

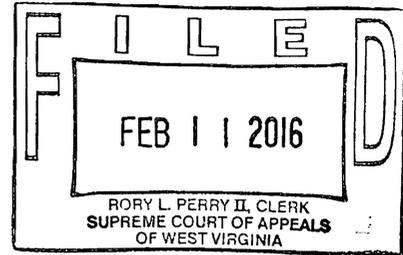
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 15-0948**

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

Petitioners,

vs.

**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,**

Respondents.

RESPONDENTS' OPPOSITION TO PETITIONERS BRIEF

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
A.	Underlying Facts of the Case.....	1
B.	Summary of the Instant Matter.....	4
II.	SUMMARY OF ARGUMENT.....	6
III.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	8
IV.	ARGUMENT.....	8
A.	The standard of review for an appeal of the denial of a motion to compel arbitration is <i>de novo</i>	8
B.	The circuit court did not err in finding that under West Virginia contract law, the ambiguity in the class action waiver contained in the arbitration agreements was so ambiguous as to render the agreements unenforceable in this case.....	9
1.	This Court must analyze the arbitration clauses at issue under the Principles of West Virginia contract law	9
2.	Applying West Virginia contract law, the circuit court correctly Found that the arbitration waivers in this case were ambiguous.....	11
C.	If the class action waiver is not ambiguous, then it creates a fundamental inequity in the parties' rights under the arbitration clauses that renders the arbitration clauses unconscionable.....	16
1.	The imbalance of equities between the parties results in unconscionably that requires the arbitration clause to be voided.....	18
a.	The arbitration clause is substantively unconscionable Because it is unreasonably favorable to Defendant SIU and May impose overly burdensome costs on the Plaintiff.....	19

b.	The circumstances surrounding the execution of the Enrollment Agreements contract show that the arbitration clauses are procedurally unconscionable.....	21
D.	Arbitration is not appropriate in this case because the Respondent Students' claims in this case fall outside the scope of the arbitration Clauses in the Enrollment Agreements.....	26
E.	Because this putative class action has not yet been certified, the Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution is not ripe for appeal.....	28
1.	The order at issue fails to conclusively determine the disputed Controversy.....	30
2.	The order at issue does not resolve an important issue separate from the merits of this action.....	30
3.	The order at issue will be reviewable at a later stage in this litigation.....	31
V.	CONCLUSION.....	31

TABLE OF AUTHORITIES

CASES

<i>Art’s Flower Shop, Inc., v. Chesapeake and Potomac Telephone Company of West Virginia, Inc.</i> , 186 W.Va. 613, 413 S.E.2d 670 (1991).....	18
<i>AT&T Mobility, LLC v. Concepcion</i> , 563 U.S. 321 (2011).....	17
<i>Berkeley County Pub. Serv. Dist.v. Vitro Corp. of Am.</i> , 152 W.Va. 252, 162 S.E.2d 189 (1968).....	12
<i>Blake v. Charleston Area Med. Ctr.</i> , 201 W.Va. 469, 475, 498 S.E.2d 41, 47 (1997)....	8,9
<i>Brown v. Genesis Healthcare Corp.</i> , 228 W.Va. 646, 724 S.E.2d 250 (2011).....	10, 11, 13,18, 19
<i>Brown v. Genesis Healthcare Corp.</i> , 229 W.Va. 382, 729 S.E.2d 217, 227 (2012).....	10-11, 18, 21, 22,
<i>Caperton v. A.T. Massey Coal Co.</i> , 225 W.Va. 128, 147, 690, S.E.2d 699, 702 (2009).	
<i>Charlton v. Chevrolet Motor Co.</i> , 115 W.Va. 25, 174 S.E. 570 (1934).....	12
<i>Coleman v. Sopher</i> , 194 W.Va. 90, 94, 459 S.E.2d 367, 371 (1995).....	29
<i>Cotiga Development Company v. United Fuel Gas Company</i> , 147 W.Va. 484, 128 S.E.2d 626 (1963).....	11
<i>Credit Acceptance Corp. v. Front</i> , 231 W. Va. 518, 745 S.E.2d 556 (2013).....	29
<i>Durm v. Heck’s Inc.</i> , 184 W.Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991).....	29, 30
<i>Estate of Tawney v. Columbia Natural Resources, L.L.C.</i> , 219 W.Va. 266, 633 S.E.2d 22 (2006).....	12,15
<i>Fall River County v. South Dakota Dep’t of Revenue</i> , 1996 SD 106, ____, 552 N.W.2d 620, 624 (1996).....	8
<i>Frymier-Halloran v. Paige</i> , 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995).....	8

Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79, 90 (2000).....	20
<i>James M.B. v. Carolyn M.</i> , 193 W.Va. 289, 456 S.E.2d 16 (1995).....	29
<i>Kirby v. Lion Enterprises</i> , 233 W.Va. 159, 756 S.E.2d 493 (2014).....	6, 7,9,18, 26
<i>Mamet Health Care Ctr., Inc. v. Brown</i> , 565 U.S. ____, 132 S. Ct. 1201, 192 L.Ed.2d 42 (2012).....	11
<i>McGraw v. Am. Tobacco Co.</i> , 224 W.Va. 211, 222, 681 S.E.2d 96, (2009).....	8
<i>Navient Solutions, Inc. v. Robinette</i> , 2015 W.Va. LEXIS 1050, 7 (November 4, 2015)..	8
<i>New v. Gamestop, Inc.</i> , 232 W.Va. 564, S.E.2d 62 (2013).....	19
<i>Province v. Province</i> , 196 W.Va. 473, 478, 473 S.E.2d 894, 899 (1996).....	31
<i>Robinson v. Pack</i> , 223 W.Va. 828, 679 S.E.2d 660 (2009).....	29
<i>Schumacher Homes of Circleville, Inc. v. Spencer</i> , 774 S.E.2d 1, 6-7; 2015 W.Va. LEXIS 562, 9 (2015).....	8, 10
<i>State ex rel. Clites v. Clawges</i> , 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (2009)...	10, 11, 18
<i>State ex rel. Frazier v. Oxley, L.C. v. Cummings</i> , 212 W.Va. 275, 569 S.E.2d 796 (2002).....	12, 13
<i>State ex rel. Johnson Controls Inc. v. Tucker</i> , 229 W. Va. 486, 495, 729 S.E.2d 808, 817 (2012).....	19
<i>State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders</i> , 228 W. Va. 125, 717 S.E.2d 909 (2011).....	7, 9, 10, 12, 18, 20
<i>State ex. Rel. TD Ameritrade, Inc., v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (2010).....	6,7, 9, 26
<i>West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co.</i> , W.Va. 490 S.E.2d 823, 1997 W. Va. LEXIS 176, 29.....	8

