



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO.: 15-0948**

**SALEM INTERNATIONAL UNIVERSITY, LLC  
a foreign limited liability corporation,  
and JOHN LUOTTO, PRESIDENT,**

**Defendants Below, Petitioners,**

**v.**

**Appeal from the Order of the  
Circuit Court of Harrison County  
(13-C-348-3)**

**TAYLOR BATES, MICHELLE SYLVA,  
AMY NORTHROP, CLARISSA HANNAH  
and GENA DELLI-GATTI ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,**

**Plaintiffs Below, Respondents.**

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**BRIEF OF PETITIONERS, SALEM INTERNATIONAL UNIVERSITY, LLC  
AND JOHN LUOTTO, PRESIDENT**

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## I. ASSIGNMENTS OF ERROR

Whether the Circuit Court of Harrison County erred in refusing to submit the parties' dispute to arbitration based upon the finding that their otherwise valid and enforceable Arbitration agreement is ambiguous as it relates to the waiver of class action claims.

## II. STATEMENT OF THE CASE

### A. **Factual Background.**

Respondents are former nursing students at Salem International University ("SIU"), which is owned by Petitioner, Salem International University, LLC. Respondents assert claims under the West Virginia Consumer Protection Act, W. Va. Code §§ 46A-1-101 to -108, as well as common law claims seeking damages allegedly arising out of SIU's 2013 loss of accreditation by the West Virginia Board of Examiners for Registered Professional Nurses of its nursing associate degree program.

Upon enrolling at SIU, each of the Respondents signed an Enrollment Agreement containing a requirement to arbitrate claims covered thereunder in the event that either party invokes arbitration. Specifically, arbitration clause states:

You and SIU agree that any dispute or claim between you and SIU (or any company affiliated with SIU, or any of its officers, directors, trustees, employees or agents) arising out of or relating to this Enrollment Agreement or, your enrollment or attendance at SIU, whether such dispute arises before, during, or after your attendance and whether the dispute is based on contract, tort, statute, or otherwise, shall be, at your or SIU's elections, submitted to and resolved by **individual binding arbitration** pursuant to the terms described herein.

...

The arbitrator shall have no authority to arbitrate claims on a class action basis, and **claims brought by or against you may not be joined or consolidated with claims brought by or against any other person...** This arbitration provision shall survive the termination of your relationship with SIU. The above supersedes any inconsistent arbitration provision published in any other document, including, but not limited to, SIU catalogs.

(A.R. 219, 223) (emphasis added).

Also contained in the Enrollment Agreement, beneath the language cited above, is a box titled "NOTICE OF ARBITRATION AGREEMENT that contains the following text:

This agreement provides that all disputes between you and SIU will be resolved by BINDING ARBITRATION. You thus GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights under this contract (EXCEPT for matters that may be taken to SMALL CLAIMS COURT). \*Your rights will be determined by a NEUTRAL ARBITRATOR and NOT a judge or jury. \*You are entitled to a FAIR HEARING, BUT the arbitration procedures are SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. FOR MORE DETAILS \*Review the provisions above, or \*Check our Arbitration Website ACMEADR.COM, OR \*Call 1-800-000-0000

(A.R. 219, 224) (emphasis in original).

**B. Procedural Background.**

Respondents filed a civil action against Petitioners on or about August 12, 2013, in the Circuit Court of Harrison County, West Virginia, containing the following counts: (1) Violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"); (2) Negligence; and (3) Conversion of Personal Property. (A.R. 013-019). The causes of action all relate to Respondents' enrollment in the nursing program at SIU and SIU's subsequent loss of accreditation with the West Virginia Board of Examiners for Registered Professional Nurses, which resulted in Respondents not being able to complete their nursing education or obtain their

degrees from SIU. Respondents did not seek to arbitrate their claims, but rather chose to seek redress via a civil complaint in circuit court.

