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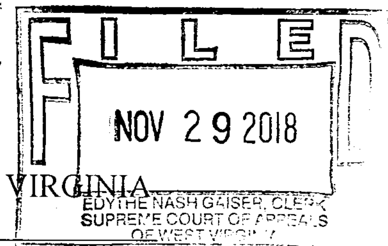

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 18-0579

DAN RYAN BUILDERS, INC., DAN RYAN BUILDERS REALTY, INC.,
DRB ENTERPRISES, INC., MONOCACY HOME MORTGAGE, LLC,
CHRISTOPHER RUSCH and CRYSTAL RANKIN,

Defendants Below, Petitioners,

v.

FRANK M. WILLIAMS, and DIANA P. WILLIAMS, et al.,

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

A. INTRODUCTION AND PROCEDURAL HISTORY

Petitioners (Defendants below) are seeking to enforce arbitration agreements contained within the Agreement of Sale which were entered into with the numerous Respondents (Plaintiffs below) during a transaction to purchase real property and construction of a home. The Petitioners first sought to enforce the arbitration agreements by filing with the circuit court a Motion to Dismiss and Compel Arbitration on March 9, 2010. R0053-R0077. Respondents filed a Response in Opposition on August 24, 2010. R0078-R0292.

In their response, Respondents provided the circuit court with over forty signed affidavits detailing the individual experience of the Plaintiffs during the sales processes between the parties in this case. R0109-R0231. Plaintiffs' Response in Opposition was followed by Defendants' Reply Memorandum (R0203-R0355), Plaintiffs' Sur Reply (R0359-R0364), Defendants' Sur Sur Reply (R0365-R0370), Plaintiffs' Supplemental Memorandum (R0371-R0389), Defendants' Response to Plaintiffs' Supplemental Memorandum (R0390-R0395), and numerous other memoranda, letters, replies and responses between the parties. Both parties provided to the circuit court a multitude of legal and factual arguments coupled with relevant state and federal law addressing the issue of arbitration. By mid-2011, both parties and the circuit court addressed the arbitration agreements, including the latest common law, *ad nauseam.*

On December 5, 2011, the circuit court denied Defendants' Motion to Dismiss Complaint and Compel Arbitration by letter ruling, basing its decision on the extensive briefing by the parties and instructing Plaintiffs to submit a proposed order which it could modify. R0466-R0467. Subsequently, on February 6, 2012, the circuit court entered an Order Denying Defendants' Motions to Dismiss Complaint and Lifting Stay of Discovery. R0468-R0477. In this Order, the

circuit court found that the arbitration agreements were unconscionable contracts of adhesion which were unenforceable based on the specific facts of this case and the inequities within the arbitration provision itself. R0474-R0475.

By Agreed Order dated March 21, 2012, the circuit court specifically held that the Defendants were not precluded from seeking "appellate review" of the ruling circuit court's arbitration ruling. R0489. The same Agreed Order instructed that "[a]t the request of the Defendants, the parties will endeavor to confer and agree upon wording for a certified question . . . regarding the arbitration ruling." R0490. However, despite with extensive discussions throughout 2012, the parties were unable to agree to the wording of a certified question. R1205-1233. The Defendants took no other action; nor filed any motion to preserve any appellate review of the circuit court's arbitration ruling despite thousands of hours of litigation proceedings and discovery.

On January 8, 2018, Defendants filed a renewed motion to compel arbitration six years after the circuit court's February 6, 2012 Order regarding arbitration. R0709-R1182. Because Defendants failed to identify under which Rule of the Rules of Civil Procedure they sought reconsideration of the circuit court's arbitration ruling and because Defendants filed said motion years too late by any measure, the circuit court treated the filing as a Rule 60(b) motion for relief from judgment. Finding no material change in the facts at Bar or the West Virginia law, and further due to the Defendants "lack of timeliness" in its attempted motion for reconsideration, the circuit court *sua sponte* denied Defendants' motion in its Order entered on May 30, 2018. R0005-R0011. The Defendants subsequently filed the instant Petition some six years after the circuit court's ruling.

B. STATEMENT OF RELEVANT FACTS

On February 9, 2009, Respondents (Plaintiffs below) filed a lawsuit against Petitioners (Defendants below) seeking relief from development-wide soil movement causing damage to properties located in Crystal Ridge Development in Bridgeport, West Virginia (hereinafter, the "Development"). R0013-R0036. The Respondents purchased lots and homes from Petitioners through standardized Agreements of Sale (hereinafter "Sales Agreements") and an enrollment form of a Limited Warranty Agreement (hereinafter "Limited Warranty Agreement"). *E.g.* R0737-R0743. *Also see* R0233-R0249. The Sales Agreements and Limited Warranty Agreements were drafted in their entirety by the Petitioners and were presented to the Respondents to sign after negotiations of any variables (price, home model, colors, etc.) regarding the purchase had concluded.[1] The Sales Agreements were largely "fill-in-the-blank" contracts which contained complicated legalese. R0470. Respondents did not contribute to or provide any input for the agreements. R0469. In fact, the only substantive terms negotiated by the Respondents were the purchase price and home model which was completed before the Sales Agreement and Limited Warranty Agreement were executed. *Id.* Respondents believed that the terms contained in the agreements were non-negotiable.

The Defendants' business model was a "soup to nuts" approach with various entities under common ownership controlling the initial development identification, then the real estate agency sales, then the financing, and finally the construction of the home itself. The Petitioners pressured all of the Respondents to use Petitioners' legal counsel for the purchase and closing of the real estate transaction, which most Respondents did. This business model allowed the Petitioners to

[1] In the case of the Limited Warranty Agreement, Respondents were not advised that they would be responsible for all expenses of arbitration. E.g. R0110-R0111. However, it is important to note that the Limited Warranty Agreement pertained only to defects within in the constructed home itself which are irrelevant to Plaintiffs' claims.

control nearly every aspect of the transaction, however, without disclosing the common ownership to the prospective purchaser.

