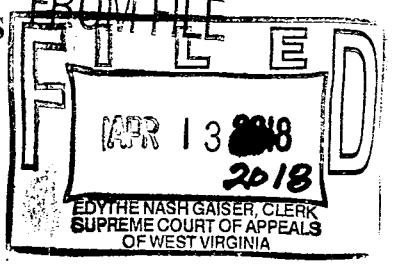

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

REPLY BRIEF IN SUPPORT OF PETITION FOR APPEAL

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For purposes of this Reply, Certegy Check Services, Inc. and Complete Payment Recovery Services, Inc. ("Defendants") incorporate their Assignments of Error, Statement of the Case, Summary of the Argument, and Statement Regarding Oral Argument and Decision from their Petition for Appeal. ("Petition"). For the reasons in Defendants' Petition and in this Reply, the Court should reverse the Circuit Court's Order Denying Defendants' Motion to Compel Arbitration (the "Motion" and the "Opinion," respectively).

I. Argument

The Circuit Court's Opinion includes three fundamental errors of law that each independently require reversal. The Circuit Court erred: (1) in finding unconscionability as a whole without ever finding substantive unconscionability; (Petition 8-9); (2) in concluding that any of the terms in the Arbitration Provision were substantively unconscionable, to the extent it reached such a holding; (Petition 9-16); and (3) in finding procedural unconscionability. (Petition 16-22). Ms. Fuller's Opposition Brief largely fails to confront most of the arguments regarding unconscionability in Defendants' Petition. And when she does confront these arguments, she ignores much of the applicable law on the issues. Instead, Ms. Fuller argues that the Circuit Court's Opinion was not actually based on unconscionability. In her view, nearly all the law and analysis in the Opinion was dicta or "purely academic," as she calls it. (Opp. Br. 19). She claims the Circuit Court's "core ruling" was that the Parties never formed an agreement to arbitrate and, therefore, the Court need not even address unconscionability. (Opp. Br. 23). Ms. Fuller is wrong.

The Circuit Court's Opinion did not make any factual determination that the Parties never formed an arbitration agreement. Indeed, it could not have made such a determination on the record. The Circuit Court never held an evidentiary hearing or made any evidentiary rulings. Defendants provided the Circuit Court with two arbitration agreements bearing Ms. Fuller's signature and demonstrated that customers sign these agreements in paper form prior to receiving

Defendants' services. The Circuit Court could not simply disregard Defendants' evidence on a motion to compel arbitration and choose to accept Ms. Fuller's unfounded and speculative version of events. And if it were to do so, one would expect the Circuit Court to put that analysis in its Opinion. To the contrary, the Circuit Court merely concluded that Ms. Fuller did not meaningfully agree to arbitrate due to alleged procedural unconscionability. This was reversible error.

A. The Opinion was based on unconscionability, which is what Defendants appealed.

Much of Ms. Fuller's Opposition Brief is based on the idea that Defendants waived the right to appeal the Circuit Court's "core ruling," which she contends was a finding that "Petitioners failed to prove the existence of a contract." (Opp. Br. 8). In other words, Ms. Fuller claims that the Circuit Court's discussion of unconscionability was "purely academic" because the Circuit Court actually decided the case on contract formation issues, rather than unconscionability. (Opp. Br. 19). Ms. Fuller's position is untenable. Unconscionability was the sole basis for the Circuit Court's decision, which is precisely what Defendants appealed. Defendants preserved the appeal.

The Opinion focused exclusively on whether Defendants' Motion should be denied based on unconscionability. The Opinion's structure and language make this clear. Specifically, the first step in the Circuit Court's analysis was to summarize Ms. Fuller's arguments. It framed them as seeking to avoid arbitration "because she was merely told to sign an electronic card reader in a rushed environment" and because "the actual terms are unconscionable." (App. p. 89). This language is the classic formulation of procedural and substantive unconscionability. Thus, at the outset, the Circuit Court framed the issue as one of unconscionability.

The Circuit Court's next step was to recite the law it was going to apply. In doing so, it focused exclusively on the law of unconscionability. The Circuit Court first discussed the "doctrine of unconscionability" as a general matter. (App. p. 89). It then discussed "Procedural Unconscionability" and "Substantive Unconscionability" under subheadings bearing those same

titles. (App. pp. 90-93). That is the only law the Circuit Court discussed in the analysis portion of the Opinion. Although the Court titled this portion of its Opinion "Existence of a Contract," it focused on unconscionability, not on whether an agreement was formed in the first instance.