On February 20, 2014, Petitioners moved to compel Respondents' claims to arbitration and dismiss or, in the alternative, stay their action pending arbitration. (A.R. 037). Following a court ordered stay of the proceedings to afford the parties an opportunity to engage in settlement negotiations (A.R. 058-059), Respondents filed their Response to Petitioner's Motion seeking arbitration on February 13, 2015 (A.R. 069-095), and Petitioner filed a Reply on February 27, 2015 (A.R. 096-109). A hearing was held on the SIU's Motion on April 16, 2015, and the Court entered an Order for Additional Briefing on May 1, 2015 (A.R. 114-115). Supplemental memoranda of law were filed on behalf of all parties (A.R. 117-167 and A.R. 207-217), and a second hearing on the issue was held on August 19, 2015, and the Court entered its Order Denying Petitioner's requested relief on August 27, 2015 (A.R. 222-233), which Order Petitioner seeks to have reviewed by this Court.

**C. The Circuit Court's Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution.**

The crux of the Circuit Court's basis for refusing to enforce arbitration is that although the arbitration clause contained in each of the Enrollment Agreements signed by the Respondents made it "clear that individual claims may not be joined by other parties or consolidated" and such language "implies a waiver of class action rights" (A.R. 231), "the language of the agreement creates ambiguity as to whether or not there is a class action waiver." (A.R. 228). The Circuit Court concluded that the purported ambiguity operated to defeat the "otherwise valid" agreement to submit to arbitration. (A.R. 227).

### III. SUMMARY OF ARGUMENT

Over the past decade, this Court, much like other courts in other jurisdictions (both state and federal), has devoted substantial attention to arbitration and the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* While the frequency of decisions from this Court addressing the arbitrability of consumer claims has increased, the principles of law governing agreements to arbitrate remain unequivocally clear. Yet, circuit courts have, at times, struggled with the application of governing federal arbitration law and state law contract defenses in a manner consistent with that contemplated by this Court. This case is no exception.

This Court has repeatedly recognized that a circuit court’s inquiry in ruling on a motion to compel arbitration is two-fold. Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E. 2d 293, 294 (2010). First, a circuit court must assess whether a valid arbitration agreement exists between the parties – that is, one that survives scrutiny when analyzed under common law defenses applicable to *all* contracts generally, not just “rules” of law targeting agreements to arbitrate. Pursuant to the FAA’s Savings Clause, which expressly reserves “those grounds as exist at law or in equity for the revocation of any contract[.]” 9 U.S.C. § 2, the validity of an agreement to arbitrate is determined through the application of generally applicable state contract law.

Second, a circuit court must determine whether the parties’ dispute falls within the substantive scope of their agreement to arbitrate. Here, the Circuit Court answered both questions in support of arbitration, but erred as a matter of law in determining that the language in the arbitration clause dealing with class actions operated as an exception to the requirement to

arbitrate, rather than as a waiver of the Respondents' right to bring class action claims within the context of mandatory arbitration. The Circuit Court reached its erroneous conclusion as a result of the faulty determination that the language limiting arbitration to individual claims, and eliminating the availability of class actions claims, was ambiguous. As set forth more fully herein, the language is not ambiguous, and is a clear class action waiver, not as an exception to the requirement to arbitrate.

#### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioner respectfully requests that this Court grant oral argument under Revised Rules 20(a)(2). This case involves an issue of fundamental public importance; specifically, the validity of, and preference for, mutual agreements to arbitrate. Recent years have seen much activity in the area of arbitration within the courts, and a corresponding evolution of arbitration agreements such as the one at issue in this case, in response to legal developments. Due to the courts' demonstrated interest, and the ongoing developments in this area of the law, oral argument under Rule 20 is warranted.

#### V. ARGUMENT

##### A. JURISDICTION

This Court has held that under the collateral order doctrine, an order denying a motion to compel arbitration is an interlocutory ruling that is subject to immediate appeal. Syl. pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E. 2d 556 (2013). In *Credit Acceptance*, this Court discussed the factors to be considered in the collateral order test, the first being that the

ruling being appealed “conclusively determines the disputed controversy.” *Id.*, 231 W. Va. at 523, 745 S.E.2d at 561, quoting *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566 at n. 2, 401 S.E.2d 908, 912 at n. 2 (1991). The Court held that a circuit court's ruling that refuses to compel arbitration is conclusive as to the disputed controversy of whether the parties are required to arbitrate, reasoning that “[b]y denying such a motion, the circuit court thereby concludes that a case will proceed to trial. Such a ruling forecloses arbitration of the underlying claims asserted and, therefore, conclusively resolves the issue of arbitration.” *Id.*, 231 W. Va. at 525, 745 S.E.2d at 563.

