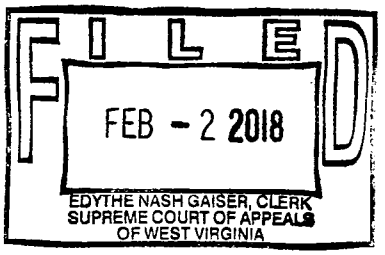
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



Record No. 17-0972
(Mercer County Case No. 17-c-147)

CERTEGY CHECK SERVICES, INC. and
COMPLETE PAYMENTS RECOVERY SERVICES, INC.,

Defendants Below-Petitioners,

v.

JANICE FULLER,

Plaintiff Below- Respondent.

PETITION FOR APPEAL

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I. Assignments of Error

The Circuit Court erred in denying Defendants' Motion to Compel Arbitration for the following reasons:

1. The Circuit Court erred in holding that the Arbitration Provision was unconscionable without specifically finding substantive unconscionability.

2. The Circuit Court erred in holding that the Arbitration Provision was procedurally unconscionable.

3. The Circuit Court erred in holding that the Arbitration Provision was substantively unconscionable, to the extent it reached such a holding.

II. Statement of the Case

In January of 2016, Plaintiff walked into the Luxor Hotel and Casino in Las Vegas, Nevada. (App. pp. 1, 40). Although Defendants are unaware of the entire reason for Plaintiff's visit to the Luxor, one reason was undoubtedly to gamble in the Luxor's casino. (App. pp. 40; 42-48; 50-51). To facilitate her gambling, Plaintiff wanted a quick and streamlined way to access the funds she would use. To that end, Plaintiff signed two VIP Preferred Checking Cashing Enrollment Forms (the "Check Cashing Agreements"). (App. pp 42-43; pp 46-47). Each of these Check Cashing Agreements included a binding arbitration provision (the "Arbitration Provision"):

> **9. ARBITRATION**
> Any dispute arising out of or relating to the [Terms of Service] or the Services, regarding Global Payments or its Service Providers or any affiliate thereof, shall be finally resolved by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitration will be conducted in the English language in accordance with the United States Arbitration Act. There shall be one arbitrator, named in accordance with such rules. The arbitrator shall decide the dispute in accordance with the substantive law of the state of Florida. The award of the arbitrator shall be accompanied by a statement of the reasons upon which the award is based. Any arbitration arising out of the TOS or the Services shall proceed solely on an individual basis without the right for any claims to be arbitrated on a class action basis or on bases involving claims brought in a purported representative capacity on behalf of others. Claims may not be joined or consolidated unless agreed to in writing by all parties. No award or decision will have any preclusive effect as to

issues or claims in any dispute with anyone who is not a named party to the arbitration.

(App. pp. 43; 47). The Circuit Court declined to enforce the Arbitration Provision because it found it unconscionable. (App. p. 93-94). According to the Circuit Court, Plaintiff "should not be forced to arbitrate an issue" – i.e. her access to funds for gambling – "that has such an impact on her livelihood." (App. p. 94). The Circuit Court's Opinion is contrary to West Virginia law.

A. Background of the Check Cashing Agreements.

Certegy Check Services, Inc. ("Certegy") and Complete Payment Recovery Services, Inc. ("CPRS" and collectively "Defendants") are affiliated companies. Certegy provides risk management services to a wide variety of businesses, (App. p. 39), whereas CPRS provides debt recovery services. (App. p. 49). As part of their respective businesses, Certegy and CPRS both provide services to Global Payments, including assistance in administering the check and Automated Clearing House services Global Payments provides to gaming establishments. (App. pp. 39, 49).

One of the gaming establishments that Global Payments and, in turn, Certegy and CPRS, provides check and authorization services to is the Luxor Hotel and Casino in Las Vegas, Nevada. (App. p. 39). As part of these services, Global Payments provides Luxor customers with the opportunity to sign up for Global Payments' VIP Preferred Program. (App. p. 39). By signing up for this program, Luxor customers are able to access funds from their bank accounts for gambling by simply showing a valid government-issued identification. (App. p. 39). This streamlines the gambling process because it eliminates the need for customers to repeatedly present paper checks or additional checking account information to utilize their funds. (App. p. 39). Certegy and CPRS are service providers that Global Payments has engaged to assist in administering the VIP Preferred Program. (App. pp. 39. 50).

B. Plaintiff entered into the Check Cashing Agreements to gain quick access to gambling funds.

In January and February of 2016, Plaintiff initiated two check transactions at the Luxor Hotel and Casino in Las Vegas, Nevada. (App. pp. 40, 50). Certegy assisted in processing these check transactions on behalf of Global Payments. (App. p. 40). In connection with these transactions, Plaintiff signed up for the VIP Preferred Program by filling out two Check Cashing Agreements. (App. p. 40). Specifically, Plaintiff signed one Check Cashing Agreement on January 31, 2016 so that she could withdraw approximately $1,000.00 to gamble at the Luxor. (App. p. 40, 42-45). She then signed another Check Cashing Agreement on February 5, 2016 so that she could gamble with an additional $250.00. (App. p. 40, 46-48). Each of these agreements included the binding Arbitration Provision.