The Circuit Court then wrote a "Discussion" section, where it applied the law on unconscionability it previously laid out. (App. p. 93). In applying the law, it first looked at whether the contract had "sophisticated terms." (App. p. 94). This is a proxy for substantive unconscionability. It then examined whether Ms. Fuller had any choice or bargaining power, whether she "signed the agreement in a rushed environment," whether she had "an opportunity to review any terms," and whether she was deprived of her "day in court." (App. p. 94). These are hallmarks of procedural unconscionability. Finally, based on the Circuit Court's unconscionability analysis, it found "there was no agreement by the Plaintiff to arbitrate." (App. p. 94).

Defendants appealed the Circuit Court's decision regarding unconscionability because that was the basis for the Opinion. The Circuit Court found there was no enforceable arbitration agreement based on its belief that the Arbitration Provision was unconscionable, not on any lack of formation. Indeed, the Circuit Court recognized that Ms. Fuller "signed the agreement," albeit in an environment she claimed was "rushed." (App. p. 94). Defendants did not waive the right to challenge the decision. Rather, they appealed the Opinion's precise holding. To find otherwise would require the Court to find that the entire Opinion is dicta, with the actual holding buried in, but unrelated to, the unconscionability analysis. That cannot be the case. Nor can Defendants be found to have waived a challenge to what Ms. Fuller claims was the Circuit Court's reasoning when that reasoning is not apparent from what is, at best, an ambiguous Opinion.[1]

[1] Even Ms. Fuller recognizes that the Opinion was rooted in procedural unconscionability. Although she makes formation arguments throughout her brief, she argues in the *procedural unconscionability section* of her brief that the Court should find there was "no agreement by the Plaintiff to arbitrate" because of procedural unconscionability. (Opp. Br. at 24-25).

B. Defendants proved the existence of an agreement to arbitrate.

Although the Circuit Court never made any evidentiary findings regarding formation of the Arbitration Provision (as opposed to enforceability based on unconscionability), Ms. Fuller gives extensive treatment to the idea that the Court should affirm the Opinion because Defendants failed to prove an arbitration agreement exists. (Opp. Br. 12-19). She argues no contract existed because: (1) Defendants' affidavits were inadmissible to show the existence of a contract; and (2) she was never provided with the terms of the agreement. (Opp. Br. 12-19). The Court should reject this argument for three reasons. First, the Circuit Court never held that Defendants failed to prove the existence of a contract, which forecloses Ms. Fuller from raising it on appeal. Second, Defendants *did* prove a valid and enforceable contract, which Ms. Fuller failed to rebut. Third, if the Circuit Court was inclined to weigh the credibility of the evidence – which is something the Opinion does not indicate that the Circuit Court actually did – it should have conducted an evidentiary hearing.

1. The Circuit Court did not hold that Defendants failed to prove the existence of a contract, which forecloses the issue on appeal.

The preceding section demonstrated that the Circuit Court declined to enforce the Arbitration Provision based on unconscionability. Although the Circuit Court made statements like "there was no agreement by the Plaintiff to arbitrate," it based those statements on its belief that the Arbitration Provision was created in a procedurally unconscionable manner. (App. p. 94). For example, the Circuit Court believed there was no meaningful agreement to arbitrate because Ms. Fuller argued "she signed this agreement in a rushed environment" and she had no "opportunity to review any terms." (App. p. 94). The Circuit Court never found that a contract did not exist. In fact, contrary to the idea that no actual agreement existed, the Circuit Court recognized that Plaintiff "signed this agreement...." (App. p. 94).

It is well-established that this Court "will not pass on a nonjurisdictional question which

has not been decided by the trial court in the first instance." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 264 (2011) (citations omitted). *See also Phillips v. Thaxton*, No. 16-0935, 2017 W. Va. LEXIS 867, at *6 (W. Va. 2017) (same) (Memorandum Opinion). This rule is based on the "need to have the issue refined, developed, and adjudicated by the trial court, so that [the Supreme Court] may have the benefit of its wisdom." *State ex rel. State Farm Mut. Auto. Ins. Co.*, 228 W. Va. at 265 (citations omitted). Here, the Court should not entertain Ms. Fuller's argument that Defendants failed to prove the existence of an arbitration agreement because the Circuit Court never reached that conclusion.[2]

2. Even if the Court were to consider it, Defendants proved the existence of an arbitration agreement.

Ms. Fuller's Opposition Brief argues the Court should affirm the Opinion because Defendants never proved the existence of an arbitration agreement. (Opp. Br. 9-19). In making her arguments, Ms. Fuller asks this Court to make evidentiary rulings that the trial court never decided. The Court should reject Ms. Fuller's arguments for four reasons:

a) Defendants introduced substantial evidence of Ms. Fuller's agreement to arbitrate;
b) Because the Circuit Court never concluded that Defendants' declarations were inadmissible, the Court should not engage in that analysis here.
c) Ms. Fuller's affidavit does not create any issue as to her agreement to arbitrate; and
d) Defendants' declarations are fully admissible in evidence and, to the extent the Circuit Court had concerns, it should have held an evidentiary hearing.

a) Defendants' declarations establish an agreement to arbitrate.