The Court further held that the second factor of the collateral order test, “whether the order appealed from resolves an important issue completely separate from the merits of the action,” was met and noted that there is “little doubt that the issue of arbitration is completely separate from the merits of the underlying claims in a given action.” *Id.* (citing *Durm*, 184 W.Va. at 566 n. 2, 401 S.E.2d at 912 n. 2). The Court further reasoned that resolution of the issue of arbitration is immediately important because it addresses the fundamental question of how the parties’ underlying dispute will be resolved – via arbitration or court action. *Id.*

Finally, the *Credit Acceptance Corp* Court found that the third prong of the collateral order test - whether the order appealed from is effectively unreviewable on appeal from a final judgment - was satisfied because once the underlying claims are litigated, the issue of arbitration is effectively moot since its purpose and benefit are at that point irretrievably lost. *Id.*

The reasoning set out in the *Credit Acceptance* opinion is identically applicable to the case currently before this Court, and this Court’s jurisdiction is clear.

## B. STANDARD OF REVIEW

On appeal to this Court, “review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.” *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). Likewise, “[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011). Finally, this Court in addressing the enforceability of an arbitration clause in *Credit Acceptance Corp.*, employed the same *de novo* review standard applicable that an appeal of an order denying a motion dismiss. *Id.* 231 W. Va. at 525, 745 S.E.2d at 563. Accordingly, matter currently before this Court is subject to a *de novo* standard of review.

## C. A CIRCUIT COURT’S INQUIRY IN RULING ON A MOTION TO COMPEL ARBITRATION IS TWO-FOLD: VALIDITY AND SCOPE.

It is “beyond dispute that the FAA was designed to promote arbitration.” *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. \_\_\_, 131 S. Ct. 1740, at 1749, 179 L.Ed.2d 742, \_\_\_ (2011). And, there is “. . . an emphatic federal policy in favor of arbitral dispute resolution.” *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. \_\_\_, 132 S. Ct. 1201, at 1203, 182 L.Ed.2d 42, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012) (citing *KPMG LLP v. Cocchi*, 565 U. S. \_\_\_, 132 S. Ct. 23, 181 L.Ed.2d 323 (2011) (*per curiam*) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985))).

As the Circuit Court in this case correctly stated, “[w]hen a trial court is required to rule upon a motion to compel arbitration . . . the authority of the 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." Syllabus Point 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010). (A.R. 225). In making its assessment, a court should examine the language of the agreement in light of the strong federal policy in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353 (1985).

**D. THE CIRCUIT COURT PROPERLY FOUND THAT THE ARBITRATION AGREEMENT IN QUESTION IS VALID AND THAT IT COVERS THE CLAIMS RAISED BY RESPONDENTS.**

The Circuit Court properly applied the applicable law in determining the validity of the subject arbitration agreement, recognizing that "[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." Syl pt. 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 564 U.S. \_\_\_, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012)." (A.R. 225). Notably, the lower Court did not undertake an in depth analysis of the validity of the agreement, likely because the law is well settled that arbitration agreements such as the one contained in each of the Enrollment Agreements are valid and enforceable, as will be more fully discussed herein. While no meaningful discussion on the validity of the agreement was engaged in by the lower Court, the Order did include the relevant legal principles applicable to that determination, and properly concluded that the arbitration agreement at issue in this matter is generally valid and

enforceable (A.R. 227), leaving only the question of whether or not the agreement, by its terms, excepted class action claims from the requirement to arbitrate.

