will be bound by terms hidden in hyperlink agreements. Navient similarly fails to show that borrowers manifested assent to the additional terms contained elsewhere. A borrower has only one signature line on the entire application. A.R. 34. Navient does not require a signature, initials, or any manifestation that the borrower assents to the additional material terms contained in a separate document when signing the loan application. Just as in 'clickwrap'

agreements, Navient must show specific assent to be bound by the separate terms. Navient cannot make this showing.

The “Promissory Note” itself is not a clear and unmistakable writing. The first pages appear to be a frequently asked questions flyer discussing eligibility and general outlines of the student loan program. See A.R. 35. There is no mention of arbitration until the ninth page of the document. See A.R. 44. Contractual language buried at the back of a ten page document that appears to be more of an instruction manual is hardly a clear and unmistakable writing sufficient to allow a court to find assent to material terms contained inside. To include an arbitration clause inside a ‘Promissory Note,’ much more must be said to notify the borrower of the import of the alleged agreement so that what the borrower is agreeing to does not result in surprise or hardship. Navient was not free to add material terms to this written and signed contract after the parties had already arrived at a meeting of the minds upon the agreement. A student loan agreement is the offer of money with the promise to repay with interest. Additional material terms require an additional showing of assent. Navient has none.

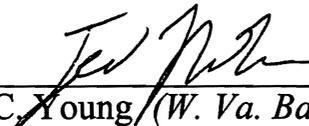
Importantly, Ms. Robinette never signed any document that contained the term ‘arbitration.’ Here, we have an ambiguous reference to an incorporated document that Ms. Robinette never saw with no clues to find her way to an unidentified arbitration provision. She cannot be deemed to have assented to arbitration by reference in this matter.

## **CONCLUSION**

The Circuit Court's rulings in this case are correct, and therefore, cannot be considered a clear error of law. This Court should therefore not issue a rule to show cause and deny the Petition.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NAVIENT SOLUTIONS, INC.,  
formerly known as Sallie Mae, Inc.,

DEFENDANT/PETITIONER

V.

APPEAL NO. 14-1215

JENNIFER ROBINETTE,

PLAINTIFF/RESPONDENT

**CERTIFICATE OF SERVICE**

I, **JED R. NOLAN**, counsel for the plaintiff/respondent, Jennifer Robinette, do hereby certify that a copy of the **RESPONDENT'S BRIEF** was served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

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the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 10<sup>th</sup> day of April, 2015.

  
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**JED R. NOLAN**