In support of their Motion, Defendants submitted declarations from two competent declarants establishing the process through which Ms. Fuller would have signed the VIP Preferred Check Cashing Enrollment Form ("Check Cashing Agreements"), which included the Arbitration

[2] To the extent the Court finds that the Circuit Court reached questions of formation separate from issues of unconscionability, Defendants discuss formation below. Accordingly, because Ms. Fuller fully argued formation issues in her Opposition Brief, and Defendants address it below, there is no ground for waiver.

Provision. These declarations were more than sufficient to show an agreement to arbitrate.

Defendants' first declaration came from Ron Whyte ("Whyte"), who is a General Manager of Certegy Check Services, Inc. ("Certegy"). (App. p. 38). His declaration established that he has held the position of General Manager at Certegy since 2014. His declaration also established that he has years of experience working for Certegy, personal knowledge of Certegy's relationship with Global Payments, personal knowledge of the work Certegy performs for Global Payments, and personal knowledge of the manner in which Certegy's business records are created. (App. p. 38).

Given this knowledge, Whyte explained in detail the way Check Cashing Agreements are signed in the ordinary course of Certegy's business. Whyte stated:

- Customers are provided an opportunity to sign Check Cashing Agreements in connection with the VIP Preferred Program. (App. p. 39);
- When a Check Cashing Agreement is used in a transaction, it is presented to the customer as a *paper document, rather than in an electronic format.* (App. p. 40);
- To proceed with the transaction, the customer must review and physically fill out and sign the Check Cashing Agreement. (App. p. 41); and
- An individual cannot become part of the VIP Preferred Program without receiving and signing the Check Cashing Agreement. (App. p. 41).

In addition to recounting the process by which Check Cashing Agreements are signed in the ordinary course of business, Whyte attached the genuine and authentic signed documents in Defendants' records pertaining to Ms. Fuller's two check cashing transactions. These documents included two Check Cashing Agreements bearing Ms. Fuller's signature, two receipts bearing Ms. Fuller's signature, and a check that Ms. Fuller endorsed with her signature. (App. pp. 42-48).

Defendants' second declaration came from Ann Akins ("Akins"). The Akins declaration corroborated the statements in the Whyte declaration. Akins is the President of Complete Payment Recovery Services, Inc. ("CPRS"). She has held that position since 2012. (App. p. 49). Her declaration established that it was based on the personal knowledge she gained in her years of

experience at CPRS, including her personal knowledge of CPRS' relationship with Global Payments, her personal knowledge of the work CPRS performs for Global Payments, and her personal knowledge regarding CPRS' business records. (App. p. 49). Based on this knowledge, Akins stated that as part of the services CPRS and Certegy offer in conjunction with Global payments, customers are given the opportunity to sign up for the VIP Preferred Program. (App. p. 50). This program streamlines customers' access to funds to use at gaming establishments. (App. p. 50). Consistent with this program, the Akins declaration attests to Ms. Fuller's transactions with Certegy and CPRS based on her experiences and their records. (App. p. 50-51).

The declarations prove the standard practice customers go through when signing a Check Cashing Agreement and signing up for Defendants' services. The standard business practice is for customers to be presented with a paper document, for customers to review the document, and for customers to physically sign the document. The declarations also establish that a customer cannot become part of the VIP Preferred Program without receiving and signing the Check Cashing Agreement. Finally, Defendants' evidence includes multiple documents that Ms. Fuller signed, including the Arbitration Provision from Defendants' business records. This is substantial evidence demonstrating the existence of an agreement to arbitrate.[3]

b) The Court should disregard the attacks on Defendants' evidence.

Ms. Fuller attacks Defendants' evidence in several ways. First, she argues that the Court should disregard the evidence of the arbitration agreements because they are allegedly not based on personal knowledge. Second, she claims that Ms. Fuller denies the agreement to arbitrate, which the Court must simply accept as true. The Court should disregard Ms. Fuller's attacks.

[3] Although Ms. Fuller tries to analogize this case to *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432 (W. Va. 2013), they are nothing alike. The *U-Haul* decision decided a narrow question regarding the ability of a contracting party to incorporate a second contract by reference. *Id.* at *443. It did not involve unconscionability or evidence from the movant that the consumer signed the document that included the arbitration provision at issue.

i. The Whyte and Akins declarations are admissible based on their personal knowledge of Defendants' business practices.

Ms. Fuller first argues that neither Whyte nor Akins were present when she signed the Check Cashing Agreements and, as a result, their declarations are inadmissible because they are not based on personal knowledge. (Opp. Br. 12-16). For example, Ms. Fuller argues that Whyte cannot testify about Defendants' business practices as they pertain to Ms. Fuller's arbitration agreement because he never "met the Respondent" and "does not claim to have been present in the Luxor." (Opp. Br. 13). Ms. Fuller's arguments simply ignore the standard for personal knowledge in a declaration regarding a company's business practices.