The Sales Agreement contained an arbitration provision stating as follows:

> **19. ARBITRATION.**
> (a) Any dispute arising under or pursuant to this Agreement, or in any way related to the Property and/or with respect to any claims arising by virtue of any representations alleged to have been made by Us, or any agents and/or employees thereof, (with the exception of "Consumer Products" as defined by the Magnuson-Moss Warranty Federal Trade Commission Improvements Act, 15 U.S.C. Section 2301 et seq. and the regulations promulgated thereunder) shall be settled and finally determined by arbitration and not in a court of law, irrespective of whether or not such claim arises prior to or after Settlement hereunder, pursuant to the Construction Industry Arbitration Rules and the Supplementary Procedures for Residential Construction Disputes of the American Arbitration Association ("AAA") then in effect. Prior to commencing arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of AAA, or another mediation service designated by Us. The parties hereto specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with this Agreement. Notwithstanding anything to the contrary herein contained, in the event You default by failing to settle on the Property within the time required under this Agreement, then We may either (i) commence an arbitration proceeding under this Section 19, or (ii) bring an action for its damages, including reasonable attorneys' fees, as a result of the default in a court having jurisdiction over the Purchaser. You expressly waive your right to mediation and arbitration in such event. Each party shall be entitled to full discovery in accordance with the local rules of court in the event that arbitration is invoked under this Section 19. The provisions of this Section 19 shall survive the execution and delivery of the deed, and shall not be merged therein.
>
> (b) In the event that an action is brought in court under Section 19(a) or for any reason a claim is determined not to be subject to binding arbitration under Section 19(a), then You and Us knowing and voluntarily waive our rights to a trial by jury in any action, proceeding or counterclaim related to this Agreement or the Property, including such actions, proceedings or counterclaims in which You and Us as well as others are parties.

E.g. R0742-R0743. The arbitration provisions contained in the Sale Agreement were not explained to the Respondents, and the Petitioners failed both to explain the process of arbitration and the arbitration provisions themselves. *E.g.* R0109-R0110. The Sales Agreements, specifically, were provided to the Respondents only after reaching an oral agreement for the home purchase.

Respondents were told to initial each page and sign the Sales Agreement to simply evidence that they had received a copy of the same. *E.g.* R0110. Petitioners did not provide Respondents an opportunity to review the agreements at their own pace or even instruct the Respondents to read the agreements at all. *E.g.* R0110. Further, the Petitioners did not suggest that legal counsel could be obtained if Respondents had any questions about the agreements. *E.g.* R0110.

The Respondents were never advised of the process or costs and fees associated with arbitration. *E.g.* R0110-R0111. Respondents would have never executed the agreements had they been made aware of the arbitration fees and costs. *E.g.* R0111. The complete lack of understanding of the arbitration provision by the Respondent could not be more clearly demonstrated than by the sworn testimony of Crystal Rankin, the Petitioners' only employee charged with explaining the Sales Agreements to each of the Plaintiffs prior to execution.

As the real estate salesperson at the Development for the Petitioners, Ms. Rankin was charged with explaining the provisions in the Sales Agreement to each Respondent. However, Ms. Rankin did not understand the provisions, nor the concept of arbitration generally. When asked if arbitration was different than settling a dispute in court, Ms. Rankin provided chaotic, yet telling testimony stating that:

> [I]t's two of the same . . . So if you're arbitrating something, I can arbitrate anything with anyone if I have a difference of opinion. However, if it comes to an agreement, it does not need to go any further than that. But if it goes further, then you need to hire legal counsel and possibly a trial to get to an end result.

R0706. Clearly, despite discussing the arbitration issue with Petitioners' legal counsel prior to her deposition (R0704), Ms. Rankin still did not understand arbitration, let alone the ramifications of the arbitration provision and, therefore, could never have adequately explained the arbitration provision to Respondents before they signed the Sales Agreement. Thus, Petitioners' own employee who conducted the transactions to purchase homes in the Development did not possess

an accurate understanding of arbitration, so it should be no surprise that Respondents could not have understood the arbitration provision which the Petitioners now attempt to enforce.

The Limited Warranty Agreement was presented as an additional incentive to purchase a home from Petitioners at Crystal Ridge Development. Importantly, the "Enrollment Form" provided with the Limited Warranty Agreement explains that damage caused by soil movement is specifically excluded from the Warranty. *E.g.* R0232. Because the Respondents' underlying claims do not arise from defects in the construction of the Plaintiffs' homes, arbitration of Plaintiffs' claims cannot be demanded in good faith under the Limited Warranty Agreement.

Importantly, Plaintiffs' Complaint also alleges fraud in the inducement of the Sales Agreement. In that regard, Plaintiffs allege, and discovery has demonstrated, that the Defendants were aware of the historical soil movement and drainage issues on the lands of the Development but failed to disclose that issue to a single perspective purchaser even after one of the first homes constructed by them collapsed and to be demolished. R0031-R0033.

II. SUMMARY OF ARGUMENT

The Petitioners go to great lengths to morph relatively simple factual circumstances into a complicated web in an effort to justify a six-year delay in appealing the circuit court's 2012 Order denying their motion to compel arbitration. The 2012 Order was based on the circuit court's analysis of clear and concise affidavits from each of the Respondents detailing their experience with Petitioners during the purchase of a home located in the Development. From the detailed affidavits, in addition to extensive pleadings motions practice of the parties, and the arbitration provision itself, the circuit court possessed more than sufficient evidence and information to find

that the arbitration provision was an inequitable, one-sided and unconscionable aspect of a contract of adhesion.[2]

The Petitioners attempt to seek reconsideration of the circuit court's arbitration ruling is untimely as they inexplicably waited six years since the circuit court's arbitration ruling adverse to their position. The circuit court's 2018 Order was correct in treating Petitioner's renewed motion to compel arbitration as a Rule 60(b) motion for relief from judgment or order as Petitioners unjustifiably exceeded the appropriate filing deadline by years for such a motion. Therefore, this Court must deem Petitioner's ability to appeal waived and uphold the circuit court's 2012 ruling holding the arbitration provisions unenforceable. To permit otherwise would waste scarce judicial resources, squander thousands of hours of attorney time, render irrelevant the circuit court's numerous hearings and rulings, and make a mockery of the Rules of Civil Procedure.