When a Check Cashing Agreement is used in a transaction, it is presented to the customer as a paper document, not in electronic format. (App. p. 40). To proceed with the transaction, the customer must review and physically sign the Check Cashing Agreement. (App. p. 41). An individual cannot become part of the VIP Preferred Program without signing a Check Cashing Agreement. (App. p. 41). Although Plaintiff contends that she does not believe she reviewed the Check Cashing Agreements before signing them, she concedes that the signature on each respective agreement is hers. (App. p. 77). Indeed, the Circuit Court recognized in its Opinion that Plaintiff "signed this agreement." (App. p. 94). She simply contends that she signed it "in a rushed environment without an opportunity to review any terms." (App. p. 94).

C. The Court denied Defendants' Motion to Compel Arbitration.

After Plaintiff left the Luxor, she claims that "Defendants began to engage in collection" of the indebtedness she incurred there. (App. p. 2). Based on these collection efforts, she filed a Complaint in the Circuit Court of Mercer County, West Virginia against Defendants on March 30,

2017. (App. p. 1). In the Complaint, Plaintiff alleges a claim under the West Virginia Consumer Credit and Protection Act ("WVCCPA") and common law invasion of privacy. (App. p. 11, 12).

On August 8, 2017, Defendants filed a Motion to Compel Arbitration based on the two Arbitration Provisions to which Plaintiff agreed in the Check Cashing Agreements. (App. p. 95). Plaintiff filed her response to the motion on September 28, 2017, (App. p. 95), although Defendants did not receive a copy of the filing until the day of the hearing. The Circuit Court held a hearing on the motion on October 2, 2017. At the hearing, the Circuit Court took the motion under advisement. (App. p. 101). Subsequently, the Circuit Court issued a written Order (the "Opinion") denying the motion on October 4, 2017. In the Opinion, the Circuit Court found that the Arbitration Provision was unconscionable. This is the Opinion from which Defendants appeal.

The Opinion included very little analysis as to how the Arbitration Provision was procedurally and substantively unconscionable. (App. p. 93, 94). As to substantive unconscionability, the Circuit Court found that the Check Cashing Agreements have many "sophisticated terms." The Circuit Court summarized these terms as follows:

a) "Wavier [sic] of the benefit of the fee shifting provisions of the WVCCPA due to the election of Florida law;"
b) "the required selection of Commercial Arbitration Ruels [sic] when the dispute is clearly a consumer dispute" and "the unnecessary designation of Commercial Arbitration Rules when consumer rules exist for this type of claim;" and
c) "the class wide ban on arbitration arising in an adhesive contract, even if class members have identical claims."

(App. p. 93, 94). The Circuit Court merely listed these terms as "sophisticated." It never actually concluded that these terms were substantively unconscionable. (App. p. 93, 94)

As to procedural unconscionability, the Circuit Court held that "[t]here was no real choice or bargaining on the part of the Plaintiff" because "she argues that she signed this agreement in a rushed environment without an opportunity to review any terms." (App. p. 94). As a result, the

Circuit Court held that the Check Cashing Agreement was not a "bargained for exchange," Plaintiff is entitled to her "day in court," and she "should not be forced to arbitrate an issue that has such an impact on her livelihood" (i.e. the collection of money related to gambling). (App. p. 94).

III. Summary of the Argument

This case is another example of a Circuit Court manifesting its hostility to arbitration by invalidating an arbitration agreement based on a theory of unconscionability. Here, the Circuit Court declined to enforce the binding Arbitration Provision because it contained "sophisticated terms" and because Plaintiff claimed she had "no real choice or bargaining" power. In recent years, the Supreme Court of Appeals of West Virginia has repeatedly rejected nearly identical arguments. In doing so, it has re-affirmed the established principle that arbitration agreements should not be discarded lightly on the theory of unconscionability. Yet, that is precisely what the Circuit Court did here. Despite this Court's case law to the contrary, the Circuit Court cast aside the Arbitration Provision based on paper thin allegations of procedural unconscionability and without *ever* making a finding as to substantive unconscionability. In reaching its decision, the Circuit Court committed reversible error for three separate reasons.

First, to find unconscionability under West Virginia law, a contract must be *both* procedurally and substantively unconscionable. *See* Syllabus Point 20, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 680, 724 S.E.2d 250 (2011). Here, the Circuit Court never found any portion of the Arbitration Provision substantively unconscionable. Although the Circuit Court's Opinion listed several provisions that it labeled as "sophisticated terms," it never concluded that these terms were substantively unconscionable. This constitutes reversible error – a finding of substantive unconscionability is an essential element of an unconscionability claim.

Second, even if the Circuit Court had held that the "sophisticated terms" were substantively unconscionable, that would have been contrary to West Virginia law. As discussed below, not

only is it not unconscionable to have a choice of law provision in an arbitration provision, but the law chosen here provides the very protections for consumers that the Circuit Court claimed were lacking. Moreover, there is nothing unconscionable about an arbitration provision that selects the American Arbitration Association's ("AAA") Commercial Arbitration Rules over the Consumer Arbitration Rules as the governing rules for arbitration. And even if the Circuit Court was justified in preferring the Consumer Arbitration Rules (which it was not), it failed to recognize that the Consumer Rules *would* apply in this case. Further, the Circuit Court's implication that a class action waiver is unconscionable ignores recent law from this Court and the U.S. Supreme Court.