**E. THE CIRCUIT COURT ERRED IN REFUSING TO ENFORCE THE ARBITRATION AGREEMENT BASED UPON ITS ERRONEOUS DETERMINATION THAT THE LANGUAGE REGARDING CLASS ACTION CLAIMS IS AMBIGUOUS.**

**1. It is well settled law that class action waivers within arbitration agreements are generally valid and enforceable.**

Both the U.S. Supreme Court and this Court have repeatedly held that class action waivers in arbitration agreements are valid. For example, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011), the United States Supreme Court held that the FAA preempted California's common law that, under certain circumstances, class actions waivers in consumer contracts of adhesion are unconscionable. In fact, a substantial portion of the Opinion in *Concepcion* is devoted to discussing why arbitration is unsuited for class action claims and why California's law was contrary to the federal policy in favor of arbitration.

In *Shorts v. AT&T Mobility*, No. 11-1649, 2013 WL 2995944 (W. Va. June 17, 2013) (memorandum decision), this Court addressed the enforceability of class action waivers in a case that dealt with substantially identical arbitration agreement and class action waiver provisions upheld by the United States Supreme Court in *Concepcion*. (A.R. 146).<sup>1</sup> Like the *Concepcion* Court, and relying heavily on that opinion, this Court held that the provisions were enforceable.

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<sup>1</sup> A copy of the agreement at issue in *Concepcion* was attached as an Exhibit to Petitioner's Supplemental Memorandum in Further Support of Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution and is included in the Appendix in this appeal. The relevant language is contained in the cited portion of the Appendix.

The arbitration agreement language currently under consideration by this Court is very similar to the language addressed and upheld in *Concepcion* and *Shorts*.<sup>2</sup> *Shorts* involved a 2005 agreement as well as 2006 and 2009 modifications to that agreement, and this Court held that the agreement and modifications were enforceable. *Shorts* at \*4 and \*6. The 2005 arbitration agreement and the 2006 and 2009 modifications all included agreements to arbitrate all claims not brought in small claims court. (A.R. 148-157 (2005 Agreement), A.R. 158-160 (2006 Modification; A.R. 161-162 (2009 Modification)).<sup>3</sup> Both the 2006 and 2009 modifications provided, "we each agree to resolve . . . disputes through binding arbitration or small claims

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<sup>2</sup> *Shorts* class action waiver language upheld by the Court:

2005 agreement:

YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding . . . .

2006 and 2009 modifications (identical to *Conception* language):

YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

SIU language currently at issue:

You and SIU agree that any dispute. . . shall be, at your or SIU's elections, submitted to and resolved by individual binding arbitration pursuant to the terms described herein...

The arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by or against you may not be joined or consolidated with claims brought by or against any other person...

<sup>3</sup> A copy of the 2005 agreement and the 2006 and 2009 modifications at issue in *Short* were attached as Exhibits to Petitioner's Supplemental Memorandum in Further Support of Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution and are included in the Appendix in this appeal.

court instead of in courts of general jurisdiction. . . . Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted." (A.R. 158; A.R. 162) (emphasis removed). The 2005 agreement further provided:

YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding . . . .

(A.R. 156). The 2006 and 2009 modifications at issue in *Shorts* include the following language (which is identical to the language upheld by the United States Supreme Court in *Concepcion*):

YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and AT&T agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

(A.R. 160; A.R. 162).

After considering other terms of the agreement and modifications as well as the test articulated in its prior decisions dealing with enforceability of arbitration clauses (e.g., Syl pt. 4, *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va.*, 186 W. Va. 613, 413 S.E.2d 670 (1991); Syl. pt. 2 and 4, *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 550, 567 S.E.2d 265, 266 (2002)), this Court found no error in the lower court's finding that the agreement and modifications were conscionable and enforceable. *Shorts*, 2013 WL 2995944, at \*6. In upholding the provisions of the arbitration agreement and the 2006 and 2009 modifications, this Court noted that "[n]umerous other courts have likewise upheld the 2006 and 2009 provisions."

*Id.* at \*6, n.6.

The United States Supreme Court reiterated and further developed its holding in *Concepcion* in *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2304 (2013), a case extensively cited by this Court in *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (2013). The arbitration agreement at issue in *Ocwen* provided,

All disputes, claims, or controversies arising from or related to the loan . . . , including statutory claims, shall be resolved by binding arbitration, and not by court action, except as provided . . . below . . . . All disputes subject to arbitration under this agreement shall be arbitrated individually, and shall not be subject to being joined or combined in any proceeding with any claims of any persons or class of persons other than Borrower or Lender.

