No. 17-1412

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LATRICIA E. GOODWIN, individually and on behalf of a class of persons,
Plaintiff-Appellee,

vs.

BRANCH BANKING AND TRUST COMPANY.
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia at Beckley
No. 5:16-cv-10501

APPELLEE'S BRIEF

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INTRODUCTION

Branch Banking and Trust Company ("BB&T" or "Defendant") services home mortgages throughout the southern United States. In 2009, it entered into a Loan Agreement, secured by a Deed of Trust, with West Virginia residents Latricia and Daniel Goodwin. The loan paperwork was presented to the Goodwins in a rushed manner; Latricia, who has only a high school education and very little experience with home-secured loans, had no ability to negotiate any terms and was simply told where to sign. The documents memorializing this loan are replete with terms that benefit BB&T and disadvantage the Goodwins, such as an indemnification clause holding BB&T harmless and requiring the Goodwins to reimburse it for any expenses related to legal disputes concerning the property, a "no waiver" clause stipulating that BB&T would not waive any of its collection rights even if it delayed exercising them, and, as relevant to this dispute, an arbitration clause requiring that any claim of a borrower be brought in arbitration within one year, even if applicable law provided a longer statute of limitations, while allowing BB&T to file collection actions in court within three years.

After Daniel Goodwin died, Latricia fell behind on her mortgage payments, and BB&T initiated foreclosure proceedings against her. As part of that process, BB&T sent Latricia letters threatening to add its attorney's fees to her mortgage in violation of West Virginia law. And BB&T has since admitted, in seeking to

remove this action to federal court, that it sent nearly thirty-five hundred similar letters to over five hundred West Virginia citizens since 2012.

But when Latricia filed a putative class action under West Virginia consumer protection law seeking compensation for herself and other borrowers affected by BB&T's illegal practices, BB&T responded by seeking to enforce the arbitration clause and class action waiver in the Goodwins' Loan Agreement, even though Latricia stated in an affidavit that if she had to proceed under the arbitration clause's unfair terms, she would be forced to abandon her claim. The district court denied BB&T's motion, finding the arbitration clause procedurally unconscionable due to Latricia's lack of sophistication and bargaining ability, its placement two pages after the contract's only signature line, the rushed circumstances of its presentation, and the clause's substantively unconscionable terms. The court found the clause substantively unconscionable primarily because of the shortened statute of limitations and the numerous exemptions from arbitration that BB&T granted to itself, but was also troubled by the mandatory award of attorney's fees and arbitration costs to the prevailing party, the shortened discovery period, and the arbitrator selection criteria that mentioned bank lending contracts but not consumer protection.

Because the arbitration clause that BB&T drafted was both "one-sided" and "overly harsh" to borrowers like Latricia, the district court refused to enforce the

clause in its entirety. *See McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 279 (4th Cir. 2016) (applying West Virginia law). In doing so, the district court acted well within its discretion and well within the bounds of West Virginia law on unconscionable contracts. This court should affirm.

STATEMENT OF THE ISSUES PRESENTED

1. Was the district court correct to find the arbitration provision included in the Retail Note and Security Agreement ("Loan Agreement") procedurally unconscionable (a) where it was inconspicuously presented two pages after the signature page of the Loan Agreement; (b) where the contract of adhesion was one of multiple documents signed during a rushed loan closing process by the plaintiff, a high school graduate with limited experience of home-secured financial transactions; and (c) where the arbitration provision contained substantively unconscionable terms?

2. Was the district court correct to find the arbitration provision substantively unconscionable where it (a) required borrowers like the plaintiff to arbitrate all claims subject to a shortened statute of limitations period of one year notwithstanding any longer statute of limitations available at law for those claims, but allowed Defendant to go to court to collect payments due under the Loan Agreement within three years of the last missed payment; and (b) contained a mandatory loser-pays provision that an assigned arbitrator would be required to

follow regardless of whether the arbitrator considered the claim to be frivolous or brought in bad faith, and which the plaintiff testified in a sworn affidavit would deter her from pursuing her claims in arbitration?

3. Did the district court abuse its discretion in declining to sever the substantively unconscionable terms from the arbitration provision where it found that the arbitration provision "as a whole is so unconscionable that it cannot justly be enforced" because "multiple unfair or biased provisions favoring BB&T combine to render the arbitration clause unconscionable"? JA 150 and n.4.

STATEMENT OF THE CASE

I. The Goodwins' 2009 Transaction with BB&T, the Subsequent Foreclosure, and Latricia's Complaint

In May of 2009, Latricia Goodwin and her husband, Daniel, entered into a Retail Note and Security Agreement ("Loan Agreement") to refinance their home in Princeton, West Virginia, which they had owned since 1992. JA 46, 55. In addition to the arbitration provision at issue in this appeal, the Loan Agreement contained other terms favorable to BB&T and/or punitive to the Goodwins, such as a "no waiver" clause allowing Defendant to accept partial or late payments or delay in exercising its collection rights without waiving them, and an "acceleration" clause entitling BB&T to require payment of the total balance due on the loan if the Goodwins missed a single payment. JA 48.

As part of this same transaction, the Goodwins executed a Credit Line Deed of Trust ("Deed of Trust") that conveyed their home, its surrounding land, and all fixtures and equipment located there to BB&T Collateral Services Corporation, as trustee, for the benefit of Defendant. JA 50-55. This Deed of Trust also indemnified Defendant and BB&T Collateral Services Corporation from any amounts paid in conjunction with a "suit or legal proceeding involving the Property" and obligated the Goodwins as grantors to refund any such costs. JA 52.

After Daniel died, Latricia fell behind on her payments to Defendant under the Loan Agreement. Defendant began calling her and sending her letters in an attempt to collect on the loan. JA 17 at ¶¶5-6. In one such letter, sent to Latricia on March 11, 2015, Defendant stated that "[y]our mortgage loan will be charged for any attorney's fees or foreclosure costs stipulated in your Mortgage Loan Agreement." *Id.* at ¶7.

West Virginia's Consumer Credit and Protection Act ("WVCCPA") lists the types of fees that may be collected as part of a foreclosure, and attorney's fees are not among them. W. Va. Code § 46A-2-115 (2016) (amended on other grounds by S.B. 344 (2017)). The WVCCPA also forbids a debt collector from representing, as BB&T did in its March 2015 letter, that it may increase the amount of an existing debt obligation by adding fees that are not authorized by statute. W.Va.

Code §§ 46A-2-127(g); 128(d) (1997) (amended on other grounds by S.B. 563 (2017)).