Third, the Circuit Court erred when it found the Arbitration Provision was procedurally unconscionable. The Circuit Court simply adopted Plaintiff's argument that the Arbitration Provision was procedurally unconscionable because it was an adhesion contract that Plaintiff accepted without "real choice." West Virginia law requires Plaintiff to show much more than that to meet her burden of demonstrating procedural unconscionability. Yet, she was unable to make such a showing. Last, to the extent the Circuit Court based its procedural unconscionability finding on its belief that arbitration would have "such an impact on [Plaintiff's] livelihood," that finding is divorced from the facts of this case. This case does not pertain to Plaintiff's livelihood. It pertains to gambling funds Plaintiff withdrew at the Luxor Hotel and Casino in Las Vegas, Nevada.

IV. Statement Regarding Oral Argument and Decision

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, Defendants respectfully request oral argument before the Court because this matter involves: (1) assignments of error in the application of settled law, (2) a decision that is against the weight of the evidence; and (3) a decision involving a narrow issue of law. Defendants believe that this case is appropriate for a memorandum decision.

V. Argument

A. Standard of Review

This Court recently held that "[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syllabus Point 1, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 525, 745 S.E.2d 556, 563 (2013). And when such an appeal is taken, the review is *de novo*. *See id.* Since the Court's decision in *Credit Acceptance*, it has consistently followed suit – finding that an order denying a motion to compel arbitration is immediately reviewable under a *de novo* standard of review. *See W. Va. CVS Pharm., LLC v. McDowell Pharm.*, 238 W. Va. 465, 470 (2017) (holding that an order denying a motion to compel arbitration is subject to immediate appeal that is reviewed *de novo*) (citations omitted); *Citizens v. Telcoms Co. v. Sheridan*, 799 S.E.2d 144, 148 (2017) (finding an order denying a motion to compel arbitration is immediately reviewable) (citations omitted).

B. The Court Abused its Discretion in Denying the Motion to Compel Arbitration Based on a Theory of Unconscionability

In Defendants' Motion to Compel Arbitration, they introduced evidence that when a Check Cashing Agreement is used in a transaction, it is presented to the customer prior to signing. (App. p. 40). To proceed with the transaction, the customer must review and physically sign the agreement. (App. p. 41). An individual cannot become part of the VIP Preferred Program without signing the Check Cashing Agreement. (App. p. 41). Although Plaintiff countered Defendants' motion by arguing that she did not review the Check Cashing Agreements before signing them, she concedes that she affixed her signature. (App. p. 77). Indeed, the Circuit Court accepted that "she signed this agreement" in its Opinion. (App. p. 94). Thus, the fundamental appellate issue is this: Did the Court err when it found, acting out of a desire to ensure Plaintiff's "day in court," that the Arbitration Provision was procedurally and substantively unconscionable?

The Court must answer this question in the affirmative. The Circuit Court's Opinion violates established principles of West Virginia law for the following reasons:

1) The Circuit Court did not actually find that any term of the Arbitration Provision was substantively unconscionable. A court *must* find substantive unconscionability for the agreement to be unconscionable as a whole.
2) The contractual terms that the Circuit Court cited in its Opinion are not substantively unconscionable as a matter of law.
3) The Circuit Court's conclusion that the Arbitration Provision was procedurally unconscionable is contrary to established West Virginia law. A plaintiff must show more to invalidate an arbitration agreement than that it was an adhesion contract that resulted from "no real choice."

This Court should reverse the Circuit Court's Opinion, compel the case to arbitration, and stay the case in the Circuit Court pending the outcome of arbitration.

1) The Court did not find any term of the Arbitration Provision was substantively unconscionable. This precludes a finding of unconscionability as a whole.

The burden of proving that a contract term is unconscionable falls on the party attacking the contract. *Emple. Res. Group, LLC v. Harless*, No. 16-0493, 2017 W. Va. LEXIS 265, at *8 (W.Va. Apr. 13, 2017) (Memorandum Opinion) (quoting *Brown*, 228 W.Va. at 680). To find unconscionability as a whole, the contract must be *both* procedurally and substantively unconscionable. Syllabus Point 20, *Brown*, 228 W.Va. 646. Procedural and substantive unconscionability need not be present in the *same* degree. *Id.* The more substantive unconscionability that exists in a contract, the less procedural unconscionability that is required for a finding of unconscionability as a whole. *Id.* And vice versa. *Id.* Yet, both must be present in *some* degree. *Id.* at 658.

In the Circuit Court's Opinion, it never concluded that *any* term of the Arbitration Provision was substantively unconscionable. Specifically, the Opinion summarized four elements of the Arbitration Provision that the Circuit Court believed contained "sophisticated terms." The Circuit Court recounted these terms as follows:

a) "Wavier [sic] of the benefit of the fee shifting provisions of the WVCCPA due to the election of Florida law;"

b) "the required selection of Commercial Arbitration Ruels [sic] when the dispute is clearly a consumer dispute;"

c) "the unnecessary designation of Commercial Arbitration Rules when consumer rules exist for this type of claim;" and

d) "the class wide ban on arbitration arising in an adhesive contract, even if class members have identical claims."