Williams v. Precision Coil, Inc., 194 W.Va. 52, 65, 459 S.E.2d 329, 342 (1995).....12

Zimmer v. Romano, 223 W. Va. 760, 777, 679 S.E.2d 601, 609 (2009).....8

STATUTES

W. Va. Code § 58-5-1.....28

RULES

W.Va. R. Civ. P54(b).....28

SECONDARY SOURCES

Black’s Law Dictionary 435 (6th ed. 1990).....8

Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-307.....6, 9

I. STATEMENT OF THE CASE

A. Underlying Facts of the Case

This case arises from Salem International University's ("SIU") failure to deliver on promises it made to students who enrolled in school's nursing program. Petitioner SIU induced numerous students, including the Respondent Students/putative class action representatives, to enroll in its nursing program by representing the program as accredited and promising them degrees that would allow them to sit for their nursing boards. At the time it made these promises, SIU knew that its accreditation was in the process of being revoked. It ultimately lost accreditation, delaying education and career aspirations of the Respondent Students.

The Respondents in this case are nursing students who were enrolled in the nursing program at SIU in 2012 or after.¹ At the time SIU lost its nursing school accreditation, Respondent Students were all pursuing nursing degrees and looking forward to beginning their careers in nursing. Instead, the SIU nursing School lost its accreditation and was ordered to cease admission to the nursing program and halt the progression of students already enrolled. Consequently, the Respondent Students were forced to delay their plans for a nursing career, a situation that caused them financial loss and emotional pain.²

¹ Complaint, ¶ 6, AR002.

² *Id.*

When the Respondent Students were recruited by SIU in 2012, each was assured that the nursing program was in sound shape.³ Each was assured that, assuming they progressed satisfactorily through their courses, their graduation date would be approximately twenty (20) months after their Enrollment.⁴ For each of the putative class representatives, SIU projected a graduation date in Spring 2014.⁵

SIU's assurances were illusory. On February 16, 2012, the West Virginia Board of Examiners for Registered Professional Nurses ("Nursing Board") ordered SIU to cease admission for all nursing students pending the submission to and approval of plans to reform SIU's inadequate nursing program to meet the Nursing Board's minimum standards.⁶ SIU complied with this order to the extent that in June, 2012, the Nursing Board removed the restriction on Enrollment pending SIU's compliance with the plan of action SIU had submitted to the Nursing Board.⁷

SIU failed to comply with the plan of action it submitted to SIU, so on February 22, 2013, the Nursing Board withdrew the school's accreditation and halted admission to

³ Complaint, ¶ 19, AR003.

⁴ Enrollment Agreements, AR216 – 221.

⁵ *Id.*

⁶ The Nursing Board specifically ordered:

For Salem International University to: 1) Immediately cease all admissions for all nursing students. This includes students at each level; 2) Submit a plan and status report regarding the hiring of new faculty and the progress in the mentoring and development plan for Dr. Bloch by May 1, 2012 for review at the Board's June 2012 meeting; 3) Submit a report that includes the total number of nursing faculty (full time and part time) which provides the programs in which they teach and each person's teaching load. This report shall include information regarding faculty teaching in any nursing program including LPN, RN-BSN and ADN.

Complaint, ¶ 20, AR003.

⁷ Complaint, ¶ 21, AR004.

any of SIU's nursing programs.⁸ The Nursing Board modified this decision on July 1, 2013, reinstating SIU to provisional accreditation status.⁹ However, the Nursing Board did not lift its ban on admissions or program progression, restating the following prohibitions:

1) Cease admission into the nursing program and university leading to a nursing degree; 2) Cease progression into nursing core courses or nursing courses of those cohorts admitted prior to February 25, 2013 and have not progressed into NURS courses, or Nursing core courses; 3) Cease progression of students who began NUR115 in April 2013; 4) Permit progression of all other cohorts currently taking NURS courses; 5) Provide the Board with a copy of the letters sent to the students notifying them of this decision.¹⁰

The failure of the SIU to rectify the failings of its program caused the Nursing Board to cease the progression of the Respondent Students who were not scheduled to begin their core nursing courses until April 2013. Consequently, the students progress was stalled.

The Respondent Students filed the putative class action Complaint in this case in August 2013, alleging Violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-1-101 *et seq.*; negligence; breach of contract; breach of duty of good faith and fair dealing; and conversion of personal property.¹¹

⁸ The Nursing Board stated,

[SIU shall] cease and desist all admissions to all nursing programs/pathways or any other program representing progression toward a nursing degree from this date (February 22, 2013); Notify all students accepted and planning to begin nursing courses in April 2013, that the opportunity to begin nursing courses will be delayed; Submit to the Board a roster of **all** programs leading to initial licensure as a registered professional nurse. (Emphasis in original).

Complaint, ¶ 22, AR004.

⁹ Complaint, ¶ 23, AR004

¹⁰ *Id.*

¹¹ Complaint, AR001 – AR009.