(A.R. 163).<sup>4</sup> The Court in *Ocwen*, relying heavily upon the United States Supreme Court's *Italian Colors* opinion, as well as previous decisions by the West Virginia Supreme Court of Appeals, found that the circuit court erred when it concluded "that the class action waiver rendered the arbitration agreement in that case substantively unconscionable." *Ocwen*, 232 W. Va. at 361-62, 752 S.E.2d at 392-93. The Court directed the circuit court to enter an order compelling arbitration. *Id.* at 367, 752 S.E.2d at 398.

In the case *sub judice*, because the arbitration agreement and class action waiver are otherwise lawful and enforceable as determined by the Circuit Court, the terms of the parties' agreement should be enforced as a matter of contract. In fact, the arbitration and class waiver agreements at issue here are strikingly similar to those that the U.S. Supreme Court found to be enforceable in *Italian Colors*, the case relied upon by this Court in *Ocwen*. The clause at issue

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<sup>4</sup> A copy of the agreement at issue in *Ocwen* was attached as an Exhibit to Petitioner's Supplemental Memorandum in Further Support of Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution and is included in the Appendix in this appeal.

here provides, "[t]he arbitrator shall have no authority to arbitrate claims on a class action basis..." The clause at issue in *Italian Colors* provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id.*, 133 S.Ct. at 2308. In finding that the class action waiver at issue in *Italian Colors* did not eliminate the parties' right to pursue their statutory remedy, the U.S. Supreme Court stated, "[t]he class-action waiver merely limits arbitration to the two contracting parties." *Id.* at 2311. Here, too, the Enrollment Agreement contains a class action waiver that merely limits arbitration to the two contracting parties.

Like the arbitration agreement and class action waivers at issue in *Italian Colors*, *Ocwen*, *Concepciony*, and *Shorts*, the arbitration agreement and class action waiver at issue here are valid and enforceable. Therefore, the Court erred in refusing to stay the circuit court proceedings and compel arbitration of Respondents' claims.

**2. The Circuit Court erred in finding that the class action waiver language is ambiguous and construing it as an exception to the agreement to arbitrate.**

While the Circuit Court's Order cites many of the well settled legal principles attendant to the determination of whether or not a contract term is ambiguous, the lower Court failed to apply those rules to the language at issue to arrive at the correct result. The Court below correctly stated that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1963). (A.R. 226). It also acknowledged that "[t]he term "ambiguity" is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be

uncertain or disagree as to its meaning.’ Syl pt. 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006).” *Id.* While the lower Court took note of these legal principles, it incorrectly determined that the language in the Enrollment Agreements entered into by the parties was ambiguous, and as a result, the Circuit Court erroneously construed the language in favor of the non-drafting Respondents.

"The question as to whether a contract is ambiguous is a question of law to be determined by the court" Syl pt. 1, in part, *Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968), and on appeal, the issue of ambiguity is subject to a *de novo* review. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 64 n. 23, 459 S.E.2d 329, 342 n. 23 (1995). "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." Syl pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous." Syl. pt. 1, in part, *Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

Contrary to the Circuit Court’s conclusion, a correct application of the legal principles set forth above leaves no reasonable basis to find that the language employed in the arbitration clause at issue is ambiguous. The agreement signed by each of the Respondents clearly provides that any claims arising out of, or related to, the Enrollment Agreement and/or attendance at Salem International University must be submitted, at either party’s election, to “**individual binding arbitration,**” and that claims “**may not be joined or consolidated with claims brought**