(App. p. 93-94). But after recounting these terms, the Circuit Court made no further findings as to them. Instead, it simply listed these terms as "sophisticated" and then immediately moved on to a procedural unconscionability analysis. (App. p. 93-94).

Finding a term is "sophisticated" is a far cry from finding it is unconscionable. Indeed, this Court has repeatedly upheld arbitration agreements that included supposedly sophisticated terms. *See, e.g. State ex rel. Ocwen Loan Servicing LLC v. Webster*, 232 W. Va. 341, 361-62 (W. Va. 2013) (enforcing an arbitration agreement that included a class action waiver). Because the Circuit Court never found any of the terms in the Arbitration Provision substantively unconscionable, it committed a fundamental error of law in finding the Arbitration Provision unconscionable as a whole. The failure to find one forecloses a finding of the other. *See, e.g. Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 88 (W. Va. 2016) (citations omitted) ("To conclude that a contractual term is unenforceable on grounds of unconscionability requires a finding that the provision in issue 'is both procedurally and substantively unconscionable.'").

2) None of the "sophisticated terms" the Circuit Court summarized are substantively unconscionable. This precludes a finding of unconscionability as a whole.

Even if the Circuit Court had undertaken a substantive unconscionability analysis of the four "sophisticated terms" discussed above, it could not have concluded that these terms were

substantively unconscionable as a matter of law. And without such a finding, the Circuit Court could not have invalidated the Arbitration Provision.

When assessing substantive unconscionability, a court focuses on "on the nature of the contractual provisions rather than on the circumstances surrounding the contract's formation." *West*, 237 W. Va., at 92. According to this Court:

> 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.

Syllabus Point 19, *Brown*, 228 W. Va., at 658. In conducting its analysis, the Circuit Court failed to address any of the factors above. In fact, its Opinion included no substantive analysis as to how any terms in the Arbitration Provision rise to the level of substantively unconscionability. Other court decisions that have addressed similar "sophisticated terms," however, have soundly rejected the arguments the Circuit Court adopted.

a) The Florida choice of law provision is not substantively unconscionable.

The Arbitration Provision includes a choice of law provision stating that "[t]he arbitrator shall decide the dispute in accordance with the substantive law of the state of Florida." (App. p. 43). In the Circuit Court's Opinion, it interpreted this term as a "Wavier [sic] of the benefit of the fee shifting provisions of the [West Virginia Consumer Credit and Protection Act] due to the election of Florida law." (App. p. 93). To the extent this interpretation served as a basis for the Circuit Court's unconscionability finding, that is legal error. Not only are choice of law provisions commonplace in enforceable arbitration agreements, but the Arbitration Provision *does not* require a waiver of potential fee shifting.

As to the first basis of error, this Court has specifically held that West Virginia law does not always apply "whenever a West Virginia consumer is involved." *Joy v. Chessie Employees Fed. Credit Union*, 411 S.E.2d 261, 265 (W.Va. 1991). Such a holding would wrongly "impl[y] that [West Virginia's] sister states are not willing to protect consumers." *Id.* To the contrary, West Virginia courts routinely enforce choice of law provisions in consumer contracts. *See, e.g. Harrison v. PNC Bank, N.A.*, No. 3:13-19944, 2015 U.S. Dist. LEXIS 61333, at *8-9 (S.D. W.Va. May 8, 2015) (applying Ohio law in a consumer mortgage dispute). In fact, "[t]his Court has recognized the presumptive validity of a choice of law provision...." *Manville Personal Injury Settlement Trust v. Blankenship*, 749 S.E.2d 329, 336 (W. Va. 2013). In the Circuit Court's Opinion, it appears to have simply assumed the choice of law provision was unconscionable without conducting any analysis of the issue and without recognizing the presumptive validity of these provisions. (App. p. 93). This is a manifest error of law.

As to the second basis of error, the Check Cashing Agreements were signed in Las Vegas, Nevada, not West Virginia. (App. p. 40). The Circuit Court failed to advance any rationale as to why the application of Florida law amounted to a substantively unconscionable term, except to say that it would constitute a "[w]avier [sic] of the benefit of the fee shifting provisions of the WVCCPA." (App. p. 93). In reaching this holding, however, the Circuit Court failed to recognize two significant points.

First, the Florida legislature has adopted the Florida Unfair and Deceptive Trade Practices Act ("FDUTPA"). This is comprehensive consumer protection legislation designed "to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202(2). In implicitly holding that Florida's consumer protection

laws are not good enough for a West Virginia citizen, the Circuit Court simply ignored this Court's admonition to *not* assume "sister states are not willing to protect consumers." *Joy,* 411 S.E.2d at 265. Indeed, the Circuit Court assumed the exact opposite.

Second, in passing the FDUTPA, the Florida legislature *included* a fee-shifting provision that provides for reasonable attorneys' fees and costs to a prevailing party in a successful lawsuit under the FDUTPA. *See* Fla. Stat. § 501.2105 ("In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party."). Accordingly, the Circuit Court's assumption that Plaintiff would be giving up the possibility of collecting fees in a successful lawsuit is simply wrong.