B. Summary of the Instant Matter

On February 30, 2014, SIU moved to compel the Respondent Students' claims to arbitration on the grounds that the Enrollment Agreements signed by the Respondent Students contain an arbitration clause that 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 election, submitted to and resolved by individual binding arbitration pursuant to the terms described herein. Arbitration shall be conducted by the American Arbitration Association ("AAA") pursuant to its rules and procedures. The party electing arbitration shall comply with the AAA notice requirements. Information about AAA is available at 1633 Broadway, 10th Floor, New York, New York 10019 . . . SIU agrees that it will not elect to arbitrate any individual claim that you bring in a West Virginia magistrate or small claims court (or in a similar court of limited jurisdiction subject to expedited procedures). If that claim is transferred or appealed to a different court, however, or if your claim exceeds the limits of the applicable small claims court, SIU reserves the right to elect arbitration and, if it does so, you agree that the matter will be resolved by binding arbitration pursuant to the terms of this Section. 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. Any arbitration hearing shall take place in the federal judicial district in which you reside or pursuant to AAA rules and procedures. Each party will bear the expense of its own attorneys, experts and witnesses, regardless of which party prevails, unless applicable law or this Agreement gives a right to recover any of those fees from the other party. If the arbitrator determines that any claim or defense is frivolous or wrongfully intended to oppress the other party, the arbitrator may award sanctions in the form of fees and expenses reasonably incurred by the other party (including arbitration administration fees, arbitrator's fees, and attorney, expert and witness fees), to the extent such fees and expenses could be imposed under Rule 11 of the Federal Rules of Civil Procedure. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, shall govern this arbitration provision. 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.¹²

This arbitration clause is located on the back-side of the double-sided form Enrollment Agreement, while the signature line is located on the front side.¹³

Each putative class representative testified at an August 19, 2015, hearing that they were rushed through the process of signing the Enrollment Agreement.¹⁴ One Respondent Student testified that her Enrollment experience was so rushed that she was not even aware that there was a back-side to her Enrollment Agreement.¹⁵

Corroborating the statements of the Respondent Students is the testimony of Brenda Davis, an Admissions Advisor employed by SIU.¹⁶ Testifying before the circuit court, Ms. Davis walked the court through each and every step an Admissions Advisor at SIU takes an enrolling student through in filling out an Enrollment Agreement form.¹⁷ Ms. Davis stated that she explains the credit requirements of the program,¹⁸ pricing of the program,¹⁹ financial aid,²⁰ and SIU's internal complaint process.²¹ Ms. Davis did not once reference pointing the arbitration clause out to enrolling students, let alone discussing the clause with those students.

¹² Enrollment Agreements, AR216 – AR221.

¹³ *Id.*; Transcript of August 19, 2015, Hearing, AR243 – AR244.

¹⁴ Testimony of Taylor Bates, AR247 - AR248; Testimony of Kelly Nutt, AR258 – AR250; Testimony of Mallory Bundy, AR269 – AR 273; Testimony of Tiffany Kerr, AR275 – AR279.

¹⁵ Testimony of Tiffany Kerr, AR276.

¹⁶ Testimony of Brenda Davis, AR289.

¹⁷ Testimony of Brenda Davis, AR289 – AR295.

¹⁸ Testimony of Brenda Davis, AR291.

¹⁹ Testimony of Brenda Davis, AR292.

²⁰ *Id.*

²¹ Testimony of Brenda Davis, AR293.

After the hearing, the circuit court ordered a brief stay of the case to allow the parties to mediate.²² On February 13, 2015, the Respondent Students filed their Response to SIU's Motion to Compel Arbitration.²³ A hearing was held on the Motion on April 16, 2015,²⁴ following which the circuit court ordered additional briefing.²⁵ A second hearing on the issue of arbitration was held on August 19, 2015.²⁶

The circuit court denied SIU's Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution, holding that the arbitration clause in the Enrollment Agreement is ambiguous as to the arbitrability of class action suits.²⁷ Petitioner SIU takes this appeal from the Circuit Court of Harrison County, West Virginia's August 27, 2015, Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution.

II. SUMMARY OF ARGUMENT

This case requires the Court to determine the enforceability of an arbitration agreement contained in the Enrollment Agreements signed by the Respondent Students in this case. Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307, a court ruling upon a motion to compel arbitration has authority only to determine 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

²² Order, AR058 – AR059.

²³ Plaintiffs' Response to Defendants' Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution and Supporting Memorandum, AR069 – AR095.

²⁴ Transcript from April 16, 2015, Hearing, AR168 – AR206.

²⁵ Order for Additional Briefing, AR114- AR115.

²⁶ Transcript from August 19, 2015, Hearing, AR 234 – AR307.

²⁷ Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution, AR231.

agreement.” Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010), *see also* Syl. Pt. 2 *Kirby v. Lion Enterprises*, 233 W. Va. 159, 756 S.E.2d 493 (2014).

A court considering the validity of an arbitration agreement must apply state contract law principles. *See, e.g., American Homes*, 228 W. Va. 125, 133-134, 717 S.E.2d 909, 917-18 (2011). Applying West Virginia contract law to the arbitration agreement in this case, the circuit court did not err in finding the arbitration agreement at issue in this putative class action unenforceable. The purported class action waiver in the arbitration clause is ambiguous as to whether class actions are maintainable in court but not in litigation or whether class actions are simply not maintainable at all. Therefore, the arbitration agreement is unenforceable as to this putative class action suit.

Even if the class action waiver were unambiguous, the arbitration agreement in this case is unenforceable because it is both substantively and procedurally unconscionable under West Virginia law. The arbitration agreement contains a fundamental inequity that imposes overly burdensome costs on the Respondent Students. Moreover, the circumstances of the making of the Enrollment Agreements were fraught with procedural unconscionable.

Finally, the issues in the Respondent Students’ Complaint do not fall within the scope of the arbitration agreement, as they do not arise from the students’ enrollment at SIU. The arbitration clause in this case is unenforceable.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent Students request oral argument under West Virginia Rule of Appellate Procedure 19, as the case involves the application of settled law to the unique facts presented. Additionally, Respondent requests that the Court issue a written decision.

IV. ARGUMENT

A. The standard of review for an appeal of the denial of a motion to compel arbitration is *de novo*.

The question of whether an arbitration clause is valid and enforceable is *de novo*.

Schumacher Homes of Circleville, Inc. v. Spencer, 774 S.E.2d 1, 6-7; 2015 W. Va.