On September 19, 2016, Latricia Goodwin ("Latricia" or "Plaintiff") filed a complaint in West Virginia Circuit Court in Raleigh County, Civil Action No. 16-C-609. JA 5 at ¶1. The complaint included individual claims for violations of the WVCCPA for BB&T's debt collection phone calls to Latricia, JA 20 at ¶24 (citing W. Va. Code § 46A-2-125), and for attempting to collect a debt by coercion, *id.* (citing W. Va. Code § 46A-2-124). It also included class claims on behalf of a class of West Virginia citizens who have or had loans serviced by Defendant and who received letters threatening to collect attorney's fees in connection with foreclosure actions between September 2012 and the date when any class is certified. JA 6 at ¶5. In its notice of removal, Defendant averred that it sent over 3,400 (thirty-four hundred) such letters to over five hundred distinct West Virginia borrowers since September of 2012. JA 6-7 at ¶¶7, 12.

II. Latricia's Evidence and Arguments Against Enforcement of BB&T's Arbitration Clause

In opposing Defendant's motion to compel arbitration, Latricia executed a sworn affidavit in which she stated that: (1) she has only a high school education, supplemented by some courses to become a Licensed Practical Nurse, which she never completed, JA 80 at ¶2; (2) she only entered into one home-secured loan in

her entire life, which is the transaction now at issue in this appeal, *id.* at ¶3; (3) the loan documents were signed in a rushed environment, where no terms were explained and she was simply told where to sign, *id.* at ¶¶4-5; and (4) she was not able to negotiate any of the terms of the loan, *id.* at ¶6.

Through counsel, Plaintiff also challenged the following terms of the Loan Agreement's arbitration provision as unconscionable: (1) the provision shortening the statute of limitations for all claims subject to arbitration to one year, "notwithstanding any longer statute of limitations available at law"), JA 49; (2) the provision allowing BB&T to "file a civil action" to collect amounts owed under the contract within three years of the last event of default, *id.*; (3) the requirement that any arbitration award pursuant to the Loan Agreement "*shall* include . . . a provision that the prevailing party in such arbitration *shall* recover its costs of the arbitration and reasonable attorneys' fees from the other party," *id.* (emphasis added); (4) the requirement that the assigned arbitrator be "a retired judge or retired attorney experienced in bank lending contracts," *id.*; and (5) the requirement that the arbitration hearing take place within ninety days of the written demand for arbitration, JA 71. With respect to the mandatory loser pays provision, Latricia testified in her affidavit that if this provision were enforced against her, "I would have to abandon my claim." JA 80 at ¶7.

III. The District Court's Order Denying BB&T's Motion to Compel Arbitration

On March 10, 2017, the district court denied Defendant's motion to compel arbitration and strike class claims because it found the arbitration clause "unconscionable and unenforceable." JA 140. Specifically, with respect to procedural unconscionability, the court found that (1) the "Goodwins did not have the opportunity to alter terms of the Loan Agreement or to opt out of the arbitration clause without foregoing the offered mortgage"; (2) Latricia "is a financially unsophisticated consumer"; (3) "BB&T is a large national lender with significant experience in lending contracts, and had the advantage of drafting the Loan Agreement"; 4) the arbitration clause appeared "two pages after the only signature line in the contract, as an incorporated term"; and 5) Plaintiff "signed in a rushed environment." JA 148. The court added that while these factors alone might not render an arbitration clause unenforceable if it were otherwise commercially reasonable, they "provide sufficient evidence of procedural unconscionability" under the sliding scale of unconscionability established by West Virginia law "to render a commercially *unreasonable*, and substantively unconscionable, arbitration clause unenforceable." *Id.* (emphasis in original).

Turning to substantive unconscionability, the court found that the arbitration clause "heavily favors BB&T's interests and position over those of the borrower."

Id. The prime example of such one-sidedness was the one-year statute of limitations, not just for WVCCPA claims but for any claims subject to arbitration "notwithstanding any longer statute of limitations available at law." *Id.* at 148 & n.2. Moreover, under the Loan Agreement BB&T alone is exempt from arbitrating various sorts of claims, such as collection actions (which it may file in court within three years of default), foreclosure proceedings, self-help remedies like setoff, and injunctive relief and writs of possession which it may seek in court. JA 148-49. The district court acknowledged that "the West Virginia Supreme Court has recognized that lenders may except foreclosure and receivership from arbitration clauses," but concluded that "the one-sidedness here extends further" by carving out collection actions from the arbitration clause and extending the statute of limitations for those actions from one year to three. JA 149.

Finally, the district court noted other provisions in the arbitration clause that, while not necessarily unconscionable, "have the practical effect of . . . discouraging borrowers from pursuing claims in arbitration." JA 149. These included the loser pays provision, the shortened discovery period, and the provision requiring the arbitrator to have experience with bank lending contracts (without also allowing for arbitrators with a background in consumer protection). JA 150 & n.3. Thus, the court declared the arbitration clause substantively unconscionable primarily due to its "largely unilateral nature," but found that "in

view of the other terms and conditions, as well as the procedural inequities, the arbitration clause as a whole is so unconscionable that it cannot justly be enforced." JA 150. "Collectively," the court concluded, "the terms are well beyond the reasonable expectations of an ordinary person." *Id.*

SUMMARY OF THE ARGUMENT

Unconscionability is a "general contract law principle, based in equity," that is "deeply ingrained" in West Virginia law. *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859 (W. Va. 1998). "[U]nconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written." *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 376-77 (W. Va. 2013). Here, an overall and gross imbalance pervades everything about the Loan Agreement and the arbitration clause it contains: from the disparity in bargaining power between BB&T and the Goodwins; to the distance between the signature line and the inconspicuous arbitration clause on the last page; to the thrice-longer statute of limitations that BB&T granted to itself for the claims it is permitted to bring in court than for the claims that borrowers like the Goodwins must bring in arbitration; to the mandatory loser-pays provision that, while bilateral, falls much more harshly on individual consumers than on BB&T.

Set against this backdrop, other terms of the loan transaction, like the ban on joinder of claims, shortened discovery period, reference to bank lending contracts in the arbitrator selection provision, and provisions in the Deed of Trust indemnifying BB&T from legal costs, while not all unconscionable in themselves, underscore that BB&T took every advantage it could and drafted a contract that would not comport with the reasonable expectations of an ordinary person. The district court chose not to reward BB&T for this overreaching conduct by simply severing some unconscionable terms from a thoroughly one-sided and lopsided contract. Instead, it exercised its discretion and refused to enforce the arbitration clause in its entirety. That was an equitable outcome, and there is no reason for this Court to disturb it.