Further, contrary to the Petitioners' amorphous assertions, the common law regarding consideration of arbitration provisions has not undergone a "sea change" as the procedure and analysis applied by the circuit court finding that the Sales Agreements were contracts of adhesion and the subject arbitration provisions were procedurally and/or substantively unconscionable remains sound. Subsequent common law should not be retroactively applied to the circuit court's 2012 Order, but, even then, the circuit court had more than sufficient factual evidence on which to base such ruling under any subsequent rule, and this Court, respectfully, must uphold the circuit court's 2012 ruling.

[2] Contrary to the Petitioners' unsupported platitudes, the subsequent deposition testimony of some twenty-six (26) of the Respondents regarding the arbitration issue was entirely consistent with the Affidavits on which the circuit court relied in reaching its decision. If Petitioner's claims had been accurate, surely, they surely would have demonstrated any material inconsistencies by verbatim from such deposition testimony.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents agree with Petitioner to the extent that there are no novel issues of law raised in this appeal, pursuant to W. Va. R.A.P. 19. Respondents believe that this case is appropriate for issuance of a memorandum decision, pursuant to W. Va. R.A.P. 21(c). Petitioner's appeal involves (1) no substantial question of law; (2) there is no prejudicial error considering the applicable standard of review for Petitioner's assignments of error; and (3) because of Petitioner's failure to properly raise issues in its appeal in a timely manner and utilize the correct standards of review, other just cause exists for issuance of a memorandum decision denying Petitioner's requested relief.

IV. ARGUMENT

A. STANDARD OF APPELLATE REVIEW.

Regarding the interpretation and analysis of the arbitration agreements at issue, the review is de novo. "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before the Supreme Court of Appeals, the Supreme Court of Appeals review is de novo." *W. Va. CVS Pharmacy LLC v. McDowell Pharmacy Inc.*, Syl. Pt. 1, 238 W. Va. 465, 795 S.E.2d 574 (2017). Further, the Supreme Court of Appeals has the authority to "examine the circuit court's interpretation of the parties' Agreement." *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286, 292 (2018).

B. THE CIRCUIT COURT'S 2012 RULING PROPERLY INVALIDATED THE ARBITRATION AGREEMENTS.

The circuit court found that the arbitration agreements contained in the Sales Agreement were unconscionable as of contracts of adhesion based on a more than sufficient evidentiary record, which consisted of over 40 affidavits detailing these transactions and the arbitration provision itself. R0468-R0477. Although the circuit court did not feature findings of fact in its

letter ruling, those findings of fact were set forth in detail in the Court's February 6, 2012 Order based upon the parties' briefs and evidence adduced as instructed in such letter ruling. R0468-R0471.

Failing to initially identify findings of fact in a decisional letter is appropriate as the circuit court instructed Respondents to draft a proposed order detailing the findings of fact and conclusions of law. R0467. Petitioners have implied that the circuit court merely adopted Respondents' suggested findings of fact by taking the proposed order at face value; however, the circuit court provided specific instructions to Respondents to provide its proposed order in a Word Perfect or Microsoft Word document that allowed the Court to make any modifications it saw fit. R0467. Directing a party to draft a proposed order for the Court to review, edit and extend as its own is a common practice, and, of course, the reputation of Judge J. Lewis Marks is beyond reproach in this regard. Of course, Petitioners now complain about the process by which the circuit court drafted and entered its 2012 Order; however, Petitioners did not voice such concerns at the time of the ruling or at any time prior to the filing of the Petition at Bar.[3]

It is accurate, pursuant to West Virginia law, that "the burden of proving that a contract term is unconscionable rests with the party attacking the contract." *Brown ex rel. Brown v. Genesis Healthcare Corp.* (*Brown I*), 228 W. Va. 646, 680, 724 S.E.2d 250, 284 (2011), *rev'd on other grounds sub nom. Marmet Health Care Ctr., Inc. v. Brown (Brown II)*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012). Respondents carried this burden of proof by providing the circuit court with over 40 affidavits describing the Respondents' individual experiences in transacting business with the Petitioners. R0109-R0231. By providing these affidavits describing the

[3] Of course, the Defendants had every opportunity to object to the Respondents' proposed 2012 Order regarding arbitration and, in fact, on February 23, 2012, brought to the circuit court's attention a subsequent U.S. Supreme Court case. R0478-R0485 to which Plaintiffs responded was of no import. R0486-R0487 .

Petitioners' acts and failures to act, including concealment of the import of the arbitration provisions, the Respondents carried their burden of proof and, accordingly, the circuit court had sufficient grounds on which to analyze and rule upon the enforceability of the arbitration provision. The evidence that existed at the time of the ruling allowed the circuit court to analyze "the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." *Kirby v. Lion Enterprises, Inc.*, Syl. Pt. 6, 233 W. Va. 159, 765 S.E. 493, 494 (2014), *quoting Troy Min. Corp. v. Itmann Coal Co.*, Syl. Pt. 3, 176 W. Va. 599, 601, 346 S.E.2d 749, 750 (1986).

