No. 13-

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA *ex rel.*
U-HAUL CO. OF WEST VIRGINIA,

Petitioner,

v.

THE HONORABLE PAUL ZAKAIB JR., AMANDA FERRELL, JOHN STIGALL, AND MISTY EVANS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

THOMAS R. MCCARTHY
Counsel of Record
WILLIAM S. CONSOVOY
SAMUEL B. GEDGE
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
tmccarthy@wileyrein.com

Attorneys for Petitioner

April 25, 2014

253231

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Under the Federal Arbitration Act (FAA), "attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'" *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (per curiam) (quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008)). Under this rule—commonly known as the FAA's "severability" rule—only those challenges "directed specifically to the agreement to arbitrate" lie with the court. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010). At issue here is a rental contract that expressly incorporates a contract addendum housing several contractual provisions, including an arbitration clause. The Supreme Court of Appeals of West Virginia refused to enforce the arbitration clause, holding that the rental contract's incorporation clause was invalid, thereby invalidating the addendum in its entirety.

The question presented is whether the West Virginia Supreme Court of Appeals violated the FAA's severability rule by refusing to enforce the arbitration clause on the basis of a challenge that was not directed specifically to that clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is U-Haul Co. of West Virginia. U-Haul Co. of West Virginia is a wholly owned subsidiary of U-Haul International, Inc. AMERCO owns 100% of the stock of U-Haul International, Inc. AMERCO is a publicly traded company. AMERCO has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are the Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County, West Virginia; Amanda Ferrell; John Stigall; and Misty Evans.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner U-Haul Co. of West Virginia respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 752 S.E.2d 586 and reprinted in the Appendix ("App.") at 1a-41a. The order of the Circuit Court of Kanawha County is reprinted at App. 49a-61a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia, which denied Petitioner's petition for a writ of prohibition, was entered on November 26, 2013. App. 1a. On February 6, 2014, the Chief Justice extended Petitioner's deadline for filing a petition for a writ of certiorari to and including April 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Appeals of West Virginia "has original jurisdiction in prohibition proceedings pursuant to Art. VIII, § 3, of The Constitution of West Virginia," *State ex rel. W. Va. Nat'l Auto Ins. Co., Inc. v. Bedell*, 672 S.E.2d 358, 362 (W. Va. 2008), and "[t]he State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable … under 28 U.S.C. § 1257[(a)]." *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954). Section 1257(a) also gives this Court jurisdiction over an order of a state court of last resort refusing to enforce an arbitration agreement. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in … 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 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.

INTRODUCTION

"State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, including the [FAA's] national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Accordingly, the Court has not hesitated to take corrective action when state supreme courts fail to heed the "basic tenet[s]" of the FAA's substantive law of arbitrability. *Id.*; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam); *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam). This is one of those cases in which the Court's intervention is needed.

Section 2 of the FAA "create[s] a body of federal substantive law of arbitrability," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), that applies equally in federal and state courts, *see Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). One of the central features of this federal law is the FAA's "severability" rule. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Under this rule, a court is empowered to adjudicate *only* those challenges to the enforcement of an arbitration agreement that are "directed specifically to the agreement to arbitrate," *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010); *Prima Paint*, 388 U.S. at 404 (explaining that a court may "consider only issues relating to the making and performance of the agreement to arbitrate"). Any challenge to the validity or enforceability of other aspects of the contract or to the contract as a whole "is for the arbitrator to decide." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 503.

At issue here is a rental agreement that Respondents Amanda Ferrell, John Stigall, and Misty Evans each entered into separately with Petitioner U-Haul Co. of West Virginia.[1] The rental agreement consists of a one-page Rental Contract that expressly incorporates a Rental Contract Addendum that, in turn, houses several contractual provisions, including an arbitration clause. The Supreme Court of Appeals of West Virginia refused to enforce the arbitration clause on the ground that the Rental Contract did not validly incorporate the

1. Because this petition arises from the denial of a writ of prohibition, Kanawha County Circuit Court Judge Paul Zakaib Jr. is formally named as a respondent also. For simplicity, this petition refers to "Respondents" to describe only the plaintiff parties.

Addendum, thus rendering the Addendum—including its arbitration clause—invalid in its entirety. App. 26a-28a. The court acknowledged that this attack was directed on the incorporation clause of the Rental Contract and the Addendum as a whole, App. 26a, but claimed that the FAA's "implied" severability rule was not implicated, App. 27a n.15. In the court's view, Respondents' broad attack did not violate the FAA's severability rule because they wished to invalidate only the arbitration clause and did not take issue with the "other provisions in the Addendum." *Id.*

The court's decision is clearly wrong. There is no exception to the severability rule when the party attacks the contract generally as a means to the end of invalidating the arbitration agreement. Indeed, to allow the West Virginia Supreme Court to engraft such an exception onto the severability rule would destroy the rule altogether. It would permit any challenge to the contract as a whole (or to any of its provisions other than the arbitration clause) to be deemed a challenge "directed specifically" at the arbitration clause so long as the challenger's true goal were to defeat the arbitration clause alone. Moreover, it would allow the West Virginia courts to arrogate to themselves power that the FAA reserves solely for the arbitrator while, at the same time, hindering the FAA's goal of moving "the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. This is precisely the sort of judicial hostility to arbitration that the FAA was enacted to overcome. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

This Court's supervision of the West Virginia courts is once again badly needed. Just two Terms ago, the Court

summarily reversed a West Virginia Supreme Court decision that "misread[] and disregard[ed] the precedents of this Court interpreting the FAA[.]" *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1202. That same response may be appropriate here given that the decision below blatantly departs from nearly 50 years of binding FAA precedent.