STANDARD OF REVIEW

Defendant is correct that this Court reviews the district court's decision to deny a motion to compel arbitration de novo. Appellant's Opening Brief ("AOB") at 7. But Defendant failed to mention that in conducting that de novo review, this Court affords deference to the district court's underlying factual findings. *Rota-McLarty v. Santander Consumer USA*, Inc., 700 F.3d 690, 701 (4th Cir. 2012). *See also Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) (reviewing for clear error "factual findings that form the

basis of a decision" as to whether a dispute is arbitrable). This Court need not follow the District Court's reasoning in its entirety, however, but may "affirm on any grounds supported by the record." *Willner v. Dimon*, 849 F.3d 93, 103 (4th Cir. 2017).

The district court's decision not to sever unconscionable portions of the arbitration agreement is reviewed for abuse of discretion. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000, 1005 (9th Cir. 2010) (reviewing for "abuse of discretion" where trial court had "some discretion" with regards to severing unconscionable terms under state law) (citing Cal. Civ. Code § 1670.5(a)). West Virginia applies the same discretionary standard for severance as the California law relied upon in *Bridge Fund*. *Compare Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 227 (W. Va. 2012) ("*Brown II*"), *with* Cal Civ. Code § 1670.5(a).

ARGUMENT

Defendant spends a great deal of time reminding this Court that the Federal Arbitration Act ("FAA") reflects a "liberal policy favoring arbitration" and that courts apply a pro-arbitration presumption when interpreting the FAA. AOB at 5, 8. However, many of the cases that Defendant cites for this proposition are inapposite, for they involved questions about whether a particular arbitration clause

covered a particular dispute—something that the parties here have never contested. AOB at 8 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), for the proposition that "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

The United States Supreme Court has repeatedly explained that the FAA also reflects the "fundamental principle that arbitration is a matter of contract." *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). And the FAA contains a "saving clause" providing that arbitration agreements may be held unenforceable on "such grounds as exist at law or in equity for the revocation of any contract," such as the generally applicable contract defenses of fraud, duress or unconscionability. *Id.* (quoting 9 U.S.C. § 2). Or, as the United States Supreme Court has explained on another occasion, "the purpose of Congress [in enacting the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (adding that to prevent a court from invalidating an arbitration clause based on fraud in the inducement of the arbitration clause itself would "elevate [the arbitration clause] over other forms of contract—a situation inconsistent with the 'saving clause.'").

Whether one of the generally applicable defenses recognized in the FAA's saving clause operates to invalidate an arbitration agreement is analyzed under

state contract law. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Here, the parties and the district court all agree that West Virginia's law on unconscionability governs this dispute. AOB at 8-9; JA 144-45, 147.

In West Virginia, a contract will be deemed unenforceable due to unconscionability where a "gross inadequacy of bargaining power combines with terms unreasonably favorable to the stronger party." *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914, 922 (W. Va. 2005) (internal quotations omitted). "The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." *Webster*, 752 S.E.2d at 377 (citations omitted).

West Virginia courts analyze unconscionability in terms of procedural and substantive components, but "the line between the two concepts is often blurred." *Brown II*, 729 S.E.2d at 227 (internal quotations omitted). A contract term must be both procedurally and substantively unconscionable to be found unenforceable, but "both [forms of unconscionability] need not be present to the same degree." *Id.* West Virginia courts apply a "sliding scale" in conducting their unconscionability analysis: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Id.*

Here, the district court found the arbitration clause in the Loan Agreement to be procedurally unconscionable because Latricia was financially unsophisticated and inexperienced, the clause appeared two pages after the contract's only signature line, and the Agreement was presented in a rushed environment in a take-it-or-leave-it manner by a party, BB&T, with much greater bargaining power. JA 148. The court concluded that these factors alone might not have rendered the arbitration clause unconscionable if it were "otherwise commercially reasonable," but its "largely unilateral nature," including the exceptions to arbitration and longer statute of limitations that BB&T reserved exclusively for its own claims, "heavily favor[ed] BB&T's interests and position over that of the borrower," making it substantively unconscionable as well. JA 148, 150. Applying West Virginia law and deferring to the district court's factual findings, *Rota-McLarty v. Santander*, 700 F.3d at 701, this Court should affirm.

I. The Arbitration Clause in the Loan Agreement Was Procedurally Unconscionable Because It Was Buried Inconspicuously Within a Contract of Adhesion, Was Presented to an Unsophisticated Consumer in a Rushed Environment, and Contained Unfair Terms Beyond the Reasonable expectations of an Ordinary Person.

Whether a contract provision is procedurally unconscionable requires an examination of several nonexclusive factors: (1) "the adhesive nature of the contract;" (2) "hidden or unduly complex contract terms;" (3) "the age, literacy, or lack of sophistication of a party;" (4) "the manner and setting in which the contract

was formed, including whether each party had a reasonable opportunity to understand the terms of the contract;" and (5) the degree to which the contract provision is "substantively oppressive." *Brown II*, 729 S.E.2d at 227 (citing *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 287, 289 (W. Va. 2011), *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) ("*Brown I*")).[1]

Defendant maintains that this case is "squarely on point" with *Nationstar Mortgage, LLC v. West*, 785 S.E.2d 634 (W. Va. 2016), because the district court here relied on "nearly identical" findings and arguments to the ones that were rejected in *Nationstar*. AOB at 10, 12. Defendant's premise is incorrect. Even if the factors considered by the district court here were "nearly identical" to those in *Nationstar v. West*—which they are not—this would not dictate that the outcomes in the two cases should be the same, because "the particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." *State ex*

[1]*Brown I* continues to be precedential on unconscionability in West Virginia, *see e.g*, *Nationstar Mortgage, LLC v. West*, 785 S.E.2d 634, 638 (W. Va. 2016) ("We examine the issue of unconscionability pursuant to the approach set forth in *Brown I*"), despite its reversal by the United States Supreme Court on other grounds. *See Brown II*, 729 S.E.2d at 222 (noting that the Supreme Court only reversed the *Brown I* opinion with respect to "whether the FAA applies to personal injury or wrongful death actions").

rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders, 717 S.E.2d 909, 919 (W. Va. 2011).

In addition to the arbitration provision's substantive unconscionability, *see* Part II, *infra*, close scrutiny of the factors above reveals that there are key facts that distinguish this case from *Nationstar*.[2] Moreover, the circumstances surrounding the formation of the arbitration provision here touch nearly every criterion for procedural unconscionability established in *Brown I* and reiterated in *Brown II*.