by or against any other person...” (emphasis added). The lower Court’s analysis of the agreement – specifically its treatment of the words “joined” and “consolidated” as legal terms of art – violates the fundamental principle of contract construction that words be given their usual, ordinary and popular meaning. *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 147, 690 S.E.2d 322, 341 (2009) (citing *Heron v. Transportation Cas. Ins. Co.*, 274 Va. 534, 650 S.E.2d 699, 702 (2007)). The provision in the arbitration agreement that claims “may not be joined or consolidated” must be interpreted by assigning the words their ordinary and common meaning. Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1997) defines the word “consolidate” as “to join together into one whole; unite; merge.” *Id.* The ordinary meaning of the word “join” is “to put or bring together so as to form a unit.” *Id.* Attributing these terms their ordinary meaning, and taking them together with the other language of the agreement, such as the requirement that claims be submitted to “individual arbitration,” presents an overriding and cohesive intent that claims may only be brought on an individual basis, and not as part of a group or a class action.

The language that the lower Court determined to be ambiguous – that “the arbitrator shall have no authority to arbitrate claims on a class action basis” – is clearly consistent with, and in fact further explains, the provision’s prohibition against consolidated claims. In other words, the language does not prohibit mandatory arbitration if a class action is pursued; rather, the language in the Enrollment Agreements specifically disallows for a class in the mandatory arbitration context.

A closer examination of the subject language as it pertains to class action claims leads to the inescapable conclusion that such claims are waived if arbitration is elected by either party.

The relevant portion of the clause states:

The arbitrator shall have no authority to arbitrate claims on a class action basis, **and** claims brought by or against you may not be joined or consolidated with claims brought by or against any other person...

(emphasis added). The use of the word “and” in the provision evinces a clear intent that in the event either party exercises its right to submit a dispute to arbitration, such dispute cannot be joined with any other claims, as in a class action.

“And” is a conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first; in its conjunctive sense the word “and” is used to conjoin words, clauses or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds, and its use implies that the connected elements must be grammatically coordinate, as where the elements preceding and succeeding the word “and” refer to the same subject matter. *Black's Law Dictionary* 79 (5th ed.1979).

*Ooten v. Faerber*, 181 W. Va. 592, 597, 383 S.E.2d 774, 779 (1989). Here, the word “and” joining two provisions that are in no way inconsistent with one another can only be interpreted to support Petitioners’ position that class action claims are effectively waived under the agreement. Any other interpretation would completely ignore and render meaningless the second portion of the sentence, which would violate fundamental principles of construction. Because contracts are construed as a whole, courts should seek to give effect to every provision and avoid any interpretation that renders a particular provision superfluous or meaningless. *See, e.g., FOP, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 103, 468 S.E.2d 712, 718 (1996); *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013) citing Restatement (Second) of

Contracts § 202(2) and 203(a). If read to provide for an exception to arbitration for class action claims, the second portion of the provision that prohibits the consolidation or joinder of claims would be completely negated and rendered meaningless. This is precisely what the rules of construction dictate against. Applying the primary principles of contract construction, and reading the arbitration agreement at issue as a whole, it is clear that no ambiguity exists.

A quick review of the case law that no doubt led to the incorporation of language such as that at issue in this case may be helpful in further illuminating the purpose, as well as the meaning, of the language. One illustrative case is *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013), in which the United State Supreme Court held that “[a]n arbitrator may employ class procedures only if the parties authorized them.” *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)). In *Oxford*, the parties’ agreement to arbitrate was completely silent on class action claims, merely stating that “no civil action” could be filed and that “all disputes shall be submitted to final and binding arbitration. . . with one arbitrator.” *Id.* at 2067. The matter was submitted to arbitration as a class action, and the arbitrator interpreted the cited language to mean that the arbitration clause “expresses the parties’ intent that class arbitration can be maintained.” *Id.*

Oxford sought review of the arbitrator’s decision and ultimately appealed to United States Supreme Court, which explained its very limited scope of review of arbitrators’ decisions governed by § 10(a)(4) of the FAA. As explained in *Oxford*, courts may only set aside an arbitral award “where the arbitrator[ ] exceeded [his] powers.” In discussing the heavy burden

that a party challenging an arbitrator's decision bears, the *Oxford* Court explained, “[i]t is not enough ... to show that the [arbitrator] committed an error—or even a serious error.” *Id.* at 2068 (quoting *Stolt–Nielsen*, 559 U.S., at 671, 130 S.Ct. 1758). Because the parties “bargained for the arbitrator’s construction of their agreement,” an arbitral decision “even arguably construing or applying the contract” must stand, regardless of a court’s view of its (de)merits. *Id.* (internal citations omitted).