As a result, to the extent the Circuit Court's Opinion implies that the choice of law provision was substantively unconscionable, this implication is incorrect as a matter of law. The Circuit Court failed to address why it should ignore a presumptively valid choice of law provision in favor of applying West Virginia law. Moreover, the sole rationale the Circuit Court advanced – a desire to preserve Plaintiff's ability to recover attorneys' fees – still exists under the Parties' chosen law. The choice of law provision is not substantively unconscionable.

b) The selection of AAA's Commercial Arbitration Rules is not substantively unconscionable.

The Arbitration Provision also calls for arbitration to be "administered by the American Arbitration Association [AAA] under its Commercial Arbitration Rules." (App. p. 43). In the Circuit Court's Opinion, it summarized these purportedly "sophisticated terms" as the "selection of Commercial Arbitration Ruels [sic] when the dispute is clearly a consumer dispute" and "the unnecessary designation of Commercial Arbitration Rules when consumer rules exist for this type

of claim." (App. p. 93). To the extent the Circuit Court found the selection of the Commercial Arbitration Rules substantively unconscionable, that is legal error for several reasons.

First, because the Circuit Court did not provide any rationale for its commentary regarding the use of Commercial Arbitration Rules, Defendants are left guessing as to the Circuit Court's unconscionability reasoning. It appears that the Circuit Court simply thought the Consumer Arbitration Rules would be more appropriate. Although the Circuit Court's preference for a different set of rules is not a ground to find unconscionability, the Circuit Court's reasoning is faulty for a more straightforward reason. The Circuit Court failed to note that the application of the Commercial Arbitration Rules in this scenario would actually result in the application of the *Consumer Arbitration Rules*. Under AAA's Commercial Arbitration Rules, "[a] dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules." *See Commercial Arbitration Rules*, American Arbitration Association, 10 (October 1, 2013) https://www.adr.org/ sites/default/files/commercial_rules.pdf. This obviates any concern the Circuit Court may have had.

Second, even if AAA were to apply the Commercial Arbitration Rules in this instance, the Circuit's Court's Opinion is devoid of any reason to find these rules substantively unconscionable. The Circuit Court did not consider this term in light of 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," as this Court directs. *See* Syllabus Point 19, *Brown*, 228 W. Va., at 658. Nonetheless, of the courts nationwide that have addressed this argument, they have routinely found that the inclusion of the AAA Commercial Arbitration Rules in a consumer arbitration agreement is not unconscionable. *See Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 964 (N.D. Cal. 2015) ("In light of these protective provisions within the AAA Rules, the general reference to the

AAA Commercial Rules is not a significantly substantively unconscionable term."); *Gillespie v. Colonial Life & Accident Ins. Co.*, No. 08-869, 2009 U.S. Dist. LEXIS 26310, at *11-12 (W.D. Pa. March 30, 2009) (finding that the application of AAA's Commercial Arbitration Rules was not unconscionable); *Jones v. Genus Management Corp.*, 353 F. Supp. 2d 598, 601-02 (D. Md. 2005) (rejecting the argument that the application of the AAA Commercial Arbitration Rules to a consumer dispute is substantively unconscionable).

Third, to the extent the Circuit Court believed that the application of the Commercial Arbitration Rules would somehow prohibit Plaintiff from pursuing her claim, the record is devoid of any such evidence. In Plaintiff's memorandum in opposition to Defendants' motion to compel, she attached a declaration in which she stated that if she is required to "conduct this clearly consumer arbitration under rules designated for commercial entities, I would have to abandon my claim." (App. p. 77). This Court has recently rejected conclusory arguments like this one regarding the alleged oppressiveness of an arbitration provision. In *West*, for example, the plaintiff sought to avoid arbitration by claiming the "oppressive costs associated with arbitration" rendered arbitration substantively unconscionable. *West*, 237 W. Va. at 93. This Court did not buy it. According to the Court, a plaintiff cannot avoid arbitration with "wholly speculative" statements regarding oppressiveness. Indeed, it is legal error for a Circuit Court to rely "upon a record devoid of evidence that the [plaintiffs] could not pay the costs of arbitration." *Id.* A plaintiff must introduce more than an "unadorned averment, couched hypothetically" that the arbitration agreement would have an oppressive impact to meet his or her burden to show unconscionability. *Id.* Yet, that is precisely what Plaintiff did here.

Although it is unclear what the Circuit Court relied on when finding that AAA's Consumer Arbitration Rules would impose a substantive unconscionability, Plaintiff's unadorned allegations

of those rules' deterrent effect are clearly insufficient. *See Harless*, 2017 W. Va. LEXIS 265, at *11-14 (Memorandum Opinion) (reversing a Circuit Court's denial of a motion to compel arbitration based on unsubstantiated claims that the arbitration agreement "discourage[d] plaintiffs from actually pursing their claims"); *Heller v. TriEnergy, Inc.* No. 5:12cv45, 2012 U.S. Dist. LEXIS 94003, at *34 (N.D. W. Va. July 9, 2012) ("This conclusory allegation [regarding costs], without more, is inadequate to show the costs likely to be imposed by the application of the cost sharing provision at issue. Even assuming the truth of this allegation, Heller has failed to provide any evidence that would lead this Court to find that the costs would impose upon him an unconscionably impermissible burden or deterrent.").

c) Finding a class action waiver in an arbitration agreement substantively unconscionable is contrary to West Virginia law.