A. The Arbitration Provision, and the Loan Agreement in Which It Appeared, Were Contracts of Adhesion.

The parties "agree that the Loan Agreement is a contract of adhesion." JA 147. There is also no opt-out provision that would have allowed Plaintiff to avoid arbitration without foregoing the loan entirely. JA 148; *Nationstar*, 785 S.E.2d at 640 (although not dispositive on its own, the "omission of an 'opt out' provision" is one of the factors to consider when determining procedural unconscionability).

[2] Two other cases Defendant relies on in a footnote are inapposite because the disputes did not involve contracts of adhesion. *See U.S. ex rel. TBI Investments, Inc. v. BrooAlexa, LLC*, 119 F. Supp. 3d 512, 530, 532 (S.D. W. Va. 2015); *Dytko v. Chesapeake Appalachia, LLC*, No. 5:13CV150, 2014 WL 2440496, at *5 (N.D. W. Va. May 30, 2014). To the extent that Defendant relies on *Miller v. Equifirst Corp. of WV*, No. CIV A 200-0335, 2006 WL 2571634 (S.D. W. Va. Sept. 5, 2006), it is distinguishable on similar grounds as Nationstar—namely, the arbitration provisions in *Miller* contained no substantively oppressive terms and were conspicuously presented "on separate pieces of paper, distinct from the other loan documents" and not, as here, "included within the body of any other loan documents or located upon the back of any document." *Id.* at *6.

These indices of adhesiveness are not irrelevant, as Defendant suggests, AOB at 10, 12, but instead are a "beginning point for analysis," *Brown I*, 724 S.E.2d at 286, and "one of multiple factors to consider in evaluating a claim of procedural unconscionability." *Nationstar*, 785 S.E.2d at 640.

Contracts of adhesion trigger "greater scrutiny than a contract with bargained-for terms": a court must "distinguish[] good adhesion contracts which should be enforced from bad adhesion contracts which should not." *Brown II*, 729 S.E.2d at 228 (quoting *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 273 (W. Va. 2002)). Procedural unconscionability is more likely to be found in a contract of adhesion where any of the following circumstances are present: "an imbalance in bargaining power, absence of meaningful choice, unfair surprise, or sharp or deceptive practices" such as the use of "fine print, legalese disclaimers, or boilerplate clauses on the back of contracts, for examples." *Brown I*, 724 S.E.2d at 286–87. When the Goodwins entered into the Loan Agreement with BB&T in 2009, all four of these suspect features were present.

Defendant does not dispute that there was an imbalance of power or that Plaintiff had a choice in signing a contract with the arbitration provision. *See* AOB at 10. The remaining circumstances roll into the next *Brown* factor.

B. Defendant Engaged in Unfair Surprise and Sharp and Deceptive Practices by Burying the Arbitration Provision in a "Maze of Fine Print."

The arbitration provision in *Nationstar* was presented in "all capital letters, located immediately above the signatory lines on [a] one-page rider." Here, in contrast, the arbitration provision in the Loan Agreement is inconspicuously buried two pages after the signature line "in a maze of fine print" that is indistinguishable from the rest of the boiler-plate language in the "ADDITIONAL TERMS" of the Loan Agreement. *Brown I*, 724 S.E.2d at 285; JA 48-49. Regardless of whether the arbitration provision was "hidden," *see* JA 148, Defendant's use of "fine print" on the "back of a contract [of adhesion]" evidences "sharp or deceptive practices" and "unfair surprise" that places a thumb on the scale in favor of finding the provision procedurally unconscionable. *Brown I*, 724 S.E.2d at 286-87; *see also D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1164 (Nev. 2004) (contract procedurally unconscionable where signature line was on front page and arbitration provision was inconspicuously placed on back page); *Schwartz v. Alltel Corp.*, 2006-Ohio-3353, at ¶34 (Ohio Ct. App. 2006) (finding procedural unconscionability where consumer signed front of contract, and arbitration provision was "at the very bottom of the back side of the agreement"); *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 35 (Or. 2014) (describing the use of "fine print" as one of the "hallmarks of surprise," an element of procedural unconscionability). *Compare Simpson v. MSA*

of Myrtle Beach, Inc., 644 S.E.2d 663, 670 (S.C. 2007) (arbitration clause procedurally unconscionable where it contained substantively unconscionable terms, was written in "the standard small print," and was "embedded in paragraph ten (10) of sixteen (16) total paragraphs" on the back page of a contract beyond the signature line), *with Herron v. Century BMW*, 693 S.E.2d 394, 398 (S.C. 2010) (distinguishing *Simpson* because the arbitration agreement appeared on "a separate, one-page document" which was "clearly labeled" in "bold, capital, and underlined font," with "important terms and provisions . . . appear[ing] in the body of the contract and again in capital letters just above the signature line."), *judgment vacated on other grounds sub nom. Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011).

Defendant first argues that the inconspicuousness of the arbitration provision "cannot support procedural unconscionability." AOB at 12-13. But Defendant misleadingly relies on a case that addressed whether a contract was a unitary document or two separate documents. *Navient Solutions, Inc. v Robinnette*, No 14-1215, 2015 WL 6756859 (W. Va. Nov. 4, 2015) (unpublished). This issue has no bearing on whether an arbitration agreement itself was unconscionable. *See Evans v. Bayles*, 787 S.E.2d 540, 545 (W. Va. 2016) (holding that an arbitration clause that lacked a signature was properly incorporated by reference into a contract, but nonetheless remanding for circuit court to determine if the arbitration provision was unconscionable). Furthermore, *Navient* is an unpublished opinion that has "no

precedential value." *Pugh v. Workers' Comp. Com'r*, 424 S.E.2d 759, 762 (W. Va. 1992).

Defendant alternatively argues that it is absolved from engaging in these "sharp or deceptive practices" because the court in *Nationstar* held that consumers should expect arbitration provisions in a loan agreement and that consumers have a duty to read such provisions. *See* AOB at 13. But *Nationstar's* holding was based on a conspicuously presented arbitration provision that did not have any substantively unconscionable terms. *See Sanders*, 717 S.E.2d at 919 ("[C]ertain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others."). Furthermore, such a broad view of procedural unconscionability would render the doctrine toothless in nearly all contracts of adhesion.

Contrary to Defendant's position, the *Nationstar* court implicitly recognized that when a contract of adhesion buries important clauses in fine print—appearing after the signature line—those clauses should be viewed as suspect. *See* 785 S.E.2d at 640 ("[G]iven the placement of the arbitration language-immediately above their signature lines and in all capital letters, we find the averment of unfair surprise to be similarly unpersuasive.") (collecting cases); *see also State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 389 (W. Va. 2013) ("The arbitration agreement contained a plainly worded statement, placed conspicuously above the

signature line in all caps, that advised the [plaintiffs] that they could reject the arbitration agreement and the lender would not refuse to complete their loan due to such refusal.").