Courts throughout the country, including in West Virginia, find that declarations regarding a company's business practices are admissible to prove that an agreement was entered consistent with those practices. This is true even when a consumer denies having entered the agreement. Indeed, Ms. Fuller's Opposition Brief fails to cite a single case holding that a company cannot rely on a declaration regarding its business practices to demonstrate conformity with those practices. Given today's economy, where companies frequently use standardized practices to accommodate large volumes of business – and where lower-level employees may not recall individual customer transactions – evidence as to business practices is commonplace. A consumer cannot avoid the reach of a binding agreement by simply arguing that a declarant with personal knowledge of a business's practices was not there when he or she signed an agreement. In fact, the West Virginia Rules of Evidence specifically allow for evidence of an "organization's routine practice" to prove an "organization acted in accordance with the habit or routine practice," regardless of "whether there was an eyewitness." W.Va. R. Evid. 406.

In *Ware v. Santander Consumer USA*, No. 3:15cv4285, 2017 U.S. Dist. LEXIS 160538, at *2 (S.D. W.Va. Sept. 29, 2017), for example, the court addressed whether the plaintiff was bound

by an arbitration provision contained in a loan modification agreement. In moving to compel arbitration, the defendant *did not have a copy of the arbitration agreement it claimed the plaintiff entered.* Instead, the defendant submitted a declaration from a Vice President as to the company's standard practices in obtaining arbitration agreements. *Id.* at *3. In that declaration, the Vice President testified that it was the company's standard practice to use "form contracts" in connection with loans. *Id.* These form contracts, according to the declarant, contained "substantially identical arbitration provisions." *Id.* Based on the company's standard business practices, the declarant stated that the plaintiff "*would have* had to execute a Form Contract as part of the process for obtaining their loan, and that the Form Contract would have included an arbitration provision..." *Id.* (emphasis added). In response, the plaintiff argued that "he did not recall an arbitration agreement being included in the document he signed." *Id.* at *8.

After considering the evidence, the District Court for the Southern District of West Virginia found the defendant's testimony regarding business practices sufficient to enforce an arbitration agreement. This was true even though the defendant could not produce the actual signed agreement. *Id.* at *11-13. According to the court, nothing could "negate [the declarant's] ability to testify from his personal experience about the loan origination process and Citifinancial's business practices." *Id.* at *12-13. As a result, the court found the existence of an arbitration agreement based on a company's business practices as they pertain to arbitration agreements, despite the fact that there was no signed agreement to be found. *Id.*

The *Ware* decision is consistent with decisions nationwide that find a company can prove a binding arbitration agreement through testimony regarding the company's standard practices in entering those agreements with customers. *See, e.g. Hancock v. AT&T Co.*, 701 F.3d 1248, 1264 (10th Cir. 2012) ("[T]he AT&T declarants demonstrated personal knowledge of the standard

practice designed for regional affiliates, as well as personal knowledge that U-verse customers such as Plaintiffs generally accept terms of service through the standard practice. This was enough to raise an inference that the standard practice was followed when Plaintiffs obtained U-verse service and shifted the burden to Plaintiffs to raise a genuine factual dispute."); *Hahn v. Citibank, N.A.*, No. 4:17cv00492, 2017 U.S. Dist. LEXIS 62627, at *3-4 (E.D. Mo. Apr. 25, 2017) (granting a motion to compel arbitration by relying on a declaration regarding the defendant's standard business practices in entering arbitration agreements); *Defillips v. Dell Fin. Servs.*, No. 3:14cv115, 2016 U.S. Dist. LEXIS 11271, at *17-18 (M.D. Pa. Jan. 29, 2015) (compelling arbitration based on the testimony of a company's standard business practice regarding the way arbitration agreements are presented to the consumer); *Losapio v. Comcast Corp.*, No. 1:10cv3438, 2011 U.S. Dist. LEXIS 42257, at *2-4 (N.D. Ga. Apr. 11, 2011) (finding the existence of an arbitration agreement over plaintiff's claim that she did not receive the agreement based on the company's standard practice for providing agreements to customers).