The Arbitration Provision also includes a class action waiver. Any arbitration may proceed "solely on an individual basis." (App. p. 43). Class action waivers have become commonplace in arbitration agreements. Indeed, the United States Supreme Court has recognized that "[a]rbitration is poorly suited to the higher stakes of class litigation." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351(2011). In the Opinion, the Circuit Court highlighted the Arbitration Provision's "class-wide ban on arbitration" in its unconscionability discussion. (App. p. 94). To the extent the Circuit Court based its unconscionability holding on the belief that a class action waiver is unconscionable, this belief is contrary to West Virginia law. In fact, this Court rejected this precise argument less than a year ago in *Citizens Telcoms. Co. v. Sheridan*, 799 S.E.2d 144 (W. Va. 2017).

In that case, the respondents argued that the Circuit Court properly found that an arbitration provision was unenforceable due to its prohibition on class wide injunctive relief. *Id.* at 154. This Court disagreed – finding such a holding contrary to United States Supreme Court precedent. *Id.* According to this Court, a class action waiver in an arbitration agreement is perfectly acceptable:

> [I]n considering arbitration agreements that contain class action waivers, ***we consistently have recognized that inclusion of such a waiver does not automatically render the arbitration agreement unconscionable or unenforceable.*** Assuming that the circuit court found the arbitration provision unenforceable due to its prohibition of class-wide injunctive relief, such ruling is prohibited by our precedent and by the [Federal Arbitration Act] under *Concepcion*. ***It is permissible for parties to an arbitration provision to agree to waive class-wide injunctive relief.***

Id. (emphasis added) (internal citations omitted).

The decision in *Citizens Telecommunications* forecloses the Circuit Court's finding regarding the unconscionability of a class action waiver. Indeed, this Court routinely upholds these types of provisions in the face of unconscionability challenges. *See, e.g. State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 228 W. Va. 125, 140 (W. Va. 2011) ("In the case at bar, we believe that the circuit court erred in its finding that the class action waiver rendered Richmond's arbitration provision unconscionable and void."); *Webster*, 232 W. Va. at 361-62 (enforcing an arbitration agreement with a class action waiver).[1]

3) The Arbitration Agreement is not procedurally unconscionable. This also precludes a finding of unconscionability as a whole.

Because the Circuit Court never found (nor could it have found) that any of the terms in the Arbitration Provision were substantively unconscionable, the Court need not assess procedural unconscionability. Nonetheless, if the Court is inclined to address this prong of the analysis, it should conclude that the Arbitration Provision is not procedurally unconscionable either.

A court cannot find procedural unconscionability lightly. It must consider many factors that this Court has previously discussed at length:

> [P]rocedural unconscionability is concerned with inequities, 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

[1] Moreover, the existence of a class action waiver is entirely irrelevant here. This case is not a purported class action. The Circuit Court failed to address how the existence of a class action waiver could be unconscionable when it has absolutely no bearing on the plaintiff or the case.

> 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.

Kirby v. Lion Enters., No. 16-1175, 2017 W. Va. LEXIS 931, at *4-5 (W. Va. Nov. 17, 2017) (Memorandum Opinion) (*citing* Syl. Pt. 17, *Brown*, 228 W.Va. 646). When considering these factors, this Court has repeatedly enforced arbitration agreements in the face of challenges based on procedural unconscionability. *See, e.g. Kirby*, 2017 W. Va. LEXIS 931, at *6 (rejecting a procedural unconscionability challenge based on the alleged failure to understand the contract terms); *Harless*, 2017 W. Va. LEXIS 265, at *10 (rejecting a procedural unconscionability challenge based on a purported adhesion contract).

Here, the Circuit Court appears to have found that the Arbitration Provision was procedurally unconscionable for the following reasons:

a) There was allegedly no real choice or bargaining power on the part of Plaintiff;
b) Plaintiff argues that she signed the Arbitration Provision in a rushed environment without an opportunity to review any terms;
c) The Arbitration Provision was not a bargained for exchange; and
d) Plaintiff is "entitled to her 'day in court' and should not be forced to arbitrate an issue that has such an impact on her livelihood.

(App. p. 94). The Circuit Court's reasoning ignores to the presumption in favor of arbitration and runs counter to this Court's established jurisprudence on procedural unconscionability. *See Syllabus Point 7, Salem Int'l Univ., LLC v. Bates*, 238 W. Va. 229, 231 (W. Va. 2016) (recognizing the "presumption favoring arbitration").

a) The Circuit Court erred in finding procedurally unconscionability because of an alleged lack of choice or bargaining power.

1) Plaintiff had a choice whether she wanted to sign the agreements.