STATEMENT

A. Statutory Background

Over the past century, arbitration has emerged as an increasingly popular alternative to court litigation. In the main, it offers a cheaper, quicker means of resolving party disputes. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results[.]'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (citation omitted). Compared to adversarial litigation, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009). More and more, disputants opt to "'trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* (citation omitted).

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk*, 417 U.S. at 510-11, by codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on an equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Under Section 2 of the FAA, "[a] written provision in … a contract … to settle by arbitration a controversy thereafter arising

out of such contract" is to 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. § 2. Section 2 "create[s] a body of federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. "As a matter of federal law," this Court holds that "any doubts concerning the scope of arbitrable issues [are] resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

The "severability" rule, at issue here, reflects these principles. Where the litigants have executed a contract that contains an arbitration agreement, the courts' role is limited. Although the courts are empowered to adjudicate challenges to the arbitration clause specifically, challenges to the agreement more generally are matters for the arbitrator to decide. *See Buckeye Check Cashing Inc.*, 546 U.S. at 445; *Prima Paint Corp.*, 388 U.S. at 404 ("[The FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally."). In other words, unless the challenge is confined "to the arbitration clause *itself*, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing Inc.*, 546 U.S. at 440 (emphasis added).

This longstanding rule follows directly from Section 2's text, which provides that a "'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable,' *without mention* of the validity of the contract in which it is contained." *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778; *Buckeye Check Cashing*, 546 U.S.

at 447. Deciding the validity of contract terms beyond the arbitration clause at issue would arrogate power to the courts that Congress vested elsewhere. "Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778. Indeed, Section 2 compels it.

B. Factual Background

Petitioner rents out trucks, trailers, and other moving equipment to the general public through six directly owned and operated rental centers in West Virginia. It also operates indirectly through a network of independent dealers across the state. App. 4a.

Customers contract with Petitioner for rental equipment by means of a standard rental agreement. The agreement comprises two documents: a one-page "Rental Contract" and a "Rental Contract Addendum." The Rental Contract contains most of the terms of the agreement. In addition, it expressly incorporates the Rental Contract Addendum; the signature line on the Rental Contract immediately follows an acknowledgement that the signing customer "ha[s] received and agree[s] to the terms of this Rental Contract and the Rental Contract Addendum." App. 6a.

The Addendum, for its part, contains "Additional Terms and Conditions for EQUIPMENT Rental[.]" App. 7a-8a. Among these provisions are terms governing fuel policies, equipment damage, the customer's indemnity obligations, equipment-return rules, geographic limits

on travel, and restrictions on the types of substances that can be transported and stored using Petitioner's property. *See, e.g.*, Ex. D to Jeff Bowles Aff., *Ferrell v. U-Haul Co. of W. Va.*, No. 11-C-1426 (W. Va. Cir. Ct., Kanawha Cnty., filed Oct. 26, 2011). The Addendum further contains an arbitration clause that requires the submission of "all disputes" between Petitioner and the customer "to binding arbitration" before the American Arbitration Association on an individual (*i.e.*, non-class, non-representative) basis. *Id.*; *see also* App. 6a.

When renting out equipment, Petitioner presents the customer with either a paper or electronic copy of the Rental Contract. App. 6a-7a. After the customer signs his or her name to acknowledge agreement to the terms of both the Rental Contract and the Addendum (but before taking possession of the rental equipment), Petitioner gives the customer a paper copy of the Rental Contract along with the incorporated Addendum. App. 7a.[2]

C. Procedural History

Respondents separately rented equipment from Petitioner on a number of occasions. App. 4a. In 2011, they commenced a putative class action lawsuit in the Circuit Court of Kanawha County, West Virginia. During three of their seventeen transactions with Petitioner, Respondents alleged, the total fee charged exceeded the quoted price

2. The Addendum is a multicolored pamphlet made of rectangular cardstock that is folded so that it is shaped like an envelope or narrow folder. A paper copy of the signed Rental Contract is folded and placed inside the Addendum and the two documents are handed to the customer prior to the customer's taking possession of the rental equipment. App. 7a-8a.

by either $1.00, $3.00, or $5.00, due to a previously undisclosed "environmental charge." App. 5a. According to Respondents, these alleged charges gave rise to claims for breach of contract, false advertising under state law, fraud, and violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.*

Petitioner moved to compel arbitration. App. 5a. The trial court evaluated the Rental Contract's incorporation clause and concluded that the clause did not validly incorporate the Addendum. As a result, the court held the entire Addendum invalid, which meant that the arbitration clause contained within the Addendum could not be enforced. App 57a-58a. As for the severability issue, the court noted that West Virginia's court of last resort had "rejected the argument that severability required the Court to limit its review to the arbitration clause." App. 59a (citing *State ex rel. Richmond Am. Home of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 919 (W. Va. 2011)). And because Respondents had no quarrel with any other aspect of the Addendum, the court saw no obstacle to invalidating the Addendum in its entirety *en route* to striking the arbitration clause. The trial court denied reconsideration, App. 44a-48a, and Petitioner sought a writ of prohibition from the Supreme Court of Appeals of West Virginia, *see* App. 42a-43a.