With the holding in *Oxford*, the inclusion of language in arbitration agreements to clearly delineate the arbitrators’ authority regarding class action claims, such as the language utilized in Respondents’ Enrollment Agreements with SIU, became necessary in order to avoid any decision by an arbitrator that the agreement might (even arguably) confer authority to arbitrate such class action claims. The contract language under review by this Court is not in the least bit ambiguous. Quite the contrary, it evinces a painstaking effort to eliminate any possibility for misinterpretation and to make abundantly clear that: (1) any claims must be arbitrated at either party’s election; (2) all claims must be brought on an individual basis and not joined or consolidated with any other claims; and (3) arbitration of class actions is not authorized.

Ambiguity in a contract provision requires the susceptibility of two or more meanings and uncertainty as to which was intended. The only reasonable interpretation of the language at issue in this case is that any claims are to be arbitrated individually, and not joined with any others or made part of a class action. In fact, strikingly similar class action waiver language has been employed in numerous arbitration agreements that have been upheld by both the United States Supreme Court and this Court, as discussed more fully hereinabove.

Reason also dictates that the provision that the agreement at issue is clearly intended to prohibit class actions in the mandatory arbitration context and require each party to arbitrate his or her claims individually. It would be nonsensical for Respondents to be able to avoid the mandatory nature of an arbitration agreement simply by styling their claims as a class action. Acceptance of such an argument would defeat the plain intent of the arbitration agreements by allowing claimants to simply group their claims together. The arbitration agreement is clear that "any dispute" must be arbitrated, other than those brought in magistrate, small claims, or a similar court. The class action provision is not an exception to the agreement that all disputes will be arbitrated; it merely limits the type of arbitration to which the parties agreed.

## VI. CONCLUSION

The Circuit Court refused to require that the Respondents' claims be submitted to arbitration based on an incorrect legal conclusion that the language of the arbitration agreement is ambiguous with regard to class action claims. Specifically, the lower Court erroneously concluded that a clause in the agreement that clarifies and reinforces the requirement that any claims be brought on an individual basis operates as the opposite - an exception to the requirement that the parties arbitrate. Such an interpretation would permit a claimant to avoid arbitration simply by joining their claims – the very result that the arbitration clause clearly dictates against.

Based the rules of construction governing contracts it is clear that the language is not "reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl pt. 4, *Estate of Tawney v.*

*Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006). The clear import of the language is that class action claims may not be brought if either of the parties opts to arbitrate. There being no ambiguity, the Circuit Court erred in interpreting the language rather than simply applying it and ordering that the Respondents' claims be submitted to individual arbitration. Syl. pt. 4, *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 133 S.E.2d 735 (1963); Syl. pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

Based upon all of the foregoing this Court should reverse the decision of the Circuit Court, dismiss the Respondents' lawsuit and compel arbitration of the claims brought in the Complaint on an individual basis.

**SALEM INTERNATIONAL UNIVERSITY,  
LLC AND JOHN LUOTTO, PRESIDENT**

**BY: SPILMAN THOMAS & BATTLE, PLLC**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 15-0948

SALEM INTERNATIONAL UNIVERSITY, LLC  
a foreign limited liability corporation,  
and JOHN LUOTTO, PRESIDENT,

Defendants Below, Petitioners,

v.

Appeal from the Order of the  
Circuit Court of Harrison County  
(13-C-348-3)

TAYLOR BATES, MICHELLE SYLVA,  
AMY NORTHROP, CLARISSA HANNAH  
and GENA DELLI-GATTI ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,

Plaintiffs Below, Respondents.

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CERTIFICATE OF SERVICE

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I, Eric W. Iskra, counsel for Salem International University, LLC and John Luotto, do hereby certify that the foregoing Brief of Petitioners, Salem International University, LLC and John Luotto, President, was served by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail this the 28<sup>th</sup> day of December, 2015, address as follows:

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