Contrary to Ms. Fuller's arguments, the Whyte and Akins declarations demonstrate that Ms. Fuller entered into the Check Cashing Agreements, which include the Arbitration Provision. These individuals have personal knowledge of Defendants' business practices and are competent to testify as such. Indeed, even if these individuals did not adequately demonstrate their personal knowledge, which they did, Defendants must only show that the evidence *could be* put in admissible form at some point in the case. *See Ballenger v. Nat'l City Mortg., Inc.*, No. 1:14cv81, 2015 U.S. Dist. LEXIS 112948, at *18 (N.D. W. Va. Aug. 25, 2015) (noting that the standard under the analogous federal rules is whether the evidence could be put into admissible form, not whether it currently is in admissible form); *Miller v. Allman*, No. 17-0080, 2018 W.Va. LEXIS 244, at *35 (W. Va. Apr. 6, 2018) (looking to the Federal Rules of Civil Procedure for guidance

given the similarity to the West Virginia Rules of Civil Procedure). If the standard were that a defendant had to introduce testimony from an individual who was physically present when a consumer signed an arbitration agreement, and who specifically recalls that transaction, as Ms. Fuller contends, it would effectively eradicate the use of arbitration agreements for large companies in consumer transactions. That is not the standard.

ii. Not only did Defendants' declarations show the existence of an agreement, but Ms. Fuller's declaration does not contradict them.

Not only do Defendants' declarations demonstrate the existence of an arbitration agreement, but Ms. Fuller did not offer any *evidence* to contradict them. Ms. Fuller's Opposition Brief reads like it is a given that she "was not provided" with the Check Cashing Agreements, "she had no notice that she was agreeing to arbitrate any claims," and no Check Cashing Agreements were "provided during the transaction." (Opp. Br. 2-3). She even claims that someone "fraudulently superimpose[ed] [her] electronic signature...onto a document never before seen..." (Opp. Br. 1-2). But these facts are far from given. Defendants do not agree with any of her allegations. Even Ms. Fuller's affidavit – her sole piece of evidence – does not go that far. Although her brief argues sordid facts regarding her execution of the Check Cashing Agreements, her affidavit tells a much more equivocal and ambiguous story.

The Whyte declaration attaches multiple relevant documents. The first set of documents are Check Cashing Agreements bearing Ms. Fuller's signature, (App. pp. 42-43, 46-47), which include the Arbitration Provision at issue. (App. pp. 43 ¶ 9; 47 ¶ 9). These Check Cashing Agreements were signed on two separate days and pertained to two separate check transactions. (App. pp. 42-43, 46-47). The Whyte declaration states that Ms. Fuller would have been presented with these Check Cashing Agreements in paper form prior to signing them. (App. pp. 40-41, at ¶¶ 18-19). The second set of documents attached to the declarations are two separate receipts that

Ms. Fuller signed pertaining to her withdrawal of funds. (App. pp. 45, 48). The third document attached to the declarations is a void check that Ms. Fuller endorsed with her signature. (App. 44).

Ms. Fuller's "formation" argument is premised on the notion that Defendants substituted her signature on Check Cashing Agreements that she never saw. Putting aside the far-fetched idea that Defendants are placing Ms. Fuller's signature on documents they are hiding from her, even Ms. Fuller's affidavit does not go this far. (App. pp. 76-77). It would have been very easy for Ms. Fuller to plainly state in her affidavit that she was denied the opportunity to review the terms of the Check Cashing Agreements, but she never does. Although she *argues* the Court should not enforce the arbitration agreement because of formation issues, there is no actual evidence to support that claim. Perhaps that is why the Circuit Court never made such a finding.

As an initial matter, although the Whyte declaration refers to three separate sets of documents, Ms. Fuller's affidavit does not refer to any documents specifically. (App. p. 76). She vaguely discusses the "documents" throughout her affidavit, but she does not actually explain the specific documents to which she is referring. For example, she states that "[n]o terms of any contract were explained to me or referenced in any detail." (App. p. 77, at ¶ 9). She does not state whether she is referring to one or both of the Check Cashing Agreements, one or both of the withdrawal authorizations, all of these documents, or none of them. (App. p. 77). Her affidavit leaves the fact-finder guessing as to what documents she is referring to in this paragraph.

Further, Ms. Fuller *never* states in her affidavit that she was denied the opportunity to review the Check Cashing Agreement's terms, despite the gloss she puts on her affidavit now. Although paragraphs 1-4 claim Ms. Fuller did not write her name, phone number or social security number on a "document," she never claims that the text of the Check Cashing Agreement was hidden or obscured, or that she asked to see the text and was denied the opportunity. (App. p. 76).

She could have easily said so in her affidavit, yet she did not. Nor does she actually state that she never signed the Check Cashing Agreements. (App. p. 76-77). That would be hard to demonstrate since it was presented to her in paper form. (App. pp. 40-41, at ¶¶ 18-19). And Ms. Fuller certainly does not state that Defendants took her signature from one document and placed it on another. She would like the Court to infer this occurred, but there is no *evidence* of these facts.[4]

Last, although Ms. Fuller makes statements regarding signing an electronic card reader and not being "presented with this contract" when she "cashed [her] check," she fails to indicate the "contract" she is referring to in this discussion or that she ever asked to see any allegedly hidden "contract." (App. pp. 76-77). While Ms. Fuller's counsel argues that she was referring to the Check Cashing Agreements, the affidavit says no such thing. To the contrary, the only document attached to the declarations that specifically memorialize the funds Ms. Fuller withdrew by "cashing her check" are the two electronically-signed receipts, not the Check Cashing Agreements. (App. 45 and 47). There is no basis to infer that Ms. Fuller is referring to the Check Cashing Agreements here. She easily could have said so.

