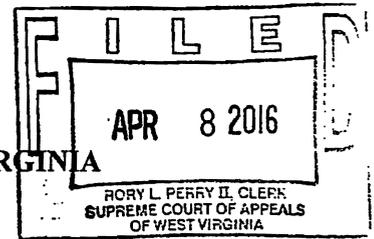


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441



SCHUMACHER HOMES OF  
CIRCLEVILLE, INC., a foreign  
corporation,

Defendant Below,  
Petitioner,

v.

JOHN SPENCER, AND  
CAROLYN SPENCER,

Plaintiffs Below,  
Respondents.

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**PETITIONER'S SUPPLEMENTAL BRIEF REGARDING  
THE EFFECT OF DIRECTV V. IMBURGIA ON THIS MATTER**

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**I. SUPPLEMENTAL STATEMENT OF THE CASE**

This appeal raises the question whether the parties are required to arbitrate their dispute under the terms of their Contract. On June 6, 2011, Respondents John Spencer and Carolyn Spencer (“Respondents”) signed a Contract with Schumacher Homes of Circleville, Inc. (“Schumacher”) for the construction of a home; the Contract contained the Arbitration Agreement at issue in this case. (A.R. 48.) A dispute arose between Respondents and Schumacher regarding the construction of the home. Despite the existence of the Arbitration Agreement in the Contract, Respondents filed a lawsuit against Schumacher in the Circuit Court of Mason County, West Virginia (“Circuit Court”) in July of 2013. On August 12, 2013, Schumacher filed with the Circuit Court a Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration (“Motion to Compel Arbitration”). The Circuit Court denied that Motion on March 6, 2014.

Schumacher timely appealed that decision to this Court. On April 24, 2015, this Court affirmed the decision of the Circuit Court. Schumacher filed a Petition for rehearing on May 26, 2015. This Court denied that petition.

Schumacher filed a Petition for Writ of Certiorari with the United States Supreme Court. On February 29, 2016, the United States Supreme Court summarily vacated this Court’s April 24, 2015 decision and remanded the case to this Court for further consideration in light of DIRECTV v. Imburgia, 577 U.S. \_\_\_\_, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015). On March 2, 2016, this Court issued an Order directing the parties to file supplemental briefs in this matter, and further instructing the parties that such supplemental briefs must solely and specifically address how the United States Supreme Court’s decision in DIRECTV v. Imburgia affects this Court’s resolution of the issues in this case.

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## II. ARGUMENT

### A. Introduction

The holding of the United States Supreme Court in DIRECTV is clear and is directly applicable in this case: The Court ruled that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”), forbids states from interpreting the provisions of an arbitration clause in a manner that departs from the words’ ordinary meaning to reach a result that disfavors arbitration. For the reasons discussed below, we respectfully submit that this Court’s prior decision in this case—now vacated—violated that principle when this Court concluded that the parties’ agreement to delegate to the arbitrator “all issues regarding the arbitrability of the[ir] dispute” was too ambiguous to be enforceable.

That is because “arbitrability” is the very term that the U.S. Supreme Court has repeatedly used to encompass “threshold questions concerning the arbitration agreement,” including “whether the parties have agreed to arbitrate.” Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); accord, e.g., BG Grp, PLC v. Republic of Argentina, \_\_\_\_\_, U.S. \_\_\_\_\_, 134 S. Ct. 1198, 1206, 188 L. Ed. 2d 220 (2014); Oxford Health Plans LLC v. Sutter, \_\_\_\_\_ U.S. \_\_\_\_\_, 133 S. Ct. 2064, 2068, n. 2, 186 L. Ed. 2d 113 (2013) (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) (plurality opinion)). This Court too has previously used the term “arbitrability” in the same way. See State ex rel. TD Ameritrade v. Kaufman, 225 W. Va. 250, 692 S.E. 2d 293 (2010). Numerous other courts are in accord, and the handful of authorities relied upon by this Court are contrary to U.S. Supreme Court precedent and therefore invalid; readily distinguishable; or both.

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This Court should follow the clear lesson of DIRECTV and the message sent by the United States Supreme Court's order in this case by enforcing the parties' clear and unmistakable delegation clause.