This isn't to say that conspicuous notice of an arbitration clause is a requirement under West Virginia law. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Rather, conspicuous placement of *any* arguably unconscionable contract clause would counter a charge that the clause constitutes "unfair surprise" or that a party used "sharp or deceptive practices"; by placing its arbitration clause on the very last page of the Loan Agreement, two pages after the signature line, Defendant has forfeited that defense to a charge of procedural unconscionability here. *See Brown I*, 724 S.E.2d at 285.

Accordingly, Defendant's inconspicuous placement of its one-sided arbitration clause weighs in favor of finding the provision procedurally unconscionable.

C. Plaintiff's Educational Status, Financial Inexperience and Lack of Sophistication Limited Her Ability to Understand the Arbitration Provision.

The district court determined that Plaintiff is an unsophisticated consumer based on a signed affidavit—included in the record—explaining Latricia's relative lack of education and inexperience with home-secured loans. JA 80 at ¶¶1-3, 148;

Int'l Paper Co., 206 F.3d at 416 ("We review factual findings that form the basis of a decision as to whether the parties have agreed to submit a dispute to arbitration for clear error."). The district court's findings here, drawn from a sworn affidavit, are unlike the "conclusory findings" rejected in *Nationstar*, 785 S.E.2d at 640, which were based on nothing more than allegations in the plaintiff's complaint. *See* Response to Defendant's Motion to Compel Arbitration, *Nationstar*, (W. Va. Cir. Ct. Oct. 20, 2014) (No. 13-C-131), 2014 WL 12488153; *see also Webster*, 752 S.E.2d at 389 ("[Plaintiffs] also have failed to direct this Court's attention to any evidence in the record to support the circuit court's finding that they lacked sophistication and financial knowledge to a degree that rendered the contract unenforceable.").

Since Plaintiff established, with competent evidentiary support, that she was not a financially sophisticated party to the Loan Agreement, this factor weighs in favor of finding procedural unconscionability.

D. The Rushed Environment in Which Plaintiff Signed the Loan Agreement Is Relevant to Procedural Unconscionability Because of Defendant's Use of "Sharp or Deceptive Practices."

Plaintiff signed the Loan Agreement in a "rushed environment" where neither the Agreement, nor anyone at the signing, detailed the existence of the arbitration provision or explained any of the contract's terms; rather, Plaintiff was simply told where to sign. JA 46–49; JA 80 at ¶¶4-5. It is true that the West

Virginia Supreme Court of Appeals gave little credence to the similarly "hurried manner" of executing the loan documents in *Nationstar*, finding it typical of real estate closings. *See* 785 S.E.2d at 641. But the rushed environment here becomes relevant to the procedural unconscionability analysis when important and complex terms are spatially separated from the signature line, making them more difficult to find and comprehend in a short period of time, especially for someone of Latricia's limited education and experience with such documents. *Cf. Robinson v. Quicken Loans Inc.*, No. CIV.A. 3:12-0981, 2012 WL 3670391, at *2 (S.D. W. Va. Aug. 24, 2012) (unsophisticated consumer exposed to misleading conduct "raised significant questions" as to whether she "had a reasonable opportunity to understand the terms of the contract"). Thus, this factor also weighs in favor of finding procedural unconscionability.

E. The Substantively Unconscionable Terms of the Arbitration Provision Tip the Scale in Favor of Procedural Unconscionability.

The arbitration provision here touches upon almost all of the factors that would make a contract term procedurally unconscionable under West Virginia law. But if this Court has any doubt, the substantive unconscionability of the arbitration provision demonstrates how Defendant used its superior bargaining power to foist upon Latricia, and other borrowers, a clause whose terms tilt strongly and unfairly in Defendant's favor.

Procedural and substantive unconscionability "need not be present to the same degree" in order to find that a clause is unconscionable overall. *Brown I*, 724 S.E.2d at 289. A "sliding scale" is used, which "disregards the regularity of the procedural process of the contract formation in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *Id.* at 289 & n.140 (citation omitted).

The district court applied this sliding scale in finding the arbitration provision procedurally unconscionable. JA 148. It found that although the above factors "alone would not render an otherwise commercially reasonable arbitration clause unenforceable[, t]hey do provide sufficient evidence of procedural unconscionability . . . to render a commercially unreasonable, and *substantively unconscionable*, arbitration clause unenforceable." JA 148 (emphasis added).

On appeal, Defendant has not attacked the district court's determination that the arbitration clause, which otherwise may not have been procedurally unconscionable, was rendered unenforceable by the substantive unconscionability that pervaded it. Thus, although Plaintiff maintains that the factors described above are sufficient to establish procedural unconscionability, even if they are not, the

substantive unconscionability of the clause renders it procedurally unconscionable, as Defendant effectively concedes.

* * * * *

Ironically, Defendant asserts that "it is difficult to imagine a scenario where arbitration would be upheld" if this Court were to find Defendant's arbitration clause procedurally unconscionable. AOB at 13. But the opposite is in fact true: it is difficult to imagine a scenario where a court would not find an arbitration provision procedurally unconscionable where nearly all of the *Brown* factors weigh in favor of such a finding. *Nationstar* did not overturn *Brown*; it only held that the conspicuously presented and substantively fair arbitration provision in that case—easily distinguished from the one here—was not procedurally unconscionable. Because the arbitration provision in the Loan Agreement was more one-sided, less conspicuous, and presented to a consumer who offered evidence of her lack of financial sophistication, this case is unlike *Nationstar* and the district court properly found the arbitration provision procedurally unconscionable.

II. The Arbitration Provision in the Loan Agreement Was Substantively Unconscionable Because It Lacked Mutuality of Obligation, Unreasonably Favored BB&T, and Substantially Limited Borrowers' Ability to Enforce and Vindicate Their Statutory Rights.

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." *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012). Reviewing courts "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*, 724 S.E.2d at 228. The West Virginia Supreme Court of Appeals has stated that "[i]n assessing substantive unconscionability, the paramount consideration is mutuality." *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d at 921. *See also Brown II*, 729 S.E.2d at 228 (noting that courts have considered "mutuality of obligation is the locus around which substantive unconscionability analysis revolves").