The Circuit Court erred in finding that there was no real choice on Plaintiff's part as to whether to sign the Check Cashing Agreement. Of course Plaintiff could choose whether to sign the Check Cashing Agreement. She signed the agreement so that she could more quickly gain access to funds for gambling at the Luxor Hotel and Casino in Las Vegas, Nevada. (App. p. 40). This is not a situation where Plaintiff signed the agreement to keep her children fed or keep the heat on in her house (although there is nothing inherently unenforceable about an arbitration agreement in those contexts either). Plaintiff signed the Check Cashing Agreement so that she could avoid the extra step of writing a check or going to an ATM machine before proceeding to the slot machines or table games. She did not have to sign the agreement before gambling. She could have withdrawn funds through other means. Plaintiff even concedes that she signed the Check Cashing Agreements "for convenience." (App. p. 77). She had a choice. She made it. And she is bound by the Arbitration Provision.

2) The Arbitration Provision is not procedurally unconscionable due to an alleged lack of bargaining power.

Even if Plaintiff did have limited choices as to whether to sign the Check Cashing Agreements, which is not the case, the Circuit Court appears to have concluded that the purported adhesive nature of the agreement rendered it procedurally unconscionable. (App. p. 94). This Court has rejected the same type of reasoning time and again.

As this Court has held, "[b]ecause contracts of adhesion are by definition typically prepared by a party with more power, we do not view that factor as persuasive in itself" when it comes to determining unconscionability. *Harless*, 2017 W. Va. LEXIS 265, at *10 (citations omitted). In

fact, "'the bulk of the contracts signed in the country are contracts of adhesion', and are generally enforceable." *Brown*, 724 S.E.2d at 286 (citations omitted). There is "nothing inherently wrong with a contract of adhesion." *West*, 237 W. Va. at 98 n.12 (citations omitted). Indeed, "an adhesion contract can contain an arbitration provision ***without being unconscionable***." *Baker v. Green Tree Servicing*, LLC, No. 5:09:-cv-00332, 2010 U.S. Dist. LEXIS 31738 at *11 (S.D. W.Va. Mar. 31, 2010) (*citing State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693 (2009)) (emphasis added). To show procedural unconscionability in an adhesion contract, a party attacking the contract must show more than that it is an adhesion contract. He or she must demonstrate, in addition to other indicia of procedural unconscionability, the existence of "terms beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable terms." *West*, 237 W. Va. at 90 (citations omitted).

Plaintiff has not met her burden here. In Defendants' Motion to Compel, they demonstrated that Plaintiff was presented with the Check Cashing Agreements and ultimately signed them. (App. p. 40). In response, Plaintiff claimed that she signed the agreements without having the terms explained to her and in a situation where she was "unable to accept, reject, or modify any terms." (App. p. 77). The Circuit Court did not hold an evidentiary hearing to test Plaintiff's tale. Instead, it simply adopted Plaintiff's conclusory assertions and labeled the contract as adhesive. If this were the standard, any plaintiff could avoid any agreement he or she desired by simply labeling it adhesive. Luckily, that is not the case.

A party opposing arbitration cannot demonstrate unconscionability through "bald assertions" that the "agreement was not subject to negotiation" or that the party "had no other meaningful alternatives available to her other than to sign the agreement." *Harless*, 2017 W. Va. LEXIS 265, at *11 (internal quotations and citations omitted). Yet, that is precisely what the

Circuit Court accepted here. This Court has repeatedly rejected that reasoning. It should follow the same approach here. *See, e.g. West*, 237 W. Va. at 90 (finding an arbitration agreement in a mortgage contract was not unconscionable despite the adhesive nature of the contract, the unequal bargaining power, and the plaintiffs' lack of financial sophistication); *State ex re. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 358 (W. Va. 2013) (rejecting a procedural unconscionability challenge to an arbitration agreement, even though it was an adhesion contract); *New v. GameStop, Inc.*, 232 W. Va. 564, 578 (W. Va. 2013) ("The petitioner's bald assertions that the arbitration agreement is procedurally unconscionable because the agreement was not subject to negotiation and because she was unemployed and had no other 'meaningful alternatives available to her' other than to sign the Acknowledgment are simply not sufficient.").

b) The Circuit Court erred in finding that the Arbitration Provision was unconscionable because it was allegedly signed in a rushed environment.

The Circuit Court also erred in finding the Arbitration Provision unconscionable based on Plaintiff's argument that she "signed the agreement in a rushed environment without an opportunity to review any terms." (App. p. 94). Once again, Defendants presented evidence in their motion papers demonstrating that Plaintiff was presented with the Check Cashing Agreements before signing them. (App. pp. 38-51). Plaintiff countered that "the signing was done in a rushed environment where I simply was told where to sign the card reader." (App. p. 77). She did not allege, however, that she ever asked for clarification as to what she was signing, that she asked for more information about the Check Cashing Agreement, or that any request for more information was ever rebuffed. Despite these shortcomings, the Circuit Court simply adopted Plaintiff's argument that the signing was procedurally unconscionable. This was in error.

Both Check Cashing Provisions that Plaintiff signed specifically stated in bold letters: **"I have read, understood, and agreed to the terms and conditions of this VIP Preferred**

Enrollment form and I declare that the information provided by me in connection with this enrollment is true and correct." (App. pp. 43; 47). Both agreements also only had a total of 10 sections, one of which was labeled "**ARBITRATION**" in bold, capital letters. Plaintiff signed these agreements twice. Not only did she sign a Check Cashing Agreement on January 31, 2016. She signed *another one* on February 5, 2016. (App. pp. 43; 47). Plaintiff cannot escape these binding contracts by arguing that she would have liked to have reviewed them more carefully prior to signing them or that she should have asked for more information. That is not the law.