LEXIS 562, 9 (2015); *McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 222, 681 S.E.2d 96,

(2009). This rule is a natural corollary to the rule that this Court will “apply a *de novo*

standard of review to [a] circuit court’s interpretation of [a] contract.” *Navient Solutions,*

Inc. v. Robinette, 2015 W. Va. LEXIS 1050, 7 (November 4, 2015) (quoting *Zimmer v.*

Romano, 223 W. Va. 760, 777, 679 S.E.2d 601, 609 (2009)).

When employing the *de novo* standard of review, [a court] review[s] anew the findings and conclusions of the circuit court, affording no deference to the lower court’s ruling. See *West Virginia Div. of Env’tl. Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834, 1997 W. Va. LEXIS 176, 31 (1997) (“*De novo* refers to a plenary form of review that affords no deference to the previous decisionmaker.” (quoting *Fall River County v. South Dakota Dep’t of Revenue*, 1996 SD 106, ___, 552 N.W.2d 620, 624 (1996) (citations omitted))). See also *West Virginia Div. of Env’tl. Protection v. Kingwood Coal Co.*, W. Va. at ___, 490 S.E.2d 823 at ___, 1997 W. Va. LEXIS 176, 29 (“The term ‘*de novo*’ means ‘anew; afresh; a second time.’” (quoting *Frymier-Halloran v. Paige*, 193 W. Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting *Black’s Law Dictionary* 435 (6th ed. 1990)))).

Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997).

Here, the Petitioners challenges the circuit court's well-reasoned finding that class action waiver in the arbitration clause at issue must be construed against SIU so as to allow the plaintiffs to bring a class action in a court of law. However, *de novo* review of the arbitration clauses at issue will show not only that the circuit court's holding is well-reasoned and correct, but that there are numerous other reasons that the arbitration clauses at issue are unenforceable.

B. The circuit court did not err in finding that under West Virginia contract law, the ambiguity in the class action waiver contained in the arbitration agreements was so ambiguous as to render those agreements unenforceable in this case.

1. This Court must analyze the arbitration clauses at issue under the principles of West Virginia contract law.

A West Virginia court considering the enforceability of an arbitration agreement must balance the goals of the Federal Arbitration Act and West Virginia Contract law. Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307, a court ruling upon a motion to compel arbitration has authority only to determine 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.” Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010); *see also* Syl. Pt. 2 *Kirby v. Lion Enterprises*, 233 W. Va. 159, 756 S.E.2d 493 (2014).

A court considering an arbitration clause must apply the doctrine of severability; it must sever the clause from the larger agreement and analyze it separately under state contract law for validity. *State ex rel. Richmond American Homes of W. Va., Inc. v.*

Sanders, 228 W. Va. 125, 134, 717 S. E. 2d 909, 918 (2011). In performing this analysis, although the arbitration agreement has been severed from the greater contract, a court

may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

Schumacher Homes, 2015 W. Va. LEXIS 562 at 13 (citing *Richmond American Homes*, 228 W. Va. at 134, 717 S. E. 2d at 918).

To determine whether a valid contract arbitration agreement exists, courts use state contract law principles. See, e.g., *Richmond American Homes*, 228 W. Va. at 133-134, 717 S.E.2d at 917-18.

[U]nder the savings clause of Section 2 [of the FAA], general state contract principles still apply to assess whether those agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law. Under the savings clause, “generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate arbitration agreements without contravening § 2.”

Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 672, 724 S.E.2d 250, 276 (2011), reaffirmed 229 W. Va. 382, 729 S.E.2d 217 (2012) (“*Brown II*”) (“[W]e otherwise reaffirm all of our discussion and holdings in *Brown I*”).

State law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contract generally.... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.

State ex rel. Clites v. Clawges, 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (2009).

A court assessing the validity of an arbitration agreement must consider a written arbitration clause as “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), *rev’d on other grounds, Mamet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 192 L. Ed.2d 42 (2012). “Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalid arbitration agreements.” *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 673, 724 S.E.2d 250, 276 (2011), reaffirmed 729 S.E.2d 217, 2012 W. Va. LEXIS 311 (W. Va., June 13, 2012) (overruling only Syl. Pt. 21).

If a court finds an arbitration agreement inconsistent with West Virginia contract law, it may: (1) refuse to enforce the arbitration agreement; (2) enforce the remainder of the arbitration agreement without the unconscionable; or (3) limit the application of any unconscionable clause to avoid any unconscionable result. *Brown I*, 228 W.Va. 646, 724 S.E.2d 250 (2011).

2. Applying West Virginia contract law to the arbitration agreement in this case, the circuit court correctly found that SIU’s arbitration waivers were ambiguous.

Under West Virginia law, a valid contract “which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation.” *See* Syl. Pt. I, *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1963). However, where there is ambiguity in the language of a written agreement and the intent of the parties cannot be determined,

the ambiguous terms will be construed against the party that drafted the agreement. *See Richmond American Homes*, 228 W. Va. at 140; 717 S.E.2d at 924.

Courts define “ambiguity” 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. Point 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006). Ambiguous language exists “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. Point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002).

Contract language usually 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. In note 23 of *Williams [v. Precision Coil, Inc.]*, 194 W. Va. [52,] at 65, 459 S.E.2d [329,] at 342 [(1995)], we said: “a contract is ambiguous when it is *reasonably* susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction.” (Emphasis added).

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 101, 468 S.E.2d 712 (1996).

“The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syl. Point 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W.Va. 252, 162 S.E.2d 189 (1968); *see also*, Syl. Point 1, *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934).

Further, “[u]nder the Federal Arbitration Act ... 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 I*, 724 S.E.2d at 261 (emphasis added).