The West Virginia Supreme Court denied the writ. Relying on the *Brown* decision this Court summarily reversed two Terms ago, the court reasoned that the FAA requires arbitration only of "those issues that by clear and unmistakable writing the[] [parties] have agreed to arbitrate." App. 2a (quoting *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), *rev'd sub nom.*,

Marmet Health Care Ctr., Inc., 132 S. Ct. 1201). Having tilted the playing field against arbitration, the court proceeded to agree with the trial court that the Rental Contract's incorporation clause was invalid, thereby invalidating the "the entire Addendum"—along with the arbitration clause contained therein. App. 27a n.15.

The court made quick work of the severability issue. In a footnote, the court found that despite the fact that its ruling necessarily adjudicated all of the "provisions in the Addendum," *id.*, the FAA's severability rule did not bar it from refusing to enforce the arbitration clause. Viewing the severability rule as merely "implied" by the FAA, the court concluded that the rule presented no barrier because Respondents had not taken issue with any of the "other provisions in the Addendum." *Id.* Thus, despite acknowledging that Respondents had not mounted a discrete challenge to the arbitration clause, the court concluded that federal law did not prevent it from ruling on the validity of the Addendum as a whole.

REASONS FOR GRANTING THE PETITION

This Court has recently admonished the West Virginia Supreme Court for "misreading and disregarding the precedents of this Court interpreting the FAA[.]" *Marmet Health Care Ctr. Inc.*, 132 S. Ct. at 1202. The West Virginia Supreme Court has not heeded the Court's warning. The West Virginia court's hostility to the FAA is on display once again—this time it is Section 2's severability rule that is under attack.

The severability rule follows directly from the text of Section 2, which provides that a "written provision … to

settle by arbitration a controversy" is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Because the statute makes no "mention of the validity of the contract in which [the arbitration provision] is contained," this Court has consistently held that challenges that are not "directed specifically to the agreement to arbitrate" lie with the arbitrator. *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778 (emphasis omitted). Thus, courts are not empowered to refuse enforcement of an arbitration clause based on the invalidity of the parties' contract as a whole or by way of an indirect attack on "another provision of the contract." *Id.* Questions of validity that go beyond the specific, governing arbitration clause are entrusted to arbitrators, not the courts.

This severability principle is "a mainstay of the [FAA's] substantive law." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 503. Yet the West Virginia Supreme Court discounted it as merely an "implied" rule. App. 27a n.15. In the state court's view, there was no obstacle to its invalidating the parties' arbitration clause by striking "the entire [contract] Addendum." *Id.* Because Respondents did not subjectively take issue with the remainder of the Addendum, the Court reasoned, the FAA did not bar it from disposing of the arbitration clause by tossing out the Addendum as a whole. *Id.*

The state court's analysis conflicts sharply with a half-century of this Court's precedent and cries out for correction. As this Court has made plain, state and federal courts alike may adjudicate no more than "the precise agreement to arbitrate at issue." *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778. Contrary to the West Virginia court's reasoning, Section 2 does not expand and contract

judicial authority based on each litigant's subjective motives; when a party's challenge to the arbitration clause depends on an attack against the contract more broadly, Section 2 directs the dispute to the arbitrator—period. In this way, the FAA honors parties' reasonable expectations at the time they formed their agreement. The West Virginia court's holding thus reflects the very "judicial hostility towards arbitration" that the FAA was designed to curtail. *AT&T Mobility LLC*, 131 S. Ct. at 1747. And because "[i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the [FAA]," *Nitro-Lift Techs., LLC*, 133 S. Ct. at 501, the West Virginia court's departure from this Court's precedent calls for prompt correction.

I. The Decision Below Departed From This Court's Precedent By Striking An Arbitration Clause Based On The Perceived Invalidity Of The Surrounding Contract Addendum As A Whole.

Central to federal arbitration law is the precept that contracts containing arbitration agreements vest power in arbitrators, not the courts. Whatever the merits of a challenge to the contract's validity, Section 2 of the FAA forbids the courts from invalidating an arbitration clause contained therein based on a claim directed at the contract "generally." *Prima Paint Corp.*, 388 U.S. at 404. Challenges that "directly affect[]" more than the arbitration agreement itself are to be "considered by an arbitrator, not a court." *Buckeye Check Cashing, Inc.*, 546 U.S. at 444, 446.

This severability rule has become "a mainstay of the Act's substantive law." *Nitro-Lift Techs., LLC*, 133 S.