Further supporting the circuit court's arbitration ruling was the subsequent testimony of Crystal Rankin, undisputedly the only employee of the Petitioners who was charged with explaining the Sales Agreements to Plaintiffs. As discussed *supra*, disregarding the testimony of every Plaintiff that no explanation of the arbitration provision was offered, Ms. Rankin clearly did not understand arbitration testifying that it was simply a first step before filing a law suit in court. R0706. In fact, she believed the arbitration provision actually resulted in the Plaintiffs giving "up the rights to arbitrate." R0708. If the Petitioners' own employee charged with explaining the Sales Agreement told the Plaintiffs that arbitration was just a first step and, if a satisfactory resolution was not be reached, then the Plaintiff could get a lawyer and go to trial, it cannot be disputed that every Plaintiff was misled.

Petitioners rely on *Hampden Coal* to argue that the evidence in the present case was insufficient for the circuit court to rule on the enforceability of the arbitration agreements. Pet. Br. at 16; *Hampden Coal*, 240 W. Va. 284, 810 S.E.2d 286. However, the Petitioners' reliance on *Hampden Coal* in establishing the sufficiency of evidence required is misplaced as the facts differ from those in the instant case. In *Hampden Coal*, the plaintiff argued that "the Agreement is

'unfair, one-sided, overly harsh, and all to [his] disadvantage.'" *Hampden Coal*, 810 S.E.2d at 297. Yet, the *Hampden Coal* plaintiff supported this assertion with only the language of the agreement itself explaining that the arbitration agreement contained a one-year limitations period. Further, the arbitration in *Hampden Coal* agreement was "short, written in plain English" and advised the plaintiff "that he was waiving his right to pursue disputes in the courts, and encouraged [plaintiff] to seek legal counsel advice if he had any questions or did not understand the provisions in the Agreement." *Hampden Coal*, *Id* at 295. The plaintiff in *Hampden Coal* only presented evidence regarding the limitations period because that was the only issue with the language and terms of the arbitration provision. *Id* at 297.

However, in the instant case, the facts demonstrate that the arbitration provision suffers from inequitable one-sidedness, legalese and an absence of instruction to seek legal advice. *See e.g.* R0229-R0231. Moreover, the Sales Agreements were not accurately explained and left the Plaintiffs with the impression that the arbitration provision was of no consequence. *See e.g.* R0229-R0231. The case at Bar also does not involve a limitations period issue.

Next, the plaintiff in *Hampden Coal* focused his unconscionability argument on the specific facts involved in the execution of the agreement rather than merely based on its terms. *Hampden Coal*, 810 S.E.2d at 298. Without presenting any factual evidence to support these allegations, this *Hampden* Court was forced to hold that there was an insufficient record to support the plaintiff's claims. *Id.* However, in the present case, the Respondents' claims involve the language and terms contained in the arbitration agreements. Further, the Respondents provided over 40 affidavits to the circuit court as evidence in support of their allegations while the plaintiff in *Hampden Coal* provided none. For example, the affidavits averred in detail each Plaintiff's experience with the Petitioners' transaction process relevant to the arbitration provision as follows:

. . .

2. I had no role or input in formulating the Agreement of Sale or Limited Warranty Agreement which were handed to me for signing by representatives of Dan Ryan Builders after we greed to a sales price and home design.

3. It was my understanding that I could not negotiate any of the terms of the Agreement of Sale or Limited Warranty Agreement other than the home design and sale price. . . .

6. The arbitration provisions of Agreement of Sale and Limited Warranty Agreement were not explained to me by Defendant Dan Ryan Builders, Inc., or any representative, thereof, nor was it explained what arbitration was, nor what rights I would give up by signing the agreement. . . .

8. I was never given the option to exclude arbitration as a provision of the Agreement of Sale or Limited Warranty Agreement.

9. I believed that arbitration was simply a first step before proceeding to court if the issue was not resolved.

10. I was never told that if arbitration was unsuccessful or resolved against me that I would have to pay the defendants' attorneys' fees and expenses, as I would never have agreed to such a requirement like that, because I and my family could not afford to take such a risk. . . .

15. I never would agree to arbitration had these facts been explained to me or had the Agreement of Sale or Limited Warranty Agreement stated these facts; and I never would agree to give up my right to go to court over problems I might have with the home purchased, let alone problems that have negatively affected all of the homes in the development.

E.g., R0154-R0156. Respondents provided sufficient proof for the circuit court to rule that the arbitration agreements were unenforceable.

C. RECENT DECISIONAL LAW DOES NOT AFFECT THE CIRCUIT COURT'S 2012 RULING.

The Petitioners go to great lengths to create a material change in the common law – that does not exist – in an effort to justify a six-year delay in appealing the circuit court's 2012 Order. The Petitioners assert without support that this Court has experienced a "sea change" in decision law regarding the enforcement of arbitration agreements and that, based on such a "sea change" in the law following the February 2012 Order, the arbitration provision should now be enforced. Pet. Br. at 18-23. However, this supposedly "new" case law on which Petitioners rely does not change

the Court's substantive or procedural analysis in determining the enforceability and validity the arbitration agreements.

To the contrary, the same common law mandate to promote "a liberal federal policy of favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" was repeatedly cited by the Petitioners in each of its briefs and considered by the circuit court in ruling upon the arbitration provision at Bar. *E.g.,* R0064; R0297; R0317. As betrayed by the Petitioner's lack of citation, there has been no "sea change" in the law regarding arbitration that did not exist at when the circuit court reached its 2012 arbitration ruling.

The Petitioners argue that arbitration agreements must be upheld unless "such grounds as exist at law or in equity for the revocation of any contract," Pet. Br. at 19, citing *New v. GameStop, Inc.,* 232 W. Va. 564, 753 S.E.2d 62 (2013); 9 U.S.C.A. § 2. The Respondents agree with this notion but would add that "[g]enerally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or *unconscionability* – may be applied to invalidate an arbitration agreement (emphasis added)." *GameStop, Inc.,* Syl. Pt. 4, 753 S.E.2d at 65. Further, "[n]othing in the Federal Arbitration Act . . . overrides normal rules of contract interpretation." *Id.*

After analyzing the arbitration agreements under state contract law, the circuit court found in 2012 that the arbitration provision was inequitable and, therefore, unconscionable, contained in a contract of adhesion, rendering the arbitration provision unenforceable. *GameStop* reinforces the circuit court's ruling as contract defenses certainly existed in 2012 to hold the arbitration agreements invalid. *GameStop* provides no contradictory or competing case law.