Review of the class action waivers in the arbitration clauses at issue in this case shows that the language of those waivers is ambiguous.²⁸ In very small print, one needs a magnifying glass to read, the purported class action waiver states, “the arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by and against you may not be joined or consolidated with claims brought by or against any other person.”²⁹

Simply stated, this language is ambiguous. It is not clear that the Respondent Students waived their right to bring a class action suit in a court of law. At best, the arbitration provision allows for multiple reasonable interpretations regarding the availability of class action, because the language implies a waiver of class action rights but does not explicitly waive those rights. At worst, it directly contradicts itself by requiring all claims to be subject to arbitration and then removing class actions from the jurisdiction of the arbitrator. *See* Syl. Point 6, *Frazier & Oxley*, 212 W.Va. 275, 569 S.E.2d 796.

Most importantly, the class action waiver agreement does not, at any point, state that the Respondents do not agree not to act as class representatives or participate in a

²⁸ Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution, AR326 – AR327.

²⁹ Enrollment Agreements, AR216 – 221.

class-action.³⁰ Therefore, the circuit court correctly found the arbitration clause in this matter is not valid and enforceable under State contract law as it is ambiguous and should be construed against the drafter, Petitioners (herein “SIU” “Salem International University”) and the dispute between the parties is a punitive class action which is excluded from the arbitration clause because of the ambiguity³¹.

When asked by the court to explain why the language in the arbitration clause was not ambiguous, Petitioners’ counsel stated:

“I don’t think so.” “I don’t know.”³³

When the Court asked Petitioners’ counsel:

“...if the language in the arbitration clause is that is susceptible to reasonable interpretation by the other side, then isn’t that sufficient for the Court to make a finding that the arbitration language is ambiguous and it gets resolved by the drafter of the agreement?”³⁴

The Petitioners stated:

“I understand what you’re saying. I don’t disagree.”³⁵

Further, the circuit court stated, “I’m trying to understand what the arbitration claim mean.”³⁶

³⁰ Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution, AR 231.

³¹ *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ August 19, 2015, Hearing Transcript, AR301.

If a Circuit Court and SIU's counsel cannot understand the language in the arbitration clause how could SIU expect the Respondents herein to understand the language in the Enrollment.

The Petitioners argue that the language in the class action waiver stating that claims "may not be joined or consolidated with claims brought by or against another person" supports its position that the class action waiver is unambiguous. But courts define "ambiguity" 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. Point 4, *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006).

It is true that West Virginia law requires that words in a contract be given their usual ordinary and popular meaning.³⁷ However, the Petitioners' long foray into the definitions provided by the Merriam-Webster's Collegiate Dictionary is unnecessary and muddies the waters of this case. The layman's understanding of the terms "joinder" and "consolidation" are trumped in this case by the fact that the terms are legal terms of art employed in a legal document. In this context, joinder and consolidation are distinct from class action. The terms have specific procedural meanings that are unrelated to a class action. See Fed. R. Civ. P. 18-20, 23, 42; see also W.Va. R. Civ. P 18-21, 23, 42. The use of these terms of art do not absolve SIU's failure to include clear language prohibiting the parties from engaging in class-action litigation-in the arbitration provision

³⁷ Petitioners' Brief, p. 15 (citing *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 147, 690 S.E.2d 699, 702 (2009)).

it drafted-creates an ambiguity as to whether the arbitration provision constitutes a class-action waiver. Therefore, because the instant case is a putative class action, the ambiguity of the purported class action waiver renders the arbitration agreement unenforceable in this case.

C. If the class action waiver is not ambiguous, then it creates a fundamental inequity in the parties' rights under the arbitration clause that renders the arbitration clauses in this case unconscionable.

If this Court finds that the class action waiver in the Enrollment Agreement is enforceable and not ambiguous, it must then consider whether or not the presence of the class action waivers creates a fundamental inequity in the parties' rights. As interpreted by SIU, the class action waiver **bars** students from arbitrating on behalf of others. On the other hand, the arbitration clause states that the Respondent Students must arbitrate a dispute with almost any entity or individual affiliated with SIU, whether or not that entity or individual was a party to the Enrollment Agreement³⁸.

Although the parties to the Enrollment Agreement include only the students and SIU, the arbitration clause purports to give non-parties the right to elect arbitration in the case of a dispute with a student. The 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 election, submitted to and resolved by individual binding arbitration . . .³⁹

³⁸ August 19, 2015, Hearing Transcript AR301 & AR302.

³⁹ Enrollment Agreements, AR216 – 221.

Thus, the clause purports to give SIU the right to elect arbitration in claims involving individuals not even a party to an Enrollment Agreement – parties it does not even fully and completely disclose by name. Taken to its logical conclusion, this arbitration agreement could force the Respondent Students to arbitrate disputes with SIU’s food service providers or booksellers, who are affiliated with SIU through contracts, but separate corporate entities. Under the terms of the arbitration clause in the Enrollment Agreement, the Respondent Students would also be forced to arbitrate any claims against the Palmer Group, Inc., a manager and principal of SIU. In the instant case, the clause binds the students to arbitrate their claims against John Luotto, President of SIU, whom they have named in this suit.

Contrast the fact that non-parties can force the Respondent Students into arbitration with the fact that the arbitration clauses contain class action waivers that read: “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.”⁴⁰

The result is a fundamental inequity in the parties’ rights under the arbitration clause. SIU can create economies of scale in the arbitration, but the Plaintiff cannot. Not only must the Respondent Students waive their rights to join others, they must also agree not to join other defendants. This prohibition requires the Respondent Students to resolve piecemeal any common claim they wish to bring against multiple parties, which in turn

⁴⁰ Enrollment Agreements, AR216 – AR221. *Note bene* - Class action waivers are generally allowable. See, e.g., *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 321 (2011).

means they must incur multiple filing fees and costs rather than benefiting from the economy inherent in joining multiple defendants. SIU and its affiliated parties, however, may consolidate both its offensive and defensive claims.

1. The imbalance of equities between the parties results in unconscionability that requires the arbitration clause to be voided.

In West Virginia, “[a] court in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability.” Syl. Pt. 9, *Richmond Am. Homes*, 228 W. Va. 125, 717 S.E.2d 909.