**B. Summary of DIRECTV v. Imburgia**

DIRECTV entered into a service agreement with its customers. That contract contained an arbitration provision that included a class arbitration waiver. The arbitration provision also stated that, if the "law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision is unenforceable.

In 2008, two customers of DIRECTV brought a lawsuit against DIRECTV in a California state court, seeking damages for early termination fees that they alleged violated California law. DIRECTV asked the California state trial court to send the matter to arbitration. The California state trial court denied that request. DIRECTV appealed that decision to a California Court of Appeal. The California Court of Appeal affirmed the trial court's decision.

In declining to enforce the arbitration provision, the California Court of Appeal reasoned as follows: In 2005, the California Supreme Court held in Discover Bank v. Superior Court, 36 Cal. 4<sup>th</sup> 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100, 1110 (2005), that class arbitration waivers are unconscionable under California law. It was undisputed that the Discover Bank rule had been rendered invalid by the United States Supreme Court's decision in AT&T Mobility v. Concepcion, 563 U.S. 333, 352, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) pursuant to the FAA. But this change in the law did not, in the eyes of the California Court of Appeal, change the fact that the Discover Bank rule remained the "law of your state" governing the named plaintiffs in question. The California court went on to reason that, by choosing the "law of your state" (i.e., California law), the parties chose to apply the Discover Bank rule to their agreement without

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regard to superseding federal law, which in that case was the United States Supreme Court's decision in Concepcion holding that the Discover Bank rule is preempted by the FAA. Finally, the California Court of Appeal declared that the phrase "law of your state" was ambiguous, so it interpreted that ambiguity against the drafter of the contract, which was DIRECTV.

The United States Supreme Court reversed the California Court of Appeal. The United States Supreme Court began its discussion by underscoring that the Supremacy Clause of the United States Constitution (Article VI, Clause 2) obligates every state court in the United States to recognize the authority of federal statutes (including the FAA) and the decisions of the United States Supreme Court in its interpretation of such statutes:

The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.

DIRECTV, 136 S. Ct. at 468.

The DIRECTV Court acknowledged that the interpretation of a contract is ordinarily a matter of state law. But it concluded that if the California court had correctly interpreted California law, then that law is not generally applicable to all contracts and therefore is preempted by the FAA.

Specifically, the United States Supreme Court asked: Did the decision of the California court place arbitration contracts on equal footing with all other contracts, as required by the FAA (e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006))? Did the California court's refusal to enforce the arbitration agreement rest upon grounds as exist at law or in equity for the revocation of any contract, as required by Section 2 of the FAA? The answers to those questions, the United States Supreme Court held, were clearly "no."

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The United States Supreme Court rejected the California court's conclusion that the phrase "law of your state" was ambiguous. In the view of the California Court of Appeal, that phrase could refer to either valid or invalid state law (i.e., state laws that had been rendered invalid by federal law, such as the FAA, as interpreted by the United States Supreme Court). The United States Supreme Court disagreed. It felt that the phrase, taken at its normal meaning, can only refer to valid state laws:

[W]e do not believe that the relevant contract language is ambiguous. . . . Absent any indication in the contract that this language is meant to refer to *invalid* state law, it presumably takes its ordinary meaning: *valid* state law. Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid.

DIRECTV, 136 S. Ct. at 469.

The United States Supreme Court further held that California courts would not rule that "law of your state" included invalid state law in any context other than arbitration; in other words, in no other context would a California state court take the phrase "law of your state" to refer to state laws that had been rendered invalid by federal law:

Assuming—as we must—that the court's reasoning is a correct statement as to the meaning of "law of your state" in this arbitration provision, we can find nothing in that opinion (nor in any other California case) suggesting that California would generally interpret words such as "law of your state" to include state laws held invalid because they conflict with, say, federal labor statutes, federal pension statutes, federal antidiscrimination laws, the Equal Protection Clause, or the like. Even given our assumption that the Court of Appeal's conclusion is correct, its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts using similar language but involving state statutes invalidated by other federal law.

DIRECTV, 136 S. Ct. at 469-470.

The United States Supreme Court further held that there are limits to the concept of interpreting ambiguous contract language against the drafter, and its use by the California court improperly disfavored arbitration agreements in violation of the FAA:

[T]he reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was. The fact that we can find no similar case interpreting the words “law of your state” to include invalid state laws indicates, at the least, that the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.