Courts interpreting West Virginia law have held that harshness to the disadvantaged party, in addition to one-sidedness and lack of mutuality, must be present to establish substantive unconscionability. *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 279 (4th Cir. 2016). The West Virginia Supreme Court of Appeals has also held that "provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections . . . afforded by . . . state law that exists for the benefit and protection of the public" are presumptively unconscionable. *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 275-76 (W. Va. 2002).

Here, the arbitration provision in the Loan Agreement both lacks mutuality in a way that unreasonably benefits BB&T, and operates to substantially limit the ability of borrowers like Latricia to enforce and vindicate their statutory rights. Thus, the district court properly found it to be substantively unconscionable.

A. The Provision Shortening the Statute of Limitations to One Year for All Claims Subject to Arbitration, While Simultaneously Carving Out from Mandatory Arbitration and Applying a Three-Year Statute of Limitations to the Claims BB&T Would Most Likely Bring, Is One-Sided and Unreasonably Favorable to BB&T.

Defendant makes much of the fact that in 2009, when the Goodwins entered into the Loan Agreement with BB&T, the statute of limitations for the types of claims Latricia has now brought under the WVCCPA was one year and not four years as it is now. AOB at 18-19. But as Defendant also points out, determinations of unconscionability are made "as of the date of execution," AOB at 18 n.7 (citing *Troy Min. Corp. v. Itman Coal Co.*, 346 S.E.2d 749, 754 (W. Va. 1986)), and as of the date of execution, the parties did not yet know what claims they might want to bring against each other in the future and what the statute of limitations for those claims might be. Thus, by limiting the analysis of the statute of limitations-shortening provision to the specific statutory claims Latricia wound up bringing seven years later, Defendant is engaging in the very post hoc rationalization of unconscionability that the West Virginia Supreme Court of Appeals rejected in *Troy Mining Corporation.*

Defendant made this same argument about the WVCCPA's 2009 statute of limitations before the district court. In rejecting that argument the district court noted that "the arbitration clause does not set a statute of limitations for specific causes of action—it instead sets a one year statute of limitation 'notwithstanding any longer statute of limitations available at law.'" JA 148 n.2. There are any number of claims that Latricia could have brought against BB&T with longer statutes of limitation than one year, such as claims under the Truth in Lending Act, 15 U.S.C. § 1635(f) (three-year statute of limitations from consummation of loan for claims of recission when proper disclosures not provided); the Fair Credit Reporting Act, 15 U.S.C. § 1681p (allowing consumers to file suit within two years of discovering a violation, or within five years of the violation's occurrence, whichever is earlier); or the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) (employing four-year federal statute of limitations under 28 U.S.C. § 1658).

And while West Virginia courts have not yet ruled on whether such limitations-shortening provisions are unconscionable, other courts throughout the country look on them with disfavor, especially when they appear in adhesive contracts imposed upon consumers or employees. *See, e.g.*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (finding one-year statute of limitations substantively unconscionable because it would deprive employees of

the benefit of the continuing violation doctrine); *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So.3d 695, 701-03 (Miss. 2009) (finding unconscionable a provision that attempted to impose a one-year statute of limitations on claims of nursing home residents); *McKee v. AT & T Corp.*, 191 P.3d 845, 859 (Wash. 2008) (finding substantively unconscionable a two-year statute of limitations imposed "in a contract of adhesion for a basic consumer service").[3]

Defendant insists that the one-year statute of limitations provision is mutual because it applies to the claims of all parties, and then goes on to quite literally bury the lead by referring at the end of the sentence to the "narrow exception that BB&T has three years from default to collect on the debt." AOB at 18. But this is not a narrow exception. Rather, it gives BB&T three times as long to bring precisely the sorts of claims that a debt collector would most likely want to bring, and it permits BB&T to bring such claims in court while restricting borrowers to bringing all of their claims in the arbitral forum.

In *Arnold v. United Companies Lending Corp.*, the West Virginia Supreme Court of Appeals considered a similar provision excluding from arbitration "the

[3] Defendant points to a Fourth Circuit case finding a one-year shortened statute of limitations to be reasonable, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007), but that case involved a dispute between business entities, not a contract of adhesion imposed upon unsophisticated consumers, and also analyzed North Carolina rather than West Virginia law. *Id.* at 287-88.

Lender's right . . . to submit and to pursue in a court of law any actions related to the collection of the debt." *Arnold*, 511 S.E.2d 854, 858 (W. Va. 1998). The court concluded that this provision was unreasonably favorable to the lender because the borrowers' "only recourse" for harm done to them was binding arbitration, whereas the lender's "access to the courts is wholly preserved in every conceivable situation where [it] would want to secure judicial relief against" the borrowers. *Id.* at 861. And while *Dan Ryan Builders, Inc. v. Nelson* later overruled one point of law in *Arnold* that appeared to create a per se rule applicable only to arbitration provisions, 737 S.E.2d at 560, *Dan Ryan Builders* did not overrule the more general holding of Arnold that nonmutual, overly one-sided provisions in a contract are substantively unconscionable, nor did it invalidate the application of those general principles of unconscionability to the facts of *Arnold*.

In finding this case "akin to" *Arnold*, the district court first acknowledged that subsequent West Virginia Supreme Court of Appeals cases have declared carve outs from arbitration provisions for certain self-help remedies of lenders not to be substantively unconscionable. JA 149 (citing *Nationstar Morg. LLC v. West*, 785 S.E.2d at 642). Defendant complains that the district court "offered no discussion or explanation as to how or why the arbitration provision in this case was allegedly more one-sided" than the provision in *Nationstar*. AOB at 22. But the differences speak for themselves: while the provision in *Nationstar* carved out

similar types of claims that the lender could bring in court rather than in arbitration, *Nationstar*, 785 S.E.2d at 637 n.8, the provision here went further by trebling the period of time for bringing those claims in court from the shortened statute of limitations governing claims that must be arbitrated—that is, all of the claims a borrower could bring against BB&T.[4]

Thus, it is the combination of three factors present in this case, and absent from *Nationstar*, that makes this provision substantively unconscionable: 1) shortening the statute of limitations for claims subject to arbitration notwithstanding longer statutes of limitation available at law; 2) exempting from mandatory arbitration a list of claims that BB&T would be likely to bring, such as collection actions in the event of default; and 3) expanding the contractually shortened statute of limitations from one to three years only for those exempted claims that BB&T may bring in court rather than in arbitration. Taken together, these terms are "unreasonably favorable" to BB&T and "so one-sided" as to "have

[4] Defendant suggests that the longer statute of limitations for collection claims actually benefits borrowers by permitting BB&T to "consider alternatives" like a repayment plan or loan modification before initiating legal action. AOB at 20. But these examples actually underscore the Loan Agreement's one-sidenness, for whether to offer any such alternatives is completely discretionary with BB&T. Borrowers have no right under the Loan Agreement to attempt to renegotiate their loan before foreclosure or other collection proceedings begin, whereas BB&T has the right under the acceleration clause to collect the full balance due under the loan once a single payment is missed. JA 48. This "disparity in the rights of the contracting parties," *Dan Ryan Builders*, 737 S.E.2d at 560, is a prime indication of substantive unconscionability.

an overly harsh effect" on borrowers like Latricia. *Dan Ryan Builders*, 737 S.E.2d at 558, 560. As such, they are substantively unconscionable under West Virginia law.