Next, the Petitioners allege that with recent case law regarding arbitration, this Court "has established a strong presumption favoring arbitration" and that if there is any question, any issue should be resolved in favor of arbitration. Pet. Br. at 19. Petitioners treat this presumption as if it

is a newly established legal principle; however, such a notion is not a new revelation as Petitioners would lead this Court to believe in its citation to cited *Salem Int'l Univ., LLC v. Bates,* 238 W. Va. 229, 793 S.E.2d 879 (2016). To the contrary, the very quote the Petitioners include in their Petition is from a 1987 case entitled *Local Div. No. 812 of Clarksburg, W. Va. of Amalgamated Transit Union v. Cent. W. Va. Transit Auth.,* 179 W. Va. 31, 365 S.E.2d 76 (1987) – certainly not a novel legal precept just developed in 2016. To the contrary, the same sentiment was stated in a 1960 United States Supreme Court case entitled *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* 363 U.S. 574 (1960).

The idea and implication that this Court has only recently established the presumption favoring enforceability of arbitration provision is simply a "red herring" to justify the Petitioners' six-year delay in bringing this appeal. This rule has been established throughout common law for decades and the circuit court was aware of the established rule of law and clearly took this presumption into consideration in reaching its 2012 ruling. R0472, (*quoting* the holding in *Bd. of Ed. of Berkeley Cty. v. W. Harley Miller, Inc.,* "[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes under the contract . . ." Syl. Pt. 3, 160 W. Va. 473, 236 S.E.2d 439, 440-441 (1977).)

The Petitioners string cite several recent cases to support their argument that any ruling which holds valid arbitration agreements unenforceable is contrary to this recent trend of case law. Pet. Br. at 19. However, the Petitioners miss the point. The Respondents argued and the circuit court held, that the arbitration provision are *not* valid under state contract law, which is why they are unenforceable. R0468-R0477. "While it is clear that the FAA preempts state law that would invalidate 'or undercut the enforcement of arbitration agreements,' the issue of whether an

arbitration agreement is a *valid* contract is a matter of state contract law . . ." (emphasis added). *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 305, 685 S.E.2d 693, 699 (2009).

The arbitration provisions are unconscionable and have been deemed as part of contracts of adhesion. Those findings invalidate the arbitration provisions. The case law Petitioners cite does not provide any new or additional guidance to the analysis of arbitration provisions beyond that which existed at the time of the circuit court's 2012 Order. Further, the string of cases the Petitioners cite as recent and applicable law are so factually different than the present case that they provide no additional insight and should not be relied upon. Pet. Br. at 19. *See, e.g., Hampden Coal,* 240 W. Va. 284, (case involving an arbitration agreement which contained a one-year limitations period for employee's claim alleging violations of the WV Human Rights Act); *SWN Prod. Co. v. Long*, 240 W. Va. 1, 807 S.E.2d 249 (2017) (case engaging in analysis of ambiguous arbitration agreement); *Citizens Telecommunications Co. of W. Va. v. Sheridan*, 239 W. Va. 67, 799 S.E.2d 144 (2017) (case regarding a modification to an arbitration agreement); *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016) (case involving a delegation provision contained within an arbitration agreement). That explains the Petitioners' scant application of such cases to the facts at Bar.

In its 2012 Order, the circuit court held that the arbitration provision was contained in a Sales Agreement that was a contract of adhesion. R0474. Further, the circuit court ruled that "[t]he contracts at issue, specifically the provisions regarding arbitration, are unconscionable . . . and, therefore, are unenforceable against the Respondents. . ." R0474. The Petitioners argue that if the entire agreement is a contract of adhesion and is unconscionable, then the circuit court should have cancelled and rescinded the entire agreement. Pet. Br. at 20. However, in *Dan Ryan Builders, Inc. v. Nelson,* this Court specifically held that "a trial court may decline to enforce a *contract clause*

– *such as an arbitration provision* – if the obligations or rights created by the clause unfairly lack mutuality." (emphasis added) 230 W. Va. 281, 283, 737 S.E.2d 550, 552 (2012). That is exactly the circumstance here where the Respondent only recourse is arbitration, but the Petitioners may seek redress in Court for the only provision they care to enforcement – payment of the purchase price. This Court clearly has concluded that a single clause contained within an agreement can be deemed unconscionable, invalid and unenforceable while upholding the remainder of the agreement, contrary to the Petitioners' assertions. *Nelson*, 230 W. Va. at 283.

Petitioners are quick to point out that *Dan Ryan Builders, Inc. v. Nelson* overruled *Arnold v. United Companies Lending Corp.*, holding that:

> [T]he formation of a contract with multiple clauses only requires consideration for the entire contract, and not for each individual clause. So long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract, or of "mutuality of obligation," in order for a contract to be formed.

Syl. Pt. 6, 230 W. Va. 281, at 289-290; Pet. Br. at 21-22. However, *Nelson* also established that "a trial court may decline to enforce a contract *clause* if the obligations or rights created by the clause unfairly lack mutuality." *Id* at 283. "Mutuality of obligation is, however, a factor for a court to consider when assessing whether a contract (or provision therein) is unconscionable." *Nelson*, 230 W. Va. at 298.