DIRECTV, 136 S. Ct. at 470-471.

The United States Supreme Court ultimately found that the California court’s refusal to enforce the arbitration agreement contained in DIRECTV’s service contract amounted to a failure to place arbitration agreements on equal footing with all other contracts and a failure to give due regard to the federal policy favoring arbitration. The United States Supreme Court therefore found that the California court’s interpretation of the agreement is pre-empted by the FAA, explaining:

[T]he Federal Arbitration Act pre-empts decisions that take their “meaning precisely from the fact that a contract to arbitrate is at issue”[.]

Id. (citing Perry v. Thomas, 482 U.S. 483, 493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)).

**C. Questions to be asked in this matter in light of DIRECTV v. Imburgia**

This Court has been directed by the United States Supreme Court to reconsider this case in light of the DIRECTV case. That order means that, in the United States Supreme Court’s view, there is “enough similarity between [this case] and [*DIRECTV*] to indicate, as a prima facie matter, that [this Court’s initial] judgment ... is in error.” Arthur D. Hellman, *The Supreme Court’s Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held*

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for *Plenary Decisions*, 11 Hastings Const. L.Q. 5, 10 (1984). DIRECTV raises several critical questions for this Court:

1. **Did the decision of this Court properly respect the Supremacy Clause of the United States Constitution?**

The United States Supreme Court summarily vacated this Court's April 24, 2015 decision and remanded the case to this Court for further consideration in light of DIRECTV v. Imburgia, *supra*. The sole purpose of the instant supplemental brief, by order of this Court, is to address how the United States Supreme Court's decision in DIRECTV v. Imburgia affects this Court's resolution of the issues in this case. In truth, this is the most important point to be made in this brief. By summarily vacating this Court's decision, and referring this Court to the DIRECTV case, the United States Supreme Court sent this Court a message of concern regarding this Court's adherence to the Supremacy Clause of the United States Constitution.

In DIRECTV, the first substantive discussion (after a recitation of the procedural facts) is a reminder to state courts regarding the Supremacy Clause of the United States Constitution:

No one denies that lower courts must follow this Court's holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U.S. 356, 371, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); cf. *Khan v. State Oil Co.*, 93 F. 3d 1358, 1363-1364 (C.A. 7 1996), vacated, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

DIRECTV, 136 S. Ct. at 468.

Just as the U.S. Supreme Court pointed out in DIRECTV in underscoring that Concepcion is the law of the land, Rent-A-Center West, Inc. v. Jackson, *supra*, also remains the

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law of the land, and “[c]onsequently, the judges of every State must follow it” (DIRECTV, 136 S. Ct. at 468).

Rent-A-Center requires a court-based challenge to a delegation provision to be made explicitly and separately from any challenges to any other part of the contract or the rest of the arbitration agreement. The Spencers failed to make such a challenge. Rent-A-Center clearly states that, because the Spencers failed to explicitly and separately challenge the validity of the delegation provision, the arbitrator must decide the validity of the arbitration agreement. Under Rent-A-Center, the question is straightforward: whether the Spencers have mounted the proper challenges to the delegation provision in order to challenge the enforceability of their arbitration agreements in Circuit Court. They have not. Rent-A-Center is clear, and the Supremacy Clause is clear. The courts involved in this matter, including this Court, are obligated under federal law to enforce the delegation provision contained in the contract between the Spencers and Schumacher.

The most efficient way for this Court to both follow the direction of the United States Supreme Court and resolve this case fairly is to shift this Court’s focus to a procedural means of resolving the case, thus avoiding any potential confrontation with United States Supreme Court authority. Under Rent-A-Center, the Spencers have failed to properly challenge the delegation provision. According to this Court’s own rules (Rule 10(d) of the Rules of Appellate Procedure), the Spencers have failed to properly address nearly all of the assignments of error originally presented by Schumacher. This Court has every procedural reason to simply reverse the trial court and order that this case proceed to arbitration. Such a path forward would comply with existing federal law, enforce West Virginia procedural law, and properly respect the Supremacy

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Clause of the United States Constitution. Schumacher asks this Court to follow this path forward.