B. The Mandatory Loser-Pays Provision Requiring the Arbitrator to Award Attorneys' Fees and Costs of Arbitration to the Prevailing Party Has Deterred Plaintiff from Pursuing Her Claims in Arbitration and Thus Severely Limited Her Ability to Vindicate Her Rights Under the WVCCPA.

Defendant asserts that the provision requiring an arbitrator to award attorneys' fees and costs of arbitration to the prevailing party cannot be substantively unconscionable because it is bilateral. AOB at 15. But lack of mutuality is not the only ground on which West Virginia courts find contract terms to be unconscionable. Unconscionability also derives from provisions that "prohibit or substantially limit" a person from vindicating her rights under "state law that exists for the benefit and protection of the public." *Berger*, 567 S.E.2d at 275-76.

In expressing its concern over this provision, the district court cited to Latricia's statement in her sworn affidavit that "she would not bring her claim if she were required to risk paying [BB&T's attorney's fees and arbitration] costs in the event of an adverse ruling." JA 150. Such complete deterrence from bringing a statutory claim is precisely the sort of limitation on the vindication of statutory

rights that the *Berger* court included within its rule that exculpatory provisions in contracts of adhesion are substantively unconscionable. *Berger*, 567 S.E.2d at 275.

Moreover, in assessing substantive unconscionability, West Virginia courts are to "consider . . . the purpose *and effect* of the terms, allocation of the *risks* between the parties, and public policy concerns." *Brown II*, 729 S.E.2d at 228 (emphasis added). Though the loser-pays provision may be bilateral on its face, the risks of that provision fall very asymmetrically on a corporation like BB&T as opposed to a consumer like Latricia who recently experienced foreclosure. And if the deterrent effect of this provision is reasonably foreseeable to BB&T—the drafter of the provision— that deterrent effect is a factor with public policy ramifications that courts reviewing the clause should consider.

Defendant also cites to *Employee Resource Group, LLC v. Harless*, No. 16-0493, 2017 WL 1371287 (W. Va. Apr. 13, 2017) (unpublished)—another unpublished decision with "no precedential value," *Pugh*, 424 S.E.2d at 762—for the proposition that bilateral fee shifting provisions are not substantively unconscionable in West Virginia.[5] But the court's holding in *Harless* turned in part

[5] Defendant quotes from *Harless* at length, AOB at 15, including an internal citation to a Ninth Circuit opinion "collecting cases" that, if taken at face value, could give the impression that no state appellate courts anywhere in the country have found a bilateral loser-pays provision to be unconscionable. But the Ninth Circuit opinion cited in *Harless* was only collecting, and analyzing, California cases, and made no observations about the state of the law outside California. *See*

on the fact that the provision there was not mandatory but was discretionary with the arbitrator. *Id.* at *6 (allowing the arbitrator to award fees to the prevailing party if the arbitrator "finds the claim [was] frivolous or unreasonable or factually groundless"). Indeed, such a discretionary fee shift is already provided for under the WVCCPA. W.V. Code § 46A-5-104 (allowing defendants to collect attorney's fees when claim is brought in bad faith or for purposes of harassment). It was the conversion of this discretionary and context-dependent statutory fee shifting provision into an automatic, mandatory, and inflexible fee shifting provision under the arbitration clause that led Plaintiff to make the entirely unspeculative statement that she would not proceed with her claim in arbitration with such a clause hanging as a Sword of Damacles over her head.[6] Under these circumstances, this Court may find the loser-pays provision substantively unconscionable.

Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1024-25 (9th Cir. 2016). Appellate courts in other states have, in fact, found such bilateral clauses to be unconscionable, particularly when they are mandatory as this one is. *See Delta Funding Corp. v. Harris*, 912 A.2d 104, 112-13 (N.J. 2006); *Small v. HCF of Perrysburg*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004); *Brown v. MHN Gov't Servs., Inc.*, 306 P.3d 948, 957-58 (Wash. 2013).

[6] Because, as Defendant has elsewhere pointed out, unconscionability is judged as of the time the contract was executed, AOB at 18 n.7, BB&T cannot retroactively cure this unconscionable provision by agreeing not to enforce it. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 677 (6th Cir. 2003) (en banc) ("If the provision, as drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case, the employer agrees to pay a particular litigant's share of the fees and costs to avoid such a holding."); *Popovich v. McDonald's Corp.*, 189 F. Supp.2d 772, 779 (N.D. Ill. 2002) (defendant could not

C. Other Terms and Conditions of the Parties' Loan Transaction, and the Arbitration Clause in Particular, Contribute to an Overall Picture of One-Sidedness and Unfairness to Plaintiff.

Defendant spends over four pages in its brief discussing a topic that took up only one sentence, plus a footnote, in the district court's opinion: the import of the requirement that the assigned arbitrator be experienced with "bank lending contracts." AOB at 24-28; JA 150 and n.3. But while Defendant suggests that the district court demonstrated hostility to arbitration by presuming that the arbitrator would be biased, the district court explicitly denied making any such assumption. JA 150 n.3 ("That does not mean the arbitrator is likely to be biased"). Rather, the district court was concerned that the phrase "bank lending contracts" was underinclusive, precluding JAMS, the arbitration administrator, from appointing a retired attorney with experience in the consumer protection laws under which borrowers would be likely to file claims. JA 150 n.3.

"unilaterally modify the existing agreement" by offering to pay costs of arbitration); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 861 (Mo. 2006) (arbitration clause unconscionable when made, and drafter's attempt to "soften" its unconscionable terms in subsequent letter ineffective). Moreover, the cases Defendant cites on this point are inapposite, AOB at 17 & n.5, as they either involved contracts that were silent on the allocation of costs and fees (*Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002)), analyzed contract language that specifically provided for the possibility of the drafter paying the other party's arbitration costs (*Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553, 557 (7th Cir. 2003)), or dealt with language in the rules of the American Arbitration Association ("AAA") rather than any language in the contract itself (*Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999)).