Petitioners rely on *Nationstar Mortgage, LLC v. West* and *State ex rel. Ocwen Loan Servicing, LLC v. Webster* to explain that the arbitration provision at issue is not one-sided despite the fact that Respondents are forced to arbitrate all claims while Petitioners are not similarly bound. Pet. Br. at 22; *Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 785 S.E.2d 634 (2016); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (2013). Petitioners reference *Nationstar* to assert that the presence of a provision excepting arbitration for one party does not create "an overly one-sided contract that is unreasonable and unfair." 237 W. Va. at 93;

Pet. Br. at 22. However, this exception is mischaracterized because it does not apply generally "where there is a commercial need to utilize the court system" as the Petitioners argue. Pet. Br. at 22. Rather, this narrow allowance for an exception to arbitration is only permitted for a financial lender who needs to utilize statutory procedures for foreclosures and to protect its security interests. *Nationstar*, 237 W. Va. at 92. "Without question, agreements related to mortgage loans that involve a lender's right to protect its security interest may require the use of the court system to enforce that security interest." *Nationstar*, 237 W. Va. at 92-93. However, Petitioners did not act as a lender in these transactions with Respondents. Despite Petitioners' claims to the contrary, this recent case law regarding arbitration agreements does not affect the circuit court's 2012 Order and cannot serve as a basis for reversing the same.

D. THE ARBITRATION PROVISION IS NOT ENFORCEABLE AS IT IS UNCONSCIONABLE AND CONTAINED IN A CONTRACT OF ADHESION.

As the circuit court correctly held in its February 6, 2012 Order, the Sales Agreement are contracts of adhesion which contained arbitration provisions, with this case's particular set of facts, that are "unconscionable and invalid" and are therefore unenforceable. R0474. The "new decisional law" Petitioners proffer does not make any substantive changes to the analysis regarding the enforceability of arbitration provisions. However, even after taking into consideration all relevant case law – both prior to and subsequent to the circuit court's 2012 Order – the arbitration provision contained in the Sales Agreement is plainly unenforceable.

Because the written arbitration provision involves transactions which affect interstate commerce, the enforceability of the arbitration provisions must be guided, in part, by Section 2 of the Federal Arbitration Act, which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

> controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2.

Although the first portion of Section 2 permits the use of arbitration agreements and bolsters their enforceability, the second portion looks to state law to determine validity and enforceability based upon state contact law. As discussed in *Clites*, "[w]hile it is clear that the FAA preempts state law that would invalidate 'or undercut the enforceability of arbitration agreements, the issue of whether an arbitration agreement is a *valid* contract is a matter of state contract law and capable of state judicial review." *Clites,* 224 W. Va. at 304, *citing Southland Corp. v. Keating,* 465 U.S. 1, 16 (1984). "An agreement to arbitration is valid, irrevocable, and enforceable, as a matter of federal law, 'save upon such ground as exist at law or in equity for the revocation of *any* contract." *Clites*, 224 W. Va. at 305, *citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). A court "may rely on general principles of state contract law in determining the enforceability of the arbitration clause." *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders,* Syl. Pt. 4, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011); *Salem International University LLC v. Bates,* Syl. Pt. 3, 238 W. Va. 229, 793 S.E.2d 879, at 880.

This Court has previously defined a contract of adhesion by explaining that an adhesion contract is a "standardized contract form offered . . . on essentially [a] 'take it or leave it' basis . . . [leaving the] weaker party . . . no realistic choice as to its terms." *State ex rel. Saylor v. Wilkes,* 216 W. Va. 766, 773, 613 S.E.2d 914, 921 (2005). Contracts of adhesion often include pre-printed forms seen by the average person as legal "gobbledygook." *State ex rel. Wells v. Matish,* 215 W. Va. 686, 692, 600 S.E.2d 583, 589 (2004), *citing State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 554, 567 S.E.2d 265, 270 (2002).

The Sales Agreement at Bar was largely a fill-in-the-blank form which Petitioners prepared without any input from Respondents other than routine choices of home design, colors, materials, etc. *See e.g.* R0229. The Sales Agreement was presented to Respondents after negotiations and selections regarding the home purchase had ended. *See e.g.* R0109. Additionally, the Sales Agreement largely consisted of complicated and verbose boilerplate language. *See e.g.* R0737. Courts have held that form agreements are treated as a necessary evil in engaging in various transactions in our current business culture and the mere existence of a form agreement does not invalidate a contract of adhesion. *Nationstar*, 237 W. Va. at 89. However, the fill-in-the-blank form agreements do factor into the analysis regarding the enforceability of contracts of adhesion. *Id.*

"[M]utuality of obligation is not a factor to consider in the formation of a contract. Mutuality is, however, a factor for a court to consider when assessing whether a contract (or a provision therein) is unconscionable." *Nelson*, 230 W. Va. at 289. In determining unconscionability, the court "must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the 'existence of unfair terms in the contract.'" *Clites*, Syl. Pt. 4, 224 W. Va. at 300, *citing Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co. of W. Va., Inc.*, 186 W. Va. 613, 614, 413 S.E.2d 670, 671 (1991).

The Sales Agreement lacked mutuality of obligation. The Respondents were clearly in a disadvantaged position compared to that of the Petitioners. The parties had already negotiated the purchase price of the home and the home design after which Petitioners presented the Sales Agreement for execution. *See e.g.* R0109. At this point, Respondents did not have a sufficient bargaining position because Respondents had already committed to purchase a home in the

Development. With a team of skilled attorneys (who also represented many of the Respondents) and other professionals, Petitioners had the upper hand throughout the transaction. *See, e.g.*, *¶5 at R0119; R0122; R0128; R0131; R0140;R0143; R0146; R0149.*

Respondents did not have any meaningful alternatives at the time the Sales Agreement when presented for execution. *Id.* at ¶7. Respondents were presented with the documents without having an opportunity to review them previously or without having the opportunity to review them on their own time and with pressure from Petitioners' authorized representatives. *Id. As* discussed, *infra*, the terms contained in the arbitration agreements were unfair and one-sided solely favoring the Petitioners.