2. **Is the agreement in this case to delegate all issues of “arbitrability” ambiguous?**

In DIRECTV, the California Court of Appeal found that the phrase “law of your state” was ambiguous. The United States Supreme Court disagreed. Instead, the Court concluded that the California Court of Appeal’s holding that the phrase “law of your state” is ambiguous was contrary to California’s ““general contract principles,”” under which contractual “references to California law incorporate the California Legislature’s power to change the law retroactively.” DIRECTV, 136 S. Ct. at 469.

That analysis applies with equal force here. The United States Supreme Court summarily vacated this Court’s order in this matter, and ordered this Court to consider this case in light of DIRECTV. The import of the U.S. Supreme Court’s order is to require this Court to more thoroughly examine the basis for its conclusion that the word “arbitrability” is ambiguous when used in an arbitration agreement. Below, we will look at two categories of authorities: First, authorities that directly and thoroughly address the question of whether the word “arbitrability” is ambiguous when used in an arbitration agreement; and second, the authorities that this Court relied upon as support for its decision that the word “arbitrability” is ambiguous when used in an arbitration agreement. A comparison of the two clearly shows that the word “arbitrability” is not ambiguous at all when used in an arbitration agreement.

a. **The overwhelming weight of authority confirms that the word “arbitrability” is clear and unambiguous**

There are three categories of authorities that directly and thoroughly demonstrate that the word “arbitrability” is not ambiguous when used in an arbitration agreement:

- The use of the word by the United States Supreme Court and other federal courts
- The treatment of the word by courts when it is actually used in arbitration agreements
- This own Court's use of the word in a prior decision

**i. The use of the word by the United States Supreme Court and other federal courts**

In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed 2d 985 (1995), the United States Supreme Court held that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” On the very next page of the First Options opinion, the United States Supreme Court succinctly defined this question as “who should decide arbitrability.” 514 U.S. at 945. A page earlier in the same opinion, the United States Supreme Court states: “[T]he question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?” Id. at 943. Indeed, the term “arbitrability” is littered all over pages 942-947 of the First Options opinion.

In Rent-A-Center West, Inc. v. Jackson, supra, the United States Supreme Court stated: “We have recognized that parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” 561 U.S. at 68-69 (emphasis added). In footnote 2 of Oxford Health Plans LLC v. Sutter, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013), Justice Kagan, writing for a unanimous court, stated that the phrase “questions of arbitrability” clearly refers to gateway matters, including the validity and scope of an arbitration provision. There is no ambiguity in the use of the word “arbitrability” as far as the United States Supreme Court is concerned.

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The Supreme Court's view of the meaning of the term "arbitrability" is widely accepted. See CPR-Cell Phone Repair Franchise Sys. v. Nayrami, 896 F. Supp. 2d 1233, 1236 (N.D. Ga. 2012) ("an arbitration provision could properly reserve the determination of arbitrability to the arbitrator"); W.L. Doggett LLC v. Paychex, Inc., 92 F. Supp. 3d 593, 597 (S. D. Tex. 2015) ("whether the parties clearly and unmistakably intended to delegate the power to decide arbitrability to an arbitrator"); Brennan v. Opus Bank, No. 2-13-CV-00094-RSM, 2013 WL 2445430, at \*4 (W.D. Wash. June 5, 2013), *aff.*, 796 F. 3d 1125 (9<sup>th</sup> Cir. 2015) ("clear and unmistakable agreement to delegate the question of arbitrability to the arbitrator"); Houston Refining, L.P. v. United Steel. Paper and Forestry, Rubber Mfg., 765 F.3d 396, 408 (5th Cir. 2014) ("agreement to arbitrate arbitrability").

In fact the Fifth Circuit's decision in Houston Refining actually holds up the term "arbitrability" as the gold standard, the word against which the language of other delegation provisions is measured: "To be sure, an arbitration agreement need not recite verbatim that the 'parties agree to arbitrate arbitrability' in order to manifest 'clear and unmistakable' agreement." Id. at 410, n.28. The court's clear suggestion, of course, is that an arbitration clause that states that the "parties agree to arbitrate arbitrability" is the paradigm of a clear and unmistakable agreement to do so.

In short, these cases show that the word "arbitrability" is not ambiguous. Rather, it is the word that the United States Supreme Court and all other courts cited above find to be the clearest way to express the concept in question.