Whether or not this concern was well-founded, it was not an independent basis for the district court's finding of substantive unconscionability; indeed, the court clarified that the language of the arbitrator selection provision would not "be enough, standing alone, to create" such a finding. *Id.* Rather, this language was simply "an additional weight that tilts the arbitration provision in favor of BB&T." *Id.*

And there are many such weights sprinkled throughout the loan documents in this record. The Deed of Trust, for example, contains two separate indemnification provisions holding BB&T harmless from any legal costs or liability, JA 52 at ¶¶13, 18, precisely the sorts of "exculpatory provisions" that the West Virginia Supreme Court of Appeals found presumptively unconscionable in *Berger*. 567 S.E.2d at 275. The juxtaposition between the acceleration clause in the Loan Agreement, which allows BB&T to claim the full balance due on the loan after one payment is missed, with the no waiver clause, stipulating that even if BB&T accepts partial or late payments it does not waive any of its collection rights, further tips the scales in BB&T's favor. And within the arbitration provision itself, terms like the shortened discovery schedule and inability to bring class claims, which the district court specifically found not to be unconscionable, nonetheless advantage BB&T by "discourage[ing] consumer suits with relatively small potential individual awards." JA 150. All of these weights, taken together,

produced an extremely one-sided and lopsided contract "so unconscionable that it cannot justly be enforced." *Id.*[7]

III. The Arbitration Provision is Unconscionable in its Entirety and the District Court Properly Exercised Its Discretion in Declining to Rewrite or Sever its Unconscionable Terms.

Whether a court may enforce an unconscionable contract provision by severing offending terms is a question governed by state law. *See McFarland v. Wells Fargo*, 810 F.3d at 279, 281 (applying "West Virginia contract law" when considering whether this Court could "sever [an] unconscionable term or reform it to avoid an "unconscionable result")(internal quotations omitted); *accord Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005)("[W]hether the severability provision is to be given effect is a question of state law, because in placing arbitration agreements on an even footing with all other contracts, the FAA makes general state contract law controlling."). Furthermore, "the presumption in favor of arbitration *does not* apply to questions of an arbitration provision's validity." *See Noohi v. Toll Bros.*, 708 F.3d 599, 611 n.6 (4th Cir. 2013) (emphasis added).

[7] Plaintiff does not rely on any language outside the arbitration clause in challenging that clause as unconscionable. *See Buckeye Check Cashing, Inc. v.* Cardegna, 546 U.S. 440, 445-46 (2006). But the doctrine of unconscionability is context-dependent and requires courts to "tak[e] into consideration all of the facts and circumstances of a particular case." *Brown II*, 729 S.E.2d at 226.

Defendant argues that it would be "appropriate" and "proper" for this court to remake the unconscionable arbitration provision even though unconscionable terms pervade the provision that BB&T drafted. AOB at 28-29.[8] But Defendant points to no West Virginia case where a court determined it could enforce an arbitration clause by severing unconscionable portions. *But see Berger*, 567 S.E.2d 265 (refusing to enforce an arbitration clause in its entirety); *Sanders*, 717 S.E.2d 909, 920, 925 (same). Instead, it bases its argument entirely on law foreign to West Virginia. AOB at 28-29; *see In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1275 (11th Cir. 2012) (applying South Carolina law); *In re Checking Account Overdraft Litig. MDL No. 2036*, 485 Fed. Appx. 403, 406 (11th Cir. 2012) (applying North Carolina law); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007)(requiring severance under federal doctrine governing terms that prevent a party from "effectively vindicate[ing]" a statutory right, not state unconscionability law); *Wigginton v. Dell, Inc.*, 890 N.E.2d 541, 544, 546 (App. Ct. Ill. 2008) (applying Illinois law).

Unsurprisingly, Defendant's position is not the law in West Virginia: a court will not sever unconscionable terms from a contract provision in order to make the provision enforceable where 1) the drafting party was in a position of greater

[8] Defendant derides the district court for only addressing this issue in a footnote, AOB at 29, but the court's reasoned and concise treatment was fitting given that Defendant itself used a footnote to raise this issue. JA 96 n.2.

bargaining power and 2) the drafting party used unconscionable terms to "shield itself from legal accountability for misconduct." *See Berger*, 567 S.E.2dat 283–84; *see also Cooper v. MRM Inv. Co.*, 367 F.3d 493, 512 (6th Cir. 2004) (bad actor would not be "deterred from routinely inserting such a deliberately illegal clause into the arbitration agreement it mandates . . . if it knows that the worst penalty for such illegality is the severance of the clause after . . . litigat[ing] the matter"); Restatement (Second) of Contracts § 184 (1981), cmt. b ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable.").

In *Berger*, the Supreme Court of Appeals of West Virginia refused to enforce an unconscionable arbitration provision in a contract of adhesion based on new, less unconscionable terms offered by the defendant after the litigation began. 567 S.E.2d at 282-84. The court found that the contract was not one formed between "two sophisticated parties" that later became unconscionable because of a mistake or changed circumstances. *Id.* at 284. Instead, the contract was unconscionable when executed because the defendant, who drafted the contract of adhesion, sought to impose unconscionable terms upon the plaintiff in order to "shield itself from legal accountability for misconduct." *Id.* Because the defendant

sought to "misuse" arbitration to accomplish this end, the court would not enforce the arbitration provision. *Id.*

Similarly here, the district court declined to alter the terms of the arbitration provision to give Defendant the benefit of drafting a grossly unfair arbitration clause. Like in *Berger*, Defendant drafted this contract of adhesion as the party with greater bargaining power and sought to limit Latricia's and other borrowers' opportunities to vindicate their statutory rights, both by shortening the statute of limitations for many claims and by including a mandatory loser-pays provision that would have a predictable deterrent effect. West Virginia courts do not attempt to "sanitize" these types of unconscionable provisions. *Berger*, 567 S.E.2d at 284.

Therefore, the district court appropriately exercised its discretion when it concluded that this arbitration provision is unconscionable in its entirety and cannot be enforced.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court affirm the district court's order denying Defendant's motion to compel arbitration and strike Plaintiff's class claims so that she may resume litigating this putative class action before the district court.

Dated: July 12, 2017

Respectfully submitted,

/s/ Karla Gilbride

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,758 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2010 in Times New Roman 14-point font.

Dated: July 12, 2017

/s/ Karla Gilbride

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on July 12, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Dated: July 12, 2017 Public Justice, P.C.

s/ Karla Gilbride
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