Ct. at 503. Unless the party seeking to avoid arbitration mounts a specific and exclusive challenge to "the precise agreement to arbitrate at issue," the courts must treat the arbitration clause "as valid under § 2" and "leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2779; *Buckeye Check Cashing, Inc.*, 546 U.S. at 446 ("[B]ecause respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract."). This bedrock rule "not only honor[s] the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.*, 388 U.S. at 404.

The same holds true for a challenge that, while not attacking the parties' agreement wholesale, nonetheless seeks to foreclose arbitration indirectly by "challeng[ing] … another provision of the contract[.]" *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2778. "Application of the severability rule does not depend on the substance of the remainder of the contract," *id.* at 2779, for "Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce." *Id.* Thus, a half-century of precedent "require[s] the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Id.* at 2778.

These principles "appl[y] in state as well as federal courts." *Buckeye Check Cashing, Inc.*, 546 U.S. at 446. Yet West Virginia has charted its own course. The Supreme Court of Appeals refused to enforce an

arbitration clause based on a sweeping invalidation of a contract Addendum that houses the parties' arbitration agreement among a bevy of other contractual provisions. The court left no doubt that the contract's perceived flaws extended well beyond the "the specific 'written provision'" contemplating arbitration. *See Rent-A-Center, West, Inc.*, 130 S. Ct. at 2779. Respondents urged the court to deny arbitration by invalidating the Addendum *in toto*. Accepting this invitation, the court addressed itself to "the entire Addendum" and held that the Addendum and all its terms were not validly incorporated into the Rental Contract. App. 27a n.15, 26a-27a; *see also* App. 27a n.15 (accepting that Respondents "specifically challenged the enforceability of the Addendum" as a whole). Because those terms "include the arbitration agreement sought to be enforced by U-Haul," the court used its invalidation of the Addendum as a whole to hold the arbitration clause unenforceable. App. 27a. This was obvious error.

It is no answer to say, as the West Virginia court did, that the severability rule dictates arbitration only when a challenger actually aspires to invalidate more than the arbitration clause. App. 27a n.15 ("While there are other provisions in the Addendum, the plaintiffs did not challenge those provisions."). Not only does this standard inject unworkable subjectivity into Section 2, it cannot be squared with this Court's precedent. In *Rent-A-Center, West, Inc.*, for example, the plaintiff consumer opposed arbitration based on a broad-based "challenge[] [to] the validity of the contract as a whole." 130 S. Ct. at 2779. It made no difference that the consumer gave no indication that he took issue with any part of the contract beyond the clause mandating arbitration; even where a perceived fault applies "equally" to the contract as a whole, this

Court "nonetheless require[s] the basis of challenge to be directed specifically to the agreement to arbitrate before" permitting the courts to intervene. *Id.* at 2778.

Just as "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract," *id.* at 2779, it likewise does not depend on a litigant's particular motive for challenging the contract. But the decision below endorses that very approach. In doing so, it creates an exception to the severability rule that would swallow the rule entirely. All a party wanting to avoid arbitration would have to do to circumvent this fundamental FAA rule would be to challenge the validity of the contract as a whole while making clear its goal of destroying only the arbitration clause itself. And with that, the court would "assume[] the arbitrator's role" and be authorized to declare contracts containing arbitration clauses null and void. *Nitro-Lift Techs., LLC*, 133 S. Ct. at 503. For all practical purposes, the decision effectively overrules *Prima Paint* and its progeny, at least in West Virginia.

II. Because State-Court Fidelity To Federal Arbitration Law Is Of Paramount Importance, Summary Reversal May Be Appropriate.

Like its *Brown* decision two Terms ago, the West Virginia court's decision here presents serious structural concerns. Unlike other areas of federal law, the FAA is unique in its reliance on state-court enforcement. "State courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 501. This "prominent role" follows from the FAA's

"nonjurisdictional cast." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009). Because state supreme courts are often the final say over FAA disputes, "[i]t is a matter of great importance" that they "adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 501; *see also id.* at 503 ("[State] Supreme Court[s] must abide by the FAA, which is 'the supreme Law of the Land,' and by the opinions of this Court interpreting that law.") (quoting U.S. Const., Art. VI, cl. 2). Indeed, given the States' key role in adjudicating FAA issues, this Court has found it appropriate to summarily reverse three state-court FAA decisions in the last two Terms alone. *See Nitro-Lift Techs., LLC*, 133 S. Ct. 500; *Marmet Health Care Ctr., Inc.*, 132 S. Ct. 1201; *KPMG LLP*, 132 S. Ct. 23.

This case calls for the same response. The relevant law "is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" Eugene Gressman et al., Supreme Court Practice 351 (10th ed. 2013) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 353 ("[T]he Court has shown no reluctance to summarily reverse a state court decision found to be clearly erroneous."). By openly departing from this Court's severability precedent—merely an "implied" doctrine, in the state court's view, App. 27a n.15—West Virginia's supreme court effectively overran Section 2, casting aside "a mainstay of the [FAA's] substantive law." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 503; *see supra* 13-14.