**ii. The treatment of the word by courts when it is actually used in arbitration agreements**

As will be shown below, none of the four authorities cited by this Court when it found the word "arbitrability" to be ambiguous actually addresses whether the word "arbitrability" is

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ambiguous when used in the context of a delegation provision. In contrast, the word “arbitrability” was specifically used in the delegation provisions at issue in CPR-Cell Phone Repair Franchise Systems v. Nayrami, *supra*, Ellis v. JF Enterprises, LLC, No. SC 95066, 2016 WL 143281 at \*2 (Sup. Ct. Mo. January 12, 2016), and Gozzi v. W. Culinary Institute, Ltd., 276 Or. App. 1, 7, 366 P.3d 743, 747 (Or. Ct. App. 2016). The delegation provisions in all three cases were upheld as valid, and arbitration was compelled. Likewise, the word “arbitrable” was part of a valid delegation clause in Sadler v. Green Tree Servicing, LLC, 466 F.3d 623, 624 (8th Cir. 2006), and the word “arbitrability” was part of a valid delegation clause in Muigai v. IMC Construction, Inc., No. PJM 10-1119, 2011 WL 1743287, at \*4 (D. Md. May 6, 2011).

The arbitration agreement in Williams v. Omainsky, 2015 WL 8056142 (S.D. Ala. Dec. 3, 2015) contains a delegation provision which uses the word arbitrability. The court found it to be a clear and unmistakable delegation of disputes to the arbitrator. The arbitration agreement in Loewen v. Lyft, \_\_\_\_ F. Supp. 3d \_\_\_\_, 2015 WL 5440729 (N.D. Ca. September 15, 2015) contains a delegation provision which uses the word arbitrability. The court found it to be a clear and unmistakable delegation of disputes to the arbitrator. The arbitration agreement in Allied Professionals Ins. Co. v. Fitzpatrick, 169 So. 3d 138 (4<sup>th</sup> Dist. Fla 2015) contains a delegation provision which uses the word arbitrability. The court found it to be a clear and unmistakable delegation of disputes to the arbitrator.

The above cases show that the use of the word “arbitrability” in the context of an arbitration agreement does not render the agreement ambiguous. Quite the opposite is true; because the United States Supreme Court has repeatedly made use of “arbitrability” to refer to gateway issues regarding the enforceability of an arbitration agreement, it is clear and unmistakable what the word means when used in the context of an arbitration agreement.

**iii. This own Court's use of the word in a prior decision**

In State ex rel. TD Ameritrade v. Kaufman, supra, this Court had begun a discussion of AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed 2d 648 (1986) when it stated the following about that decision from the United States Supreme Court:

Discussing the general rule that courts are to decide the threshold issue of arbitrability (i.e., whether there is an enforceable agreement to arbitrate), the United States Supreme Court recognized the limited nature of that initial determination[.]

TD Ameritrade, 225 W. Va. at 253, 692 S.E. 2d at 296.

This Court, just like the courts that issued the decisions cited above, has adopted the terminology used by the United States Supreme Court to refer to gateway issues affecting disputes over arbitration agreements.

**b. The sources relied upon by this Court are not to the contrary**

This Court relied on four sources when it decided that the word "arbitrability" is ambiguous when used in an arbitration agreement:

- Bruni v. Didion, 73 Cal. Rptr. 3d 395, 160 Cal. App. 4<sup>th</sup> 1272 (2008)
- GGIS Insurance Services, Inc. v. Lincoln General Insurance Company, 773 F. Supp. 2d 490 (M. D. Pa. 2011)
- Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)
- A treatise by Douglas H. Yarn and Gregory Todd Jones, *Georgia Alternative Dispute Resolution*, § 9:11 (2014)

As will be shown below, these sources do not adequately address the question of whether the word "arbitrability" is ambiguous when used in an arbitration agreement.