At bottom, the Whyte and Akins declarations demonstrate the existence of a binding arbitration agreement. Although Ms. Fuller *argues* that Defendants superimposed her signature on these agreements and obscured the Check Cashing Agreements, her actual *evidence* reveals no such facts. The only evidence is the existence of signed agreements from Ms. Fuller. She cannot introduce a vague affidavit in response to Defendants' Motion and ask her counsel to argue what she really meant. "It is axiomatic that [] counsel's arguments are not evidence." *Hampden Coal, LLC v. Varney*, 2018 W. Va. LEXIS 102, *26 (W. Va. Feb. 16, 2018) (Memorandum Opinion).

[4] It bears noting that there are slight variations in Ms. Fuller's signatures on all five documents attached to the Whyte declaration. Although the Circuit Court never held an evidentiary hearing, these differences belie the notion that Defendants superimposed her signature from one document to the next.

iii. Without an evidentiary hearing, the Court cannot simply disregard Defendants' evidence in favor of Ms. Fuller's affidavit.

Even if the Circuit Court had made evidentiary rulings, which it did not, and decided to credit Ms. Fuller's affidavit over Defendants' evidence, which it never said it did, it could not have done so without an evidentiary hearing. Ms. Fuller argues that the proper standard for a court to apply when considering the evidence is a summary judgment standard, where fact disputes are resolved against the movant. (Opp. Br. 11 n.3). But that is not the case. The summary judgment standard is appropriate on summary judgment because if summary judgment is denied, the movant gets to present its case at trial. It is not appropriate in response to a motion to compel arbitration because, by resolving factual disputes against the movant, the court would be permanently denying a party's right to arbitrate when there may, in fact, be a binding arbitration agreement. Waiting until trial to decide if an arbitration agreement exists defeats the purpose of arbitration.

Here, the Circuit Court did not resolve any disputes of fact. It simply accepted *both parties'* facts as true and decided the case on unconscionability. If it intended to resolve issues of fact, it should have held an evidentiary hearing to assess witness' credibility and weigh the Parties' facts. It could not simply choose to credit one affidavit and reject another on the pleadings. *See, e.g. Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 457 (W. Va. 2010) (remanding the case to the Circuit Court to "resolve the issue of whether a valid contract exists between the parties"). *See also Greiner v. Credit Acceptance Corp.*, 16-01328, 2017 U.S. Dist. LEXIS 20993, (D. Kan. Feb. 13, 2017) (stating, in the context of an arbitration agreement, that "the Court will hold an evidentiary hearing to resolve the forgery issue, unless the Greiners file a written demand for a jury trial within 14 (fourteen) days of the date this Order is filed"); *Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC*, No. 8:15cv861, 2015 U.S. Dist. LEXIS 141749, at *6 (M.D. Fla. Oct. 19, 2015) ("Motion to Compel Arbitration is predicated on a factual dispute, and the ensuing

evidentiary hearing necessitates the presentation of evidence and testimony regarding facts material to the arbitrability of this action."); *Fuqua v. Kenan Advantage Group., Inc.*, No. 3:11cv1463, 2012 U.S. Dist. LEXIS 95852, at *23 (D. Or. Apr. 13, 2012) ("Fuqua states under oath that he did not sign the Arbitration Agreement which Kenan has submitted to the court. Swanson states the exact opposite under oath. This is a credibility issue that cannot be resolved based on competing affidavits. Therefore, prior to resolving Kenan's motion, an evidentiary hearing must be held to determine whether a valid Arbitration Agreement exists.").

C. The Circuit Court erred in finding the Arbitration Provision unconscionable.

Defendants' Petition demonstrated that the Circuit Court erred in three separate ways when it found the Arbitration Provision unconscionable. First, the Circuit Court never found that the Arbitration Agreement was substantively unconscionable, which is required to find unconscionability as a whole. (Petition 8). Second, none of the terms in the Arbitration Provision are substantively unconscionable. (Petition 8-16). Third, the manner in which the Arbitration Provision was executed was not procedurally unconscionable. Each of these reasons provides an independent ground to reverse the Circuit Court's Opinion. (Petition 16-23). Nothing in Ms. Fuller's Opposition Brief alters these conclusions.