Summary reversal may be appropriate for an additional reason. The West Virginia court erred not only with regard to the FAA's severability rule but also as to a second "basic tenet of the [FAA]'s substantive arbitration law." *Nitro-Lift Techs., LLC*, 133 S. Ct. at 501. The FAA,

at its most fundamental level, establishes a "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *AT&T Mobility LLC*, 131 S. Ct. at 1749 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration."). The West Virginia court, however, began its analysis by stating that, under the FAA, "parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate." App. 2a.[3] But this proposition is a distortion of the presumption regarding whether a court or arbitrator decides issues of *arbitrability*. *See, e.g.*, *Rent-A-Center, West, Inc.*, 130 S. Ct. at 2777 n.1 ("Courts should not assume that the parties agreed to arbitrate [issues of] arbitrability unless there is clear and unmistakable evidence that they did so.") (citation omitted).

This presumption regarding issues of arbitrability runs counter to, and is a limited "exception" to, the "liberal federal policy favoring arbitration agreements." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quotation omitted). By applying this counter-presumption outside of its proper context—not to an issue of arbitrability but to an issue regarding the validity of the incorporation clause and thus of the Addendum—the West Virginia court effectively applied a presumption *against* arbitration that cannot be squared with the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985). In so doing, the court exhibited precisely the "judicial hostility to arbitration agreements" that the

3. Tellingly, the court cited no precedent of this Court for that proposition. Rather, it cited only its *Brown* decision, App. 2a, 13a, which this Court reversed in 2012.

FAA was intended to eliminate, *Scherk*, 417 U.S. at 510; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). By applying this presumption against arbitration to its analysis of the common law of incorporation by reference, the court appears to have created a special rule of incorporation that singles out arbitration agreements for disfavored treatment.

This hostility to arbitration has a discernible negative impact on the FAA's goals. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results[,]'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008), Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Yet despite a binding arbitration agreement in this case, the parties' dispute has stalled in the courts for more than two years, with no end in sight.

* * *

This is not the first time West Virginia's supreme court has demonstrated hostility to arbitration agreements by failing to heed "basic principle[s]" of federal arbitration law. *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1202. As noted, two Terms ago this Court was obliged to summarily reverse another West Virginia decision, holding "[t]he … court's interpretation of the FAA … both incorrect and inconsistent with clear instruction in the precedents of this Court." *Id.* at 1203. Petitioner's case raises identical concerns, and the West Virginia court's "misreading and disregarding the precedents of this Court interpreting the FAA" calls for prompt correction. *Id.* at 1202.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court may wish to consider summary reversal.

Respectfully submitted,

Thomas R. McCarthy
Counsel of Record
William S. Consovoy
Samuel B. Gedge
Wiley Rein LLP
George Mason University
School of Law
Supreme Court Clinic
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
tmccarthy@wileyrein.com

Attorneys for Petitioner

April 25, 2014

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, FILED NOVEMBER 26, 2013

IN THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

September 2013 Term

No. 13-0181

STATE OF WEST VIRGINIA EX REL. U-HAUL CO. OF WEST VIRGINIA, A WEST VIRGINIA CORPORATION,

Petitioner,

v.

THE HONORABLE PAUL ZAKAIB, JR., AMANDA FERRELL, JOHN STIGALL, AND MISTY EVANS,

Respondents.

Petition for Writ of Prohibition
WRIT DENIED

Submitted: September 25, 2013
Filed: November 26, 2013

Appendix A

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

JUSTICE KETCHUM dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication." Syllabus point 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled on other grounds by Marmet Health Care Center, Inc. v. Brown*, ___, U.S. ___, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam).

2. In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated

document so that the incorporation will not result in surprise or hardship.

Davis, Justice:

This case involves the common law doctrine of contracts known as "incorporation by reference." The parties entered into an agreement with two writings drafted by the defendant below, U-Haul of West Virginia ("U-Haul"). The first writing was titled "Rental Contract" and was signed by the three plaintiffs. The second writing, which U-Haul attempted to incorporate by reference into the signed Rental Contracts, was titled "Rental Contract Addendum" ("Addendum") and was not signed. The U-Haul Rental Contract states that the plaintiffs agreed to the terms of the Addendum. The Addendum was not made available to U-Haul customers prior to their execution of the Rental Contract and contained, *inter alia*, a provision requiring that any disputes between the parties be arbitrated.

U-Haul invokes this Court's original jurisdiction seeking a writ of prohibition and asks that we set aside a circuit court order refusing to compel the three plaintiffs who signed Rental Contracts to participate in arbitration. U-Haul contends that the circuit court erred in finding that the Addendum was not incorporated by reference into the signed Rental Contracts. Because we find no error in the circuit court's conclusion, we deny the requested writ of prohibition.

Appendix A

I.

FACTUAL AND PROCEDURAL HISTORY

Defendant U-Haul leases trucks and trailers to its customers for short-term use to transport cargo. U-Haul directly owns and operates six rental centers in West Virginia, and also relies upon a network of independent dealers throughout the State. U-Haul's moving equipment is sometimes used to transport cargo long distances, including across state lines.