i. **Bruni v. Didion**

This Court relied on a quote from dicta in Bruni v. Didion, 73 Cal. Rptr. 3d 395, 160 Cal. App. 4<sup>th</sup> 1272 (2008) as support for the notion that the word “arbitrability” is ambiguous when used in an arbitration agreement. The quote: “Regrettably, ‘arbitrability’ is an ambiguous term that can encompass multiple distinct concepts.” Bruni, 73 Cal. Rptr. 3d at 407, 160 Cal. App. 4<sup>th</sup> at 1286. However, that sentence was pure dicta because the arbitration agreement in that case did not use the word at all. Moreover, the California Court of Appeal in fact recognized that the term “arbitrability” encompasses the issue of “whether the arbitration clause is valid, binding, and enforceable.” Id. at 408, 160 Cal. App. 4<sup>th</sup> at 1287. And the court further recognized that if, as here, a party “is not denying that it agreed to the arbitration clause, but instead it is claiming some other defense to enforcement . . . then the court must enforce the ‘arbitrability’ portion of the arbitration clause by compelling the parties to submit that defense to arbitration.” Id. As such, the Bruni decision has very little to offer this Court in terms of addressing the question of whether the word “arbitrability” is ambiguous when used in an arbitration agreement.

ii. **GGIS Insurance Services, Inc. v. Lincoln General Insurance Company**

This Court relied on a quote from dicta in GGIS Insurance Services, Inc. v. Lincoln General Insurance Company, 773 F. Supp. 2d 490 (M.D. Pa. 2011) as support for the notion that the word “arbitrability” is ambiguous when used in an arbitration agreement. The quote: “The term ‘arbitrability’ is, by [ ] itself, ambiguous.” GGIS at 504. The quote is better understood when viewed in context. At that point in the opinion, the Court was drawing a distinction between the “what” of arbitration agreements (i.e., whether an issue is subject to arbitration) versus the “who” of arbitration agreements (i.e., whether a court or an arbitrator decides the issue). The Court found that the word “arbitrability,” standing completely alone, could refer to

either of those concepts. However, later in the decision, the Court looked at the word “arbitrability” in the context of that particular arbitration agreement and found that it was not ambiguous at all:

[T]he only possible meaning for the phrase “including any question as to its arbitrability” is to define not the *what* but the *who* of arbitrability.

GGIS at 506.

The Court in GGIS thus ultimately upheld the delegation of “arbitrability” issues to the arbitrator, enforcing a delegation provision assigning to the arbitrators “any question as to [the] arbitrability” of “the entire matter in dispute”—language that is substantially similar to the delegation provision in this case. Id. at 505.

iii. **Howsam v. Dean Witter Reynolds, Inc.**

This Court cited Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) in support of its finding that the word “arbitrability” is ambiguous. This Court described the United States Supreme Court’s decision in Howsam by saying that the decision “grappled with the vagueness of the word ‘arbitrability.’” Schumacher Homes of Circleville v. Spencer, 235 W. Va. 335, 346, 774 S. E. 2d 1, 12 (2015). However, very much like the portions of the Bruni and GGIS cases noted above, the section of the Howsam opinion cited by this Court is dicta that does not address the question of whether the word “arbitrability” is ambiguous when used in an arbitration agreement.

Moreover, Howsam clearly supports the enforceability of the delegation provision in this case. In Howsam, the United States Supreme Court stated that, from a linguistics standpoint, the word “arbitrability” could theoretically apply to any number of issues. However, according to Howsam, that word has been given a particular meaning by the decisions of the United States Supreme Court, most notably First Options of Chicago, Inc. v. Kaplan, supra. Specifically, the

opinion in Howsam made clear that questions of arbitrability include both “a gateway dispute about whether the parties are bound by a given arbitration clause” and “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” Howsam, 537 U.S. at 84. This Court’s holding that the term “arbitrability” has only the second meaning, but not the first, was thus contrary to Howsam.

**iv. Georgia Alternative Dispute Resolution**

This Court also cited a treatise on how alternative dispute resolution mechanisms work in the State of Georgia. According to Douglas H. Yarn, Gregory Todd Jones, *Georgia Alternative Dispute Resolution*, § 9:11 (2014), “arbitrability” is an ambiguous term. However, as with the other sources cited by this Court, this quote is better understood when viewed in context. The true import of the applicable section of *Georgia Alternative Dispute Resolution* is not that the word “arbitrability” is ambiguous; it is that the term has a specific meaning, according to United States Supreme Court decisions:

In the absence of a clear agreement to the contrary, gateway issues that parties more likely would have expected a court to decide are “questions of arbitrability.” Presumptively, these include whether parties are bound by a given arbitration agreement and whether the parties agreed to submit a particular dispute to arbitration on the merits. But if the parties have clearly agreed that an arbitrator decide such questions of arbitrability, then the arbitrator has jurisdiction to decide them.