Although the law presumes that an arbitration provision in an agreement "was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract," when unconscionability is alleged and it is alleged that the contract is one of adhesion, "the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." *Clites*, Syl. Pt. 3, 224 W. Va. at 300. Unconscionability means that due to "gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written." *Kirby*, Syl. Pt. 5, 233 W. Va. at 159. When applying the concept of unconscionability, it must be done in "a flexible manner, taking into consideration all of the facts and circumstances of a particular case." *Id.*

Under our law, unconscionability is analyzed and divided into two subparts: procedural unconscionability and substantive unconscionability. *Brown I*, 228 W. Va. at 681. To be enforceable, a contract term must – "at least in some small measure" – be both procedurally and

substantively unconscionable. *State ex rel. Johnson Controls, Inc. v. Tucker,* 229 W. Va. 486, 500, 729 S.E.2d 808 (2012). The arbitration agreements contained in the Sales Agreement and Limited Warranty Agreement are both procedurally and substantively unconscionable.

i. THE ARBITRATION AGREEMENTS ARE PROCEDURALLY UNCONSCIONABLE.

Regarding procedural unconscionability, *Brown I* states, "[p]rocedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract, inadequacies that suggest a lack of a real and voluntary meeting of the minds of the parties." *Brown I*, Syl. Pt. 17, 228 W. Va. at 657. Although courts have recognized that pre-printed form contracts are a "stark reality" of today's culture and are not inherently unenforceable "as long as they comport with the reasonable expectations of the parties," the arbitration provisions at issue here could not conform with Respondents' reasonable expectations. *Nationstar*, 237 W. Va. at 89. A reasonable person purchasing a home who had already agreed to the home design and purchase price would not expect a sales agreement to eliminate rights to seek redress in court while preserving the same solely for the seller. The arbitration provisions are procedurally unconscionable as they were added into the Sales Agreement without any discussion, negotiation or even notice to Respondents. Even the Petitioner's employees did not understand the provision.

At the time the Sales Agreement was presented to Respondents for execution, negotiations and discussions relating to the transaction already had ended. *See e.g.* R0109. Respondents had previously discussed the home design and purchase price with Petitioners and, upon agreement of those terms, Respondents believed the negotiations for this transaction were finalized. *See e.g.* R0109. Upon being presented with the arbitration agreements, Respondents were instructed to initial each page to represent that they received the same. *See e.g.* R0110. They were not instructed to read the agreements before execution. *See e.g.* R0110. Further, Respondents believed they were

not permitted to negotiate or change the terms in the Agreements as they were expected to execute the documents upon their presentation as negotiations had ended. *See e.g.* R0109. Respondents were not presented with an opportunity to take the Agreements home to review them at their own pace, were not given the opportunity to seek legal counsel and often were represented by Petitioners' legal counsel. *See e.g.* R0110. Legal advice is incredibly helpful in transactions which contain complicated and verbose language in agreements like those at issue here; however, the opportunity to seek legal counsel was even more critical in this situation because of the inequity between Petitioners' and Respondents' education and skill. Petitioners clearly understood the weight and power of an arbitration clause while Respondents did not and could not, as Petitioners did not even explain these provisions to their employee, Crystal Rankin, who was left to explain their import to the Respondents. R0708. Those undisputed facts smack of a scheme to deceive.

ii. THE ARBITRATION AGREEMENTS ARE SUBSTANTIALLY UNCONSCIONABLE.

Regarding substantive unconscionability, our law provides that:

> Substantive unconscionability involves unfairness in the terms of the contract itself, and arises when a contract term is so one-sided that it has an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Brown I, Syl. Pt. 19, 228 W. Va. at 658. The arbitration provision contained within the Sales Agreement is so lop-sided and uneven in favor of Petitioners that the arbitration agreements are rendered substantively unconscionable. In pertinent part, the arbitration agreement states:

> The parties hereto specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with this Agreement. Notwithstanding anything to the contrary herein contained, *in the event You default by failing to settle on the Property within the time required under this Agreement, then We may* either (i) commence an arbitration proceeding under this Section 19, or (ii) *bring an action for its damages, including reasonable attorneys' fees, as a result of the default in a court* having

jurisdiction over the Purchaser. You expressly waive your right to mediation and arbitration in such event.

R0742 (emphasis added). The arbitration provision mandates that Respondents resolve all claims against Petitioners solely through arbitration; however, Petitioners have not imposed the same burden on themselves. Rather, the Petitioners have afforded themselves the enjoyment of using the court system to address the only substantive claim they could have against Respondents – failure to close on the property. The Petitioners have argued that they only carved out a small exception in which they can use the court to address their claims, namely, if Respondents fail to settle on the property and pay the purchase price in a timely fashion. R0308. However, this is an absurd generalization as there could not be any other substantive claim Petitioners would have against Respondents. The only obligation Respondents have to the Petitioners under the Agreements is to pay the purchase price in timely manner. Petitioners did not carve out a specific exception to avail themselves of the court system; instead, Petitioners drafted an agreement to completely avoid arbitration for any claims they may have altogether.

Additionally, the Petitioners incorrectly characterize *Ocwen's* allowance of an exception to an arbitration agreement for a "commercial need to utilize the court system" when, again, this exception has only accepted for the specific role of financial lender. Pet. Br. at 22; *Ocwen*, 232 W. Va. at 365; *Nationstar*, 237 W. Va. at 92. Petitioners did not act as a financial lender in these transactions to which Respondent's allegations apply and, therefore, Petitioners are not privy to this narrow exception to the arbitration agreements.[4] Financial lenders are specifically identified as a narrow exception to arbitration agreements because of the "need to effect a foreclosure or to

[4] It should be explained that while Monocacy Home Mortgage, LLC is a named defendant, the allegations against it pertain solely to its prior knowledge through common ownership and management with the other Petitioners of the conditions at the Development and its fraudulent concealment from the Respondents of the same.

protect a security interest." *Nationstar*, 237 W. Va. at 93. The one-sidedness of the arbitration provisions bolsters Respondents' claims that the agreements were substantially unconscionable, resulting in their unenforceability.