On numerous occasions, the three individual plaintiffs (Amanda Ferrell, John Stigall, and Misty Evans) separately rented equipment that belonged to U-Haul. The record indicates that, before filing their lawsuit, Plaintiff Ferrell had signed a Rental Contract with U-Haul on at least four separate occasions; Plaintiff Stigall eleven times; and Plaintiff Evans twice.[1] Some of the rentals

1. An affidavit in the record indicates that:

> 19. Based upon U-Haul's computerized system, Plaintiff Stigall executed Rental Contracts with U-Haul of WV on March 4, 2006, March 31, 2006, April 8, 2006, July 28, 2007, December 31, 2008, January 3, 2009, August 7, 2009, September 5, 2009, April 23, 2010, April 24, 2010, and May 1, 2010. The contracts of July 28, 2007 and April 24, 2010, however, were subsequently cancelled.
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> 20. Based upon U-Haul's computerized system, Plaintiff Ferrell executed Rental Contracts with U-Haul of WV on March 24, 2007, June 30, 2007, April 26, 2009, and November 12, 2009.

occurred at U-Haul-owned rental centers, others at independent dealer locations. The plaintiffs allege that they were quoted a particular price for a rental. However, the plaintiffs allege that on three specific occasions, U-Haul improperly and surreptitiously added either a $1.00, a $3.00, or a $5.00 "environmental charge" to the final price of their rentals.[2]

On August 19, 2011, the plaintiffs filed a lawsuit in the Circuit Court of Kanawha County against U-Haul asserting that the inclusion of the environmental charge constituted a breach of contract; was false advertising in violation of W. Va. Code § 32A-1-2 (1974) (Repl. Vol. 2011); amounted to fraud; and violated the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq*. The plaintiffs contended that U-Haul likewise fraudulently overcharged other West Virginia citizens and asked the circuit court to certify a class action.

Defendant U-Haul responded by filing a motion asking the circuit court to compel the plaintiffs to resolve their claims in arbitration. U-Haul contended that each time a customer rents equipment from U-Haul, the customer enters into an agreement comprised of two documents: (1)

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21. Based upon U-Haul's computerized system, Plaintiff Evans executed Rental Contracts with U-Haul of WV on March 2, 2010 and June 25, 2011.

2. Plaintiff Stigall alleges that a $5.00 environmental fee was added to one of his bills. Plaintiff Ferrell alleges that a $3.00 environmental fee was added to one of her bills. And Plaintiff Evans alleges that a $1.00 environmental fee was added to one of her bills.

a one-page, signed Rental Contract and (2) an Addendum. The Addendum contains a provision stating that U-Haul and the customer agree to submit all disputes to binding arbitration. U-Haul contends the plaintiffs formed an agreement with U-Haul making them subject to this arbitration provision.

The record indicates that U-Haul customers entered into these agreements either on paper or electronically. At locations owned by independent dealers, customers would be presented with only a one-page pre-printed Rental Contract; customers were not initially shown the Addendum. Customers would sign the Rental Contract below a line that essentially said, "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum."[3]

At locations owned by U-Haul, interactive electronic terminals were used to show terms of the Rental Contract to customers; the terminals did not display any terms

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3. With regard to this statement, the circuit court found that:

> Each of the plaintiffs has filed an affidavit stating that the RCA [Addendum] was not provided to them prior to signing the RC [Rental Contract]. U-Haul has not contested these affidavits. Indeed, its affidavits seemingly confirm the plaintiffs' testimony by stating that the "routine business practice" of U-Haul was to provide the [Addendum] to customers only "prior to receiving possession of any rental property. . . ." Based upon the record herein, the Court finds that the [Addendum] was not provided to the plaintiffs prior to their signing the rental agreement.

of the Addendum. The terms of the Rental Contract would appear on successive screen pages, and before the customer could view a subsequent screen's rental terms, the customer would have to click a button marked "Accept" on the terminal at the bottom of the screen. None of the screens mentioned the arbitration clause at issue. After several screens had been displayed, the customer would reach a final screen that said, "By clicking Accept, I agree to the terms and conditions of this Rental Contract and Rental Contract Addendum." The customer would then have to sign their name on the screen with a stylus and click another button marked "Accept." If the customer clicked "Accept," a paper copy of the Rental Contract would then be printed by a U-Haul employee.

U-Haul asserts that it is its "unvarying and routine business practice" that every employee or independent dealer require every customer to agree to the terms of the Rental Contract before any rental equipment is provided. The plaintiffs, however, contend that while they may have signed the Rental Contract (on paper or on an electronic terminal), they did not agree to the terms of the Addendum, in part, because of the way U-Haul gives the Addendum to customers.

The Addendum is a multicolor pamphlet made of rectangular cardstock, but folded into five sections and shaped like an envelope or narrow folder. One of the apparent outside panels of the pamphlet has the title, "RENTAL CONTRACT ADDENDUM," with the next line saying, "DOCUMENT HOLDER." Below that are a few lines in smaller text stating, "Additional

Appendix A

Terms and Conditions for EQUIPMENT Rental, Place Rental Contract documents in this folder & keep available throughout your move." Following this text is a colored block with giant text stating, "RETURNING EQUIPMENT." The remainder of the outside of the pamphlet contains detailed instructions for returning rental equipment. The other easily visible outside panels of the Addendum have advertisements for additional services offered by U-Haul, such as storage rooms. The Addendum must be opened to reveal the arbitration clause contained inside.