1. Ms. Fuller simply ignores the fact that the Circuit Court never found substantive unconscionability.

To find unconscionability, a court must find that an agreement is *both* procedurally and substantively unconscionable. (Opp. Br. 21). *See also Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 386 syl. pt. 9 (2012) (requiring both forms of unconscionability). Defendants' Petition showed that the Circuit Court never concluded any term of the Arbitration Provision was unconscionable, which precludes a finding of unconscionability as a whole. (Petition 8-9). The Circuit Court summarized several elements of the Arbitration Provision, but never drew any

conclusions as to whether they were unconscionable. (App pp. 93-94).

Despite recognizing that a court must find substantive unconscionability, Ms. Fuller's brief ignores Defendants' argument regarding the lack of such a finding from the Circuit Court. She also ignores the fact that the Circuit Court *could not have found unconscionability as a legal matter* without finding substantive unconscionability. Plaintiff fails to point to any instance in the record where the Circuit Court made such a finding. This Court has long held that it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. at 264 (citations omitted). Because the Circuit Court never found substantive unconscionability, the Court should reverse the Opinion.

2. None of the terms are substantively unconscionable.

Defendants' Petition also demonstrated that even if the Court had performed a substantive unconscionability analysis, there is no basis to conclude any of the following provisions are substantively unconscionable: (1) a Florida choice of law provision; (2) the selection of AAA's Commercial Arbitration Rules; and (3) a class action waiver. (Petition 9-16). In her Opposition Brief, Ms. Fuller has abandoned any argument regarding the class action waiver. She never addresses the issue. With respect to the latter two items, Ms. Fuller provides a very abbreviated argument on both that fails to confront the governing law Defendants cite.

a) A Florida choice-of-law provision is not unconscionable.

The Arbitration Provision was executed in Nevada. It involved Certegy, which has offices in Florida. (*See* App. p. 80, at ¶ 7). The Check Cashing Agreement, once completed, was to be mailed to offices in Tampa, Florida. (App. p. 80). Given this connection, the Check Cashing Agreement included a provision applying the "substantive law of the state of Florida." (App. p.

80, at ¶ 9). Defendants' Petition demonstrated that there was nothing unconscionable about the Florida choice-of-law provision. Plaintiff cannot counter any of these arguments.[5]

i. This Court has enforced choice-of-law provisions in like contexts.

West Virginia courts have specifically recognized that choice-of-law provisions are presumptively valid, even in consumer contracts. (Petition 11). To hold otherwise would wrongly imply that other states are not willing to protect consumers. *See Joy v. Chessie Employees Fed. Credit Union,* 411 S.E.2d 261, 265 (W. Va. 1991). In response, Ms. Fuller argues, without citing any authority, that it is unfair to apply a different state's laws to a consumer case or to modify her rights by contract. (Opp. Br. 30). Her position is inconsistent with established West Virginia law.

As an initial matter, this Court has already held that choice-of-law provisions can supplant the application of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See id.* at 122 ("The trial court was correct in determining that the West Virginia Consumer Credit and Protection Act (W. Va. Code, Ch. 46A) does not apply in this case because choice of law principles dictate that the law of Maryland control the loan agreement."). *See also Rowe v. Aurora Commer. Corp.*, No. 5:13-21369, 2014 U.S. Dist. LEXIS 105186, at *30 (S.D. W. Va. Aug. 1, 2014) ("South Carolina law governs the loan contract in this case. The WVCCPA is therefore inapplicable, and plaintiffs' claims under the Act are dismissed."). There is no basis to claim that the WVCCPA alters the ability to agree to another state's laws.

In addition, this Court has held that a party can agree to modify its rights by contract – even those under West Virginia law. For example, in *Hampden Coal*, 2018 W. Va. LEXIS 102, this

[5] The Opinion only raised a question regarding waiving "the benefit of the fee shifting provisions of the WVCCPA." (App. p. 93). Defendants' Petition demonstrated that this was not a ground to find unconscionability. (Petition 11-12). Ms. Fuller has abandoned any argument regarding fee-shifting in her Opposition Brief. Because that was the only item the Circuit Court addressed with respect to choice-of-law, this forecloses any finding that the choice-of-law provision is unconscionable on different grounds. The Court has held that it does not address questions which have not been decided by the trial court.

Court found it was not substantively unconscionable for an arbitration agreement to shorten an otherwise applicable statute of limitations period. *Id.* at *20-23 (Memorandum Opinion). Ms. Fuller cannot avoid the choice-of-law provision by arguing it may modify her rights.

Last, this Court has concluded that, although W. Va. Code § 46A-1-107 restricts West Virginia consumers from waiving certain rights under the WVCCPA in certain situations, this provision is preempted by the Federal Arbitration Act. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 532 (2013). Accordingly, this Court has both implicitly and explicitly rejected Ms. Fuller's argument that a choice-of-law provision is substantively unconscionable. The parties agreed to Florida law, which is capable of protecting Ms. Fuller's rights.

ii. Ms. Fuller is not required to change counsel.