“The doctrine of unconscionability means that, because of an overall and gross imbalance, one sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written.” Syl. Pt. 5, *Kirby*, 233 W. Va. 159, 756 S.E.2d 493 (quoting Syl. Pt. 12, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250). “A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the ‘existence of unfair terms in the contract.’” *Clites*, 224 W.Va. at 306, 685 S.E.2d at 700 (citing Syl. Pt. 4, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991)).

Under West Virginia law, an analysis of unconscionability has two component parts: procedural and substantive unconscionability. *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 392, 729 S.E.2d 217, 227 (2012) (*Brown II*). Both procedural and substantive unconscionability “need not be present to the same degree. Courts should

apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” Syl. Pt. 8, *New v. Gamestop, Inc.*, 232 W. Va. 564, S.E.2d 62 (2013) (quoting Syl. Pt. 20, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250).

In this case, under both prongs of the analysis, the arbitration agreement contained in the Enrollment Agreements between SIU and the students are unconscionable, and this Court should refuse to enforce it.

- a. The arbitration clause is substantively unconscionable because it is unreasonably favorable to Defendant SIU and may impose overly burdensome costs on the Plaintiff.**

An evaluation of substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Brown II, 228 W. Va. at 659, 724 S.E.2d at 262; see also *State ex rel. Johnson Controls Inc. v. Tucker*, 229 W. Va. 486, 495, 729 S. E. 2d 808, 817 (2012).

The arbitration clause in the Enrollment Agreement⁴¹ is substantively unconscionable because it contains a disparity in the rights of the contracting parties such

⁴¹ Enrollment Agreement, AR218-AR219.

that it is one-sided and unreasonably favorable to one party. *TBI Invs.*, 2015 U.S. Dist. LEXIS 104256 at 30 (quoting *Brown II*, 729 S.E.2d at 500).

Although the arbitration clause requires students to submit to arbitration in the case of a dispute with almost any entity or individual affiliated with SIU, the clause as interpreted by SIU bars students from arbitrating on behalf of others⁴². This imbalance results in potentially large arbitration costs that would effectively deter Plaintiff “from effectively vindicating her . . . rights in the arbitral forum.” *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

Under West Virginia contract law, “[i]f an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable.” *Richmond American Homes*, 228 W. Va. at 137, 717 S.E.2d at 921. Importantly, it is not only the costs actually imposed on a claimant, “but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process.” *Id.* (emphasis in original).

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Id., 228 W. Va. at 137-38, 717 S.E.2d at 921-22.

⁴² *Id.*, AR219.

The arbitration clause in the adhesion contract in this case imposes unreasonably burdensome costs on Plaintiff, because it requires her to bring claims against multiple parties separately. Moreover, the clause allows SIU to arbitrate on behalf of other parties, but does not give the same right to the students⁴³. Therefore, the arbitration clause in this case is substantively unconscionable.

b. The circumstances surrounding the execution of the Enrollment Agreements show that the arbitration clauses are procedurally unconscionable.

An analysis of procedural unconscionability examines the

[i]nequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Brown II, 229 W. Va. 393, 729 S.E.2d 228 (citing Syl. Pt. 17, *Brown I*).

Petitioners allege the Respondent Students cannot argue that the Enrollment Agreement is procedurally unconscionable because the document contains “a large box at the bottom of page 2 [that] states, “NOTICE OF ARBITRATION AGREEMENT” and clearly calls attention to the arbitration agreement.”⁴⁴ However, Petitioners’ application of the analysis is far too narrow, as it involves consideration of only one of many possible indicia of procedural unconscionability.

⁴³ August 19, 2015, Hearing Transcript, AR301 & AR302.

⁴⁴ *Defendants’ Motion and Supporting Memorandum to Stay Proceedings Pending Mandatory Alternative Dispute Resolution*, p3.

In fact, the formation of the Enrollment Agreement in this case is fraught with such indicia. First, the arbitration agreement is subject to close scrutiny because it is part of an adhesion contract. *Brown II*, 229 W. Va. 393, 729 S.E.2d 228.

“A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.”

Id. (citing Syl. Pt. 17, *Brown I*). Contracts of adhesion are those standard contract forms offered on a “take it or leave it basis,” leaving the party in a weaker bargaining position with no realistic choice as to its terms. *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 773, 613 S.E.2d 914, 921 (2005).

In this case, Respondent, Taylor Bates,⁴⁹ a nineteen year-old undergraduate student, was presented with the standard Enrollment Agreement by representatives of Petitioners, a for-profit institution of higher education.⁵⁰ Respondent was aware that her admission was dependent on her signing the Enrollment Agreement, as well as a myriad of other papers presented to her at one time.⁵¹ She was offered no choice of other terms, nor was she given any indication that she might alter the terms presented to her in the adhesion contract.⁵² Importantly, the Respondent had been a student enrolled in various schools for approximately thirteen consecutive years. She was accustomed to obeying instructions from teachers and administrators; she was not accustomed to business

⁴⁹ Affidavit of Taylor Bates, AR111-AR112.

⁵⁰ August 19, 2015, Witness testimony of respondent Taylor Bates, AR246-AR248.

⁵¹ *Id.*, AR249.

⁵² *Id.*, AR250

dealings⁵³. In the process of enrolling in Salem International University, Respondent assumed her habitual role and simply complied with the instructions she was given⁵⁴.

The Respondent Students relative lack of sophistication constitutes a second indication that the Enrollment Agreement is procedurally unconscionable. The Petitioners did not only occupy a position of superior bargaining power due to the fact that they controlled admission to the university and to the nursing program, they also occupied – and exploited – a position of psychological superiority. As stated above, at the time Respondent, Taylor Bates signed the Enrollment Agreement; she had spent thirteen of her nineteen years complying with the direction of school teachers and administrators. Given her life experience, it was entirely natural and reasonable for the Respondent Student to sign the Enrollment Agreement as Petitioners expected her to do – without question.