The plaintiffs contend that, after a Rental Contract is signed by a customer, the paper copy of the Rental Contract (whether a pre-printed form or generated using the electronic terminals) is folded in thirds like a letter by a U-Haul employee or independent dealer. The Rental Contract is then slipped inside of the folder-shaped Addendum and both are handed to the customer either before or at the same time keys are provided for the rental equipment.

The circuit court received evidence and affidavits from the parties and conducted a hearing. U-Haul argued that the doctrine of incorporation by reference allowed it to enforce the arbitration provision. The plaintiffs, however, argued that the arbitration provision in the Addendum was not mutually agreed to by the parties, since nothing in the language of the Rental Contract, or in the way that U-Haul gives the Addendum to its customers, was sufficient to inform the plaintiffs of the existence of the arbitration clause inside of the Addendum.

On March 27, 2012, the circuit court entered an order denying U-Haul's motion to compel arbitration finding that the parties never mutually agreed to arbitrate their disputes. The circuit court determined that the arbitration provision was a material term of the contract which was presented to the plaintiffs only after the contract had been signed. The circuit court specifically found that the arbitration provision had never previously been communicated to the plaintiffs. Because the plaintiffs never accepted the terms of the arbitration provision, the circuit court concluded that no contract to arbitrate was ever formed between the parties. U-Haul subsequently filed a "Motion to Reconsider" the circuit court's order and submitted additional affidavits and evidence for the court to review.[4] The circuit court denied the motion to reconsider on January 16, 2013.

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4. In this matter, U-Haul argues that the circuit court used the wrong standard to review its motion for reconsideration. The circuit court's order indicates that it reviewed the motion for reconsideration as though it was a motion filed under Rule 54(b) of the West Virginia Rules of Civil Procedure. The order then purported to set out a standard for reviewing the motion. We agree with U-Haul that its motion for reconsideration was not filed under Rule 54(b) because that Rule does not empower a party to file a motion under it. Even so, we find the circuit court applied the correct standard to review the motion. The order clearly stated that the circuit court was reviewing the motion to determine whether "justice require[d]" amending the earlier order. This is a correct statement of the appropriate standard. *See Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 551, 584 S.E.2d 176, 185 (2003) ("'Interlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as *justice requires*.'" (quoting *Caldwell v. Caldwell*, 177 W. Va. 61, 63, 350 S.E.2d 688, 690 (1986) (emphasis added; additional quotations & citation omitted)).

On February 26, 2013, U-Haul filed a petition with this Court seeking a writ of prohibition to halt enforcement of the circuit court's March 27, 2012, and January 16, 2013, orders. U-Haul asks this Court to declare that the Addendum became a part of each plaintiff's Rental Contract and to direct the circuit court to refer the plaintiffs' claims to an arbitrator. We issued a rule to show cause, and we now deny the requested writ.

II.

STANDARD OF REVIEW

We have established that "[a] petition for a writ of prohibition is an appropriate method to obtain review by this Court of a circuit court's decision to deny or compel arbitration." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 492, 729 S.E.2d 808, 814 (2012) (footnote omitted). As it is an extraordinary remedy, "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

In cases where a trial court is alleged to have exceeded its authority, we apply the following standard of review:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only

> where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). With the foregoing standards as our foundation, we now consider the merits of U-Haul's request for a writ of prohibition.

III.

DISCUSSION

In its effort to persuade this Court to issue the requested writ of prohibition, U-Haul argues that a single contract may be comprised of separate documents; therefore, U-Haul contends, the circuit court erred in refusing to acknowledge that the Addendum (containing the arbitration clause) and the Rental Contract formed the parties' entire agreement. This argument involves a fundamental question of contract law that has never been thoroughly addressed in our cases: the doctrine of incorporation by reference.

In furtherance of its argument, U-Haul asserts that the circuit court erred in holding that the Addendum was a failed attempt to modify the pre-existing Rental Contract. U-Haul contends, rather, that the agreement between the parties consisted of two documents: (1) the Rental Contract and (2) the Addendum (which contains the arbitration provision). Further, U-Haul asserts that the evidence shows that each plaintiff signed either a pre-printed paper Rental Contract or a screen on an electronic terminal that contained a sentence above the signature line that stated essentially that the plaintiff "received and agree[d] to the terms and conditions of this Rental Contract and the Rental Contract Addendum." Accordingly, U-Haul takes the position that the Addendum (and the arbitration provision contained therein) was incorporated into the Rental Contract by reference.