E. THE CIRCUIT COURT PROPERLY TREATED PETITIONERS' RENEWED MOTION TO COMPEL AS A MOTION FOR RULE 60(b) RELIEF FROM THE CIRCUIT COURT'S FEBRUARY 6, 2012 ORDER.

In its renewed Motion to Compel Arbitration filed January 8, 2018, Petitioners failed to identify under which Rule of West Virginia's Rules of Civil Procedure they were seeking reconsideration of the circuit court's 2012 Order. R0709-R0731. Petitioners assert that they are now entitled to choose which Rule they filed their renewed Motion to Compel, asserting that the motion was filed pursuant to Rule 54(b) of the Rules of Civil Procedure. However, *Powderidge Unit Owners Association v. Highland Properties, Ltd.* stated that:

> When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b).

Syl. Pt. 2, 196 W. Va. 692, 695-696, 474 S.E.2d 872, 875-876 (1996). *See also Law v. Monongahela Power Co.*, 210 W. Va. 549, 551, 558 S.E.2d 349, 351 (2001) (holding "[a] motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled . . ."); *Malone v. Potomac Highlands Airport Auth.*, 237 W. Va. 235, 238, 786 S.E.2d 594, 597 (2015); *Burton v. Burton*, 223 W. Va. 191, 195-196, 672 S.E.2d 327, 331-332 (2008). Although Rule 59(e) motion to alter or amend a judgment contains a ten-day window in which Petitioners were required to file their motion, the Petitioners waited over six years before filing this motion – which is unconscionable in-and-of-itself. R0709-R1182. Therefore, the circuit court was correct in considering the

Defendant's motion under Rule 60(b), as that was only option due to the untimeliness of Petitioners' filing and failure to identify or justify any other procedural rule under which the untimely motion was being filed

However, when evaluating Petitioner's motion as being filed under Rule 60(b), it's obvious that such motion was filed out of time by any measure. Under Rule 60(b), the court may relieve a party from:

> [A] final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

W. Va. R. Civ. P. 60. However, a motion under Rule 60(b) must be filed within "a reasonable time" and, further, must be filed within "one year after the judgment, order, or proceeding was entered" if filed for reasons (1), (2), or (3) *supra*. *Id.* Petitioner never identified under which Rule of West Virginia's Rules of Civil Procedure they filed their motion, much less identify which numbered reason within Rule 60(b). However, if the reasoning fell under the purview of numbers (1), (2), or (3), the Petitioners clearly missed the deadline as they only had one year from the circuit court's February 6, 2012 Order to file such motion. Regardless of the reason for filing such motion, the Petitioners undisputedly failed to file their motion within the required "reasonable time" instead waiting over six years to do so without justification. The circuit court was correct in analyzing Petitioners' renewed motion to compel arbitration as untimely and denying the same.

In support of the six-year delay in filing the motion, Petitioners' assert that the circuit court incorrectly reviewed the motion to reconsider under Rule 60(b). While Rule 54(b) of the Rules of Civil Procedure provides that a Court may revise the decision at any time before the entry of a

judgment, there must be a basis for the revision. A court's interlocutory ruling is the law of the case. Thus, the circuit court's 2012 ruling is the law of the case. Here, Petitioners failed to produce materially different evidence in support of their Rule 54(b) motion and while Petitioners argue that there has been a "sea change" in applicable law, which is inaccurate, even then, the law does not overrule the circuit court's prior ruling, and the facts at the time of the 2012 Order are not distinguishable from the facts at hand. Moreover, Petitioners have made no showing of clear error resulting in manifest injustice.

Relying on a recent Fourth Circuit decision, *Carlson v. Boston Sci. Corp.* 856 F.3d 320 (4th Cir. 2017), the Court in *Powell v. State Farm Fire & Casualty Co.*, 2018 U.S. Dist. LEXIS 82164 (May 16, 2018), addressed the flexibility to revise *interlocutory* orders before final judgment, as new facts or arguments surface during the course of litigation. While broader than the discretion allowed relative to motions to reconsider *final* judgments under Rule 59(e), the discretion is not inexhaustible. The law-of-the-case doctrine provides when a court decides upon a rule of law, such decision should continue to control the same issues in later phases of that case. A court may revise an interlocutory ruling under the same conditions pursuant to which it may depart from the law of the case: (1) a subsequent trial resulting in substantially different evidence; (2) a change in applicable law; or (3) clear error resulting in manifest injustice. This approach diverges from the Rule 59(e) standard by allowing for different evidence presented during the course of litigation as opposed to new evidence not available at trial.

Here, none of those conditions are present. The Petitioners herein assert that the 2012 Order should be reviewed based upon a change in the applicable law. Of note, however, is that the Petitions cite to cases as early as 2013 in support of the argument of a change in the applicable law. Absent from the Petitioners' brief is any argument addressing the six year delay in the filing

of the motion. As such, regardless of the rule under which the circuit court reviewed the motion, the delay is significant and inexplicable, rendering the ruling sound.

V. CONCLUSION

The circuit court correctly held that the arbitration provisions at issue are unconscionable terms contained in contracts of adhesion and, therefore, are unenforceable. If the Petitioners truly believed the circuit court's holding was in error, their appeal should have come long ago. After six years of hard-fought litigation, thousands of hours of attorney time and thousands of dollars in expenses, Petitioners have waived any right to now demand review. This Court must uphold the circuit court's 2012 Order.

Respectfully submitted the 29th day of November, 2018.

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