Further, and most importantly, the manner and setting in which the Respondents and Petitioners entered into the Enrollment Agreement indicates procedural unconscionability. While the Respondent Students were being recruited, they were lead to believe that time was of the essence and that it was urgent that Enrollment take place swiftly, the process is extremely rushed.⁵⁵ Respondents were only required to sign the front of the Enrollment Agreement, not the back. The arbitration clause is printed on the back of the agreement.⁵⁶ The Respondent Students were not aware the Enrollment

⁵³ *Id.* AR249

⁵⁴ *Id.* AR253

⁵⁵ *Id.*

⁵⁶ *Id.* AR221.

Agreement was double-sided when signing it and testified to the same at the August 19, 2015.⁵⁷

The aforementioned testimony was confirmed by SIU. Brenda Davis, was present at the hearing, as a representative of Petitioners.⁵⁸ Ms. Davis is the Admissions advisor of SIU.⁵⁹ As an admissions advisor Ms. Davis discusses the enrollment with the students interested in attending SIU that of which includes the Enrollment Agreement.⁶⁰ Brenda Davis testified that the same Enrollment procedure is conducted for all potential students.⁶¹ She was asked to go through the Enrollment process in specific detail⁶². Ms. Davis demonstrated and provided an explanation of the entirety Enrollment process, which included the Enrollment Agreement at issue in this case.⁶³ Her testimony confirmed the statements of the Respondent Students. Ms. Davis walked the court through each step an Admissions Advisor at SIU takes an enrolling student through in filling out an Enrollment Agreement,⁶⁴ explaining the credit requirements of the program,⁶⁵ pricing of the program,⁶⁶ financial aid,⁶⁷ and SIU's internal complaint process.⁶⁸ Throughout her testimony Ms. Davis did not once mention the arbitration

⁵⁷ August 19, 2015, Hearing Transcript and Testimony of respondents: AR256; 248 testimony of Taylor Bates; AR258 testimony of Kelly Nutt; AR271 testimony of Mallory Bundy; AR276 testimony of Tiffany Marie Kerr.

⁵⁸ *Id.* AR236.

⁵⁹ *Id.*

⁶⁰ *Id.* AR289.

⁶¹ *Id.* AR291.

⁶² *Id.* AR291.

⁶³ *Id.* Testimony of Brenda Davis, AR289 – AR295.

⁶⁴ *Id.*

⁶⁵ *Id.* AR291.

⁶⁶ *Id.* AR292.

⁶⁷ *Id.*

⁶⁸ *Id.* Testimony of Brenda Davis, AR293.

clause. Ms. Davis testified what she emphasized though out the Enrollment process. Ms. Davis testified, after having heard, the testimony of the four students as to the Enrollment process⁶⁹. Yet, she never mentioned the arbitration clause⁷⁰.

Ms. Davis's testimony evidenced that SIU at no point, during the Enrollment process, do they reference or point out the arbitration clause to the enrolling students. The arbitration waiver in this case is unconscionable, it is a contract of adhesion. There is no bargaining or options for the Respondent Students.⁷¹

The totality of circumstances surrounding the Respondent Students execution of the Enrollment Agreements containing the arbitration agreement at issue in this case, shows inequity, impropriety, and unfairness in the contracting process. Petitioners exploited the Respondent Students' relative lack of sophistication by imbuing the Enrollment process with a sense of urgency.⁷³ Petitioners had the Respondent Students sign the Enrollment Agreements, adhesion contracts, in a high pressure environment in which there was no chance for negotiation.⁷⁴ Clearly, the formation of the arbitration agreement in this case was procedurally unconscionable.

Analyzing the arbitration agreements in this case and viewing the arbitration clauses within the full context of the formation of the Enrollment Agreements, it is evident that the arbitration clause is invalid because it is unconscionable and is the result of SIU's unfair and deceptive recruitment tactics.

⁶⁹ August 19, 2015, Hearing transcript, AR245-AR288.

⁷⁰ *Id.*, AR296.

⁷¹ August 19, 2015, Testimony of respondents: Taylor Bates, AR247; Kelly Nutt, AR260; Mallory Bundy, AR272; Tiffany Marie Kerr, AR278.

⁷³ *Id.*

⁷⁴ *Id.* AR250, AR261, AR272 and AR278.

D. Arbitration is not appropriate in this case because the Respondent Students' claims in this case fall outside the scope of the arbitration clauses in the Enrollment Agreements.

Under the FAA, a court analyzing the enforceability of an arbitration agreement must not only assess the validity of the arbitration agreement under state contract law, but must also determine, “ whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. Pt. 2, *TD Ameritrade* 225 W. Va. 250, 692 S.E.2d 293; *see also* Syl. Pt. 2 *Kirby*, 233 W. Va. 159, 756 S.E.2d 493. Here, the Respondent Students' claims are outside the scope of the subject arbitration clauses.

The arbitration clauses drafted by SIU state that any claim “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”⁷⁵ shall be subject to arbitration. However, the term “Enrollment” is not defined anywhere in the arbitration clauses or in the Enrollment Agreements.

The Respondent Students' dispute with SIU does not arise from their Enrollment in SIU but from SIU's unfair or deceptive acts or practices in inducing the students to enroll despite the impending failure of SIU's accreditation and its failure to provide the program it had promised.⁷⁶ Importantly, SIU did not provide a definition for this term anywhere in the Enrollment Agreements. The dictionary defines “enroll” as a verb meaning “to enter (someone) as a member of or a participant in something: to take

⁷⁵ Enrollment Agreements, AR216 – AR221.

⁷⁶ Complaint ¶¶ 37-38, AR007.

(someone) as a member or participant: to become a member or participant.” *Merriam-Webster.com*. 2015. <http://merriam-webster.com> (Aug. 19, 2015). Thus, the term “Enrollment” is aptly understood as actual participation in the nursing program and not as Defendant SIU seems to claim, any association with the nursing program, up to and including SIU’s failure to provide an accredited program.