Ms. Fuller also argues that applying Florida law is substantively unconscionable because it would result in her having to find new counsel and would add additional costs. (Opp. Br. 30). These claims are also baseless. The Arbitration Provision calls for the application of "the substantive law of the state of Florida," but it does not require the arbitration to *take place* in Florida. (App. p. 43, at ¶ 9). To the contrary, the arbitration award may be entered in "any court having jurisdiction." *Id.* There is no basis for Ms. Fuller to claim that she must retain different counsel simply because the substantive law of Florida applies.

Moreover, courts have repeatedly held that unadorned allegations of hardship stemming from an arbitration clause are insufficient to find substantive unconscionability. But that is all Ms. Fuller alleges here. *See, e.g. Chevron U.S.A. v. Bonar*, 2018 W. Va. LEXIS 101, at *11, (W. Va. 2018) ("Lessors' complaint of oppressively high costs is merely speculative.") (citations omitted) (Memorandum Opinion). It is worth noting that Ms. Fuller's affidavit – her only evidence – makes no mention of the impact arbitration costs or travel will have on her. (App. p. 77). Yet, she argues in her brief that "additional cost, time, and expense," and "extended travel," will work a hardship

on her. (Opp. Br. 30). Not only have courts rejected this type of speculative harm regarding unconscionability, Ms. Fuller cannot stand on them when there is no such *evidence* in the record.

b) There is nothing unconscionable about the application of AAA rules.

The Petition also demonstrated that it is not unconscionable to select AAA's Commercial Rules. (Petition 12-15). In response, Ms. Fuller makes two arguments, none of which are availing.

First, Ms. Fuller argues that AAA's Consumer Rules are more appropriate. In making this argument, Ms. Fuller ignores the fact that the Commercial Rules *call for the application of the Consumer Rules* in this context. (Petition 13). She does not dispute this in any way. By agreeing to the Commercial Rules, which call for the application of the Consumer Rules here, the Parties agreed to the very rules Ms. Fuller claims should be applicable. This is hardly unconscionable.

Second, Ms. Fuller argues that the Commercial Rules will impose prohibitive costs on her. Not only is this incorrect because the *Consumer Rules* will apply here, Ms. Fuller has failed to introduce *any evidence* as to how any alleged costs will impact her. Her affidavit says nothing about costs or her ability to pay them. The Court has repeatedly rejected speculative allegations of hardship when assessing substantive unconscionability. *See Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 93 (2016) ("An unadorned averment, couched hypothetically, that they could not 'afford substantial arbitration costs' is not sufficient to meet their burden of demonstrating that such costs would be unreasonably burdensome."). The Court should do the same here.

i. The Circuit Court erred in finding procedural unconscionability.

The Circuit Court also erred in finding the Arbitration Provision was unenforceable due to procedural unconscionability. Defendants' Petition established that the Circuit Court could not find procedural unconscionability on any of the grounds Ms. Fuller claimed: alleged lack of choice; lack of bargaining power; lack of time to consider the agreement; lack of bargaining; or entitlement to her day in court. (Petition 18-23). Ms. Fuller's Opposition Brief spends less than a page on

these issues, arguing only that the Arbitration Provision was a contract of adhesion that did not allow her to negotiate any terms or opt-out of arbitration. (Opp. Br. 24-25). As Defendants discussed in their Petition, this Court has rejected these arguments at every turn. *See West*, 237 W. Va. at 88-90 and n.12 (a party must show more than that a contract is an adhesion contract because "is nothing inherently wrong with a contract of adhesion") (citations omitted). *See also id.* at 90 ("[T]he omission of an 'opt out' provision is not in itself sufficient evidence that an arbitration agreement is grossly unfair and thus unenforceable on grounds of procedural unconscionability."); *Brown v. CMH Mfg.*, No. 2:13-31404, 2014 U.S. Dist. LEXIS 120648, at *26 n.5 (S.D. W. Va. Aug. 29, 2014) ("The plaintiff does not cite any cases where an Arbitration Agreement was unconscionable because there was no opt-out provision.").

II. Conclusion

The Court should reverse the Circuit Court's Opinion and compel this case to arbitration. Defendants demonstrated a valid and enforceable arbitration agreement. To the extent the Court believes a factual dispute exists and is, therefore, not inclined to compel this case to arbitration, the Court should remand the case for an evidentiary hearing on any remaining issues.

Dated: April 12, 2018

Respectfully submitted,

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

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Certificate of Service

I hereby certify that on the 12th day of April 2018, a true and correct copy of the foregoing *Reply in Support of Petition for Appeal* was sent via Federal Express to the following counsel of record:

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