"It has long been the rule that '[a] party to a contract has a duty to read the instrument.'" *West*, 237 W. Va. at 91 (citations omitted). "The fact that [Plaintiff] may have signed a document without reading it first does not excuse [her] from the binding effect of the agreements contained in the executed document." *Id.* (citations omitted). *See also Reddy v. Community Health Found. of Man.*, 171 W. Va. 368, 373 (1982) ("A person who fails to read a document to which he places his signature does so at his peril."). That is true even when the contract signing may have occurred in a manner that the plaintiff classifies as hurried after-the-fact. *West*, 237 W. Va. at 91 (denying a procedural unconscionability challenge even though the real estate transaction was "hurried"). The Court should reject Plaintiff's attempt to invalidate the Check Cashing Agreements on the ground that she allegedly felt "rushed" to sign them.

c) The Circuit Court erred in finding that the Arbitration Provision was unconscionable because it was allegedly not bargained for.

The Circuit Court also found that the Arbitration Provision was procedurally unconscionable because the provision was not a "bargained for exchange." (App. p. 94). Even if there was evidence to suggest that the Arbitration Provision was not bargained for (which Defendants deny), this Court has recognized that there is no requirement that an arbitration clause be independently bargained for.

Specifically, in *Kirby v. Lion Enters.*, 233 W. Va. 159, 165 (W. Va. 2014), this Court addressed the question of whether an arbitration provision in an otherwise valid contract must be "bargained for" in order to be enforceable. The Court answered the question in the negative. According to the Court, as long as the contract that contains the arbitration provision "in its entirety is well supported by an offer, acceptance and sufficient consideration, there is no requirement that the arbitration clause be independently 'bargained for' in order for a contract to be formed." *Id.* at 165 (citing *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 282 (2012)). A party cannot defeat an arbitration clause "based upon the argument that the clause was not bargained for." *Id.*

Here, Plaintiff has introduced no evidence to show that the Check Cashing Agreements were not supported by a sufficient offer, acceptance, and consideration. To the contrary, all the facts indicate that Plaintiff signed the Check Cashing Agreements and utilized the services offered as part of the VIP Preferred Program. (App p. 1) (recognizing that she withdrew $1,000.00 and $253.75 at the Luxor Hotel and Casino). The Circuit Court's conclusion that Plaintiff may not have specifically bargained for the Arbitration Provision is "of no moment." *Kirby*, 233 W. Va. at 165. It cannot serve as a basis to find procedurally unconscionability.

d) The Circuit Court's reasoning that Plaintiff is "entitled to her 'day in court' and "should not be forced to arbitrate an issue that has such an impact on her livelihood" is divorced from West Virginia law.

The Circuit Court's last line of reasoning in invalidating the Arbitration Provision is that Plaintiff is "entitled to her 'day in court' and "should not be forced to arbitrate an issue that has such an impact on her livelihood." (App. p. 94). The Circuit Court's rationale for this statement is not clear. What is clear, though, is that the statement is contrary to West Virginia law.

Plaintiff signed two Check Cashing Agreements that both including binding arbitration provisions. Because the Parties' dispute is within the scope of these provisions, Plaintiff is not "entitled to her 'day in court'" in this instance. To the extent the Circuit Court denied Defendants'

Motion to Compel because it believed it was wrong as a matter of principle to compel Plaintiff's claims to arbitration, that evinces a judicial hostility to arbitration that this Court has long rejected.

Further, enforcing the Arbitration Provision here does not have "such an impact on [Plaintiff's] livelihood." It bears repeating that the Arbitration Provision arose in a contract that Plaintiff signed so she could have quicker access to gambling funds. She is suing Defendants for the manner in which they allegedly attempted to collect a $1,253.00 debt connected to that gambling trip. The collection of this gambling debt does not impact Plaintiff's livelihood. It has no bearing on Plaintiff's ability to obtain gainful employment or put a roof over her head. Indeed, Plaintiff has argued that she utilized the check cashing services at issue "for convenience" and that she would "abandon [her] claim" if forced to arbitration. (App. p. 77). A gambling transaction for "convenience" that Plaintiff seeks to litigate, but that she would freely "abandon" if forced to arbitrate, does not have a substantial "impact on Plaintiff's livelihood." To the extent the Circuit Court believed Plaintiff's "livelihood" had any bearing on this case, that reasoning was in error.

VI. Conclusion

For all the reasons above, Defendants respectfully requests this Court (1) reverse the decision of the Circuit Court that denied Defendants' Motion to Compel Arbitration, (2) refer this action to arbitration in accordance with the terms of the Arbitration Provision, and (3) stay this action pending the resolution of arbitration.

Dated: February 1, 2018

Respectfully submitted,

Certegy Check Services, Inc. and Complete Payment Recovery Services, Inc.

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Certificate of Services

I hereby certify that on the 1st day of February 2018, a true and correct copy of the foregoing *Petition for Appeal* was sent via Federal Express to the following counsel of record:

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