The Respondent Students’ Complaint alleges that SIU violated W. Va. Code § 46A-6-102(7)(B), (E), (G), (J), (L), (M), and (N). Those provisions prohibit:

(B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(E) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(G) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model if they are of another;

(J) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

(N) Advertising, printing, displaying, publishing, distributing or broadcasting, or causing to be advertised, printed, displayed, published, distributed or broadcast in any manner, any statement or representation with regard to the sale of goods or the extension of consumer credit including the rates, terms or conditions for the sale of such goods or the extension of such credit, which is false, misleading or deceptive or which

omits to state material information which is necessary to make the statements therein not false, misleading or deceptive;

Therefore, the Respondent Students' claims all begin with SIU's statements and actions during SIU's recruitment process and not with the students' participation – or Enrollment in – the nursing program. They end with SIU's failure to provide the accredited nursing program it promised to provide.

When a contract is marred by ambiguity, the ambiguous language must be construed against the drafting party. *See Richmond American Homes*, 228 W. Va. at 140, 717 S.E.2d at 924. Here, SIU drafted the arbitration clause at issue, and the ambiguous term, "Enrollment," must be construed to refer only to actual participation in the nursing program and not SIU's failure to provide a program in which Plaintiff could enroll. The Plaintiff's claims against SIU are therefore outside the scope of the arbitration clause, and this case should proceed before this court rather than go to arbitration.

E. Because this putative class action has not yet been certified, the Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution is not ripe for appeal.

Under West Virginia law, there must be a full and final judgment on all claims and parties before a party may appeal a final order of a circuit court. See W. Va. Code § 58-5-1; *see also* W. Va. R. Civ. P 54(b) (authorizing entry of a final judgment in accordance with the specification of § 58-5-1 but instructing that "any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties"). (Emphasis added).

This Court has held,

Under W. Va. Code 58-5-1, appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

Syl. pt. 3 of *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995).

However, this Court has also held, "An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). However, the Court reached this holding after applying the three-part test it expressed in *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009) (applying three-part collateral order doctrine to circuit court's denial of summary judgment on issue of qualified immunity and finding order immediately appealable).

The collateral order doctrine creates a narrow exception to the rule an appeal lies only for final judgments. *See, e.g., Coleman v. Sopher*, 194 W. VA. 90, 94, 459 S.E.2d 367, 371 (1995). The doctrine may be applied to allow appeal of an interlocutory order when three factors are met: "An interlocutory order would be subject to appeal under [the collateral order] doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Robinson*, 223 W. Va. at 832, 679 S.E.2d at 664; *see also Durm v. Heck's, Inc.*, 184 W.Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991) (internal quotations and citation omitted). The instant case fails to

meet the requirements of the collateral order doctrine. Analysis of the instant case under the *Robinson* factors shows that this case is not yet ripe for appeal.

1. The order at issue fails to conclusively determine the disputed controversy.

The ruling at issue, Order denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution,⁷⁷ does not conclusively determine the disputed controversy. The circuit court's ruling refuses to compel arbitration as to the class action, which it determined is excluded from the scope of the arbitration clause. The circuit court has not yet rendered its decision to certify the class. Thus the ruling neither forecloses arbitration of the claims asserted nor does it conclusively resolve the issue of arbitration. The first factor in the collateral order test has not been met.

2. The order at issue does not resolve an important issue separate from the merits of this action.

The circuit court's order refusing to compel arbitration does not resolve the separate issue of class certification. Class certification remains pending in the circuit court. Therefore, even though the issue of arbitration is indeed separate from the merits of this case, it is not yet appealable. The circuit court must settle the issue of class certification before it can resolve the issue of whether or not the instant case falls within the scope of the arbitration clause in the Enrollment Agreements. Therefore, the second factor in the collateral order test has not been met.

⁷⁷ AR222 - AR233.

3. The order at issue will be reviewable at a later stage in this litigation.

The circuit court's order did not conclusively determine the issue of whether or not the arbitration clause in this case would be enforced. As set forth, petitioners specifically contend the circuit court's August 27, 2015, order left the question of whether or not the Enrollment Agreement, by its terms, excepted the class action claims from the requirement to arbitrate.⁷⁸ The class certification is pending as set forth in the circuit court's order "...pending the Court's decision regarding class certification."⁷⁹ Should class certification be denied, the Respondent Students will have individual claims, and a different analysis will be required.⁸⁰ Should class certification be granted, the Petitioners will then have the opportunity to appeal the denial of its motion to compel arbitration at that time.

The order that SIU appeals is an unappealable interlocutory order which this Court lacks jurisdiction to consider. The required finality is a statutory mandate, not a rule of discretion. *Province v. Province*, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996). Therefore, SIU's appeal should be denied without prejudice so that the matters may be appealed, if necessary, after a proper final judgment is in place.

V. CONCLUSION

The arbitration agreements contained in the Enrollment Agreements signed by the Respondent Students are unenforceable. First, this case is a putative class action, and the

⁷⁸ Petitioners' Brief, p. 9.

⁷⁹ Order Denying Motion to Stay Proceedings Pending Mandatory Alternative Dispute Resolution AR231

⁸⁰ As Respondent Students will discuss more fully below, it is their position that the Arbitration Clauses in the Enrollment Agreements are not enforceable under West Virginia Law regardless of whether the claims are brought individually or in a class action.

circuit court correctly found the purported class action waivers in the subject arbitration agreements ambiguous. Therefore, applying West Virginia contract law, the arbitration agreements are unenforceable as to a class action lawsuit. If this Court finds that the purported class action waivers are not ambiguous, analysis of the arbitration agreement requires a finding that it is unenforceable under West Virginia contract law because it is unconscionable. Further, the Respondent Students' claims fall outside of the scope of the arbitration agreement. If the court determines that this issue is ripe for appeal, it should deny the Petition and refuse to compel arbitration.

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

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

Defendants Below, Petitioners,

**TAYLOR BATES, MICHELLE SYLVA,
AMY NORTHROP, CLARISSA HANNAH
and GENA DELLI-GATTI, on behalf of
themselves and all others similarly situated,**

Plaintiffs below, Respondents.

CERTIFICATE OF SERVICE

I, Charles R. Webb, counsel Respondents, do hereby certify that service of the foregoing
RESPONDENTS' OPPOSITION TO PETITIONERS BRIEF in the above styled case has
been served upon the following:

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