*Georgia Alternative Dispute Resolution*, § 9:11 (emphases added).

Yarn and Jones do not describe the word “arbitrability” as ambiguous in order to declare that its use in an arbitration provision should render it unenforceable; they do so in order to help the reader understand that, rather than being an intuitively clear word, it is instead a term of art, defined by case law. As the above quote shows, *Georgia Alternative Dispute Resolution*

recognizes that the parties to a contract can agree to have the arbitrator decide questions of arbitrability, if the parties clearly agree to do so.

\* \* \* \* \*

As shown by the above authorities, the word “arbitrability” is not ambiguous when used in an arbitration agreement. When this Court originally found the word to be ambiguous, it relied on sources that do not deal directly with the issue, and when examined more carefully, fail to support the proposition that the word “arbitrability” is ambiguous when used in an arbitration agreement. Upon reconsideration, this Court should decide not to adhere to its prior view in this case, find that the word is not ambiguous, and enforce the delegation provision contained in the arbitration provision at issue in this matter.

**3. Would this Court go to such lengths to rule a specific way in any context other than in a dispute over the enforcement of an arbitration agreement?**

In what other context would this Court do all of the following in regard to a single case:

- Choose to not enforce Rule 10(d) of the West Virginia Rules of Appellate Procedure, which states: “If the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” Under Rule 10(d), the Spencers (who have consistently been represented by competent legal counsel) conceded nearly all of the assignments of error stated in this appeal, including the assignment of error dealing with the delegation provision.
- Choose to not enforce this Court’s December 10, 2012 Administrative Order which states that, after the initial two year period of acclimating to the Revised Rules of Appellate Procedure, all litigants must strictly comply with the Rules. This Administrative Order contained a specific reference to Rule 10(d).
- Decide a case based on an issue (i.e., the alleged ambiguity of the word “arbitrability”, rendering the delegation provision unenforceable) that was never briefed by the parties, never argued by the parties, and barely mentioned at oral argument.
- Choose to not substantively address all other assignments of error raised by Schumacher in this appeal, relegating treatment of all other assignments of error to a single footnote.
- Decide that the word “arbitrability” is ambiguous, without reference to any prior decisions by this Court, without reference to any United States Supreme Court law,

without reference to any cases that deal with the use of that word in an actual arbitration provision, choosing instead to cite a small handful of snippets of dicta from four disparate sources, none of which address the question of whether the word is ambiguous when used in an arbitration agreement.

- Spend pages of its decision criticizing the United States Supreme Court on what this Court perceives as unwise rulings by that court in the context of arbitration cases.

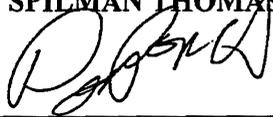
There are no examples of which we are aware in which this Court has gone to such lengths outside the arbitration context. Under the factors identified by the U.S. Supreme Court in DIRECTV, it is clear that doing so only in the context of a case regarding arbitration agreements fails to place arbitration contracts on equal footing with all other contracts, and it makes it abundantly clear that this Court's decision takes its meaning precisely from the fact that a contract of arbitration was at issue. Under DIRECTV, such actions by this Court cannot stand.

### **III. CONCLUSION**

Based on the foregoing, Schumacher respectfully requests that this Honorable Court decide not to adhere to its prior view in this case, reverse the decision of the Circuit Court, direct the Circuit Court to refer this case to arbitration, and grant such other and further relief as this Court deems just and proper.

**SCHUMACHER HOMES OF CIRCLEVILLE, INC.**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441

SCHUMACHER HOMES OF  
CIRCLEVILLE, INC., a foreign  
corporation,

Defendant Below,  
Petitioner,

v.

JOHN SPENCER, AND  
CAROLYN SPENCER,

Plaintiffs Below,  
Respondents.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner's Supplemental Brief Regarding the Effect of DIRECTV v. Imburgia on this Matter** has been made via U.S. Mail, on this 8th day of April, 2016, addressed as follows:

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