The plaintiffs counter that parties are bound to arbitrate only those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication. The plaintiffs note that while the sentence relied upon by U-Haul says the plaintiffs have "received" the Addendum, the evidence showed it was U-Haul's policy to provide the Addendum to customers only after they had signed the Rental Contract. Furthermore, the plaintiffs contend that the Addendum is not clearly and unmistakably a written agreement to arbitrate but rather appears to be a document holder with instructions and advertising. The plaintiffs argue that the circuit court correctly found that nothing on the Addendum folder alerts U-Haul customers to the nature of the obligations contained inside. Hence, the plaintiffs take the position that the Addendum was not incorporated into the Rental Contract.

Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. "Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication." Syl. pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*"), *overruled on other grounds by Marmet Health Care Ctr., Inc. v. Brown*, ___, U.S. ___, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam).

> The reason for this requirement, quite simply, is that by agreeing to arbitrate a party waives

> in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent[.]

In re. Marlene Indus. Corp., 45 N.Y.2d 327, 333-34, 380 N.E.2d 239, 242 (1978). Importantly, "[n]othing in the Federal Arbitration Act . . . overrides normal rules of contract interpretation." Syl. pt. 9, in part, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250. Rather, the purpose of the Act "is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms." Syl. pt. 7, in part, *id.*

"Thus, to be valid, an arbitration agreement must conform to the rules governing contracts, generally. . . . [T]he subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; *and* (4) mutual assent. . . . Absent any one of these elements, the Arbitration Agreement is invalid." *State ex rel. AMFM, LLC v. King*, ___ W. Va. ___, ___, 740 S.E.2d 66, 73 (2013) (internal citation omitted).

In the instant case, some of the contracts at issue were pre-printed forms, while others were presented to customers and signed using an electronic terminal. With the rise of internet commerce and electronic recordkeeping over the last two decades, courts have grappled with electronic forms of transactions where novel methods

have been used to form contracts. These *new* contract formats – variously called "shrinkwrap,"[5] "clickwrap,"[6] or "browsewrap"[7] agreements – have terms that are

5. The prototypical example of a "shrinkwrap" agreement is a one-page writing inside transparent plastic wrapped around a product (often computer software) that can be read by a purchaser before tearing open the plastic wrap. The writing typically states that, if the purchaser opens the shrinkwrap packaging and uses the product inside, then the purchaser is agreeing to a contract drafted by the seller. The writing intends to convey that that, "by opening the plastic wrap and actually using the [product], customers will bind themselves to the terms of the shrinkwrap license." Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239, 1241-42 (1995).

6. The agreement at issue herein is in the nature of a "clickwrap" agreement. This type of agreement will be explained more fully *infra*.

7. An internet website owner may attempt to form a "browsewrap" agreement with a customer by posting terms and conditions that typically can only be accessed through a hyperlink at the bottom of the screen. *See generally Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009). Unlike a clickwrap agreement, a browsewrap agreement "does not require the user to manifest assent to the terms and conditions expressly . . . . A party instead gives his assent simply by using the website." *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06–CV–0891–B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007). See also, Ian Rambarran and Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?*, 9 Tul. J. Tech. & Intell. Prop. 173, 174 (2007) ("A click-through agreement is usually conspicuously presented to an offeree and requires that person to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on 'use' of the site.").

often "not fully revealed to the buyer until after the transaction is complete." David R. Collins, *Shrinkwrap, Clickwrap, and Other Software License Agreements: Litigating a Digital Pig in a Poke in West Virginia*, 111 W. Va. L. Rev. 531, 533 (2009). *See also* Paul J. Morrow, *Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 U. Pitt. J. Tech. L & Pol'y 7, ___ (2011) ("These agreements are not communicated, definitive, or the product of negotiation. Thus, this is the quandary and perplexity of holding shrink-wrap/clickwrap agreements enforceable when they are not valid contracts.").

A "clickwrap" or "click-through" agreement usually "appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction." *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007). *See also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 (2d Cir. 2002) (discussing "clickwrap" agreements); Kevin W. Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309 (2004) (same). To form such an agreement, "users typically click an 'I agree' box after being presented with a list of terms and conditions of use." *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

U-Haul concedes that the agreements formed with customers using its electronic terminals bear some

resemblance to clickwrap agreements, the one difference being that they were not executed over the internet. Regardless of the technology platform employed, we find the agreements herein to be in the nature of clickwrap agreements. Moreover, from a legal standpoint, electronic contracting is no different from contracting using tangible paper writings. "[A] contract cannot be denied enforcement solely because it is in electronic form or signed electronically." Juliet M. Moringiello and William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 Md. L. Rev. 452, 460 (2013). *See also* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 Berkeley Tech. L.J. 577, 579 (2007) ("[C]ourts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998." (footnote omitted)).[8] An agreement where the terms are presented in an electronic form, or one that is signed electronically, is therefore interpreted and applied using the same common law rules that have been applied for hundreds of years to oral and written agreements.[9]

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8. West Virginia has adopted the Uniform Electronic Transactions Act, W. Va. Code § 39A-1-1 *et seq.*, to facilitate the continued use and development of electronic transactions. The Act specifically states that a "record or signature may not be denied legal effect or enforceability *solely* because it is in electronic form," and a "contract may not be denied legal effect or enforceability *solely* because an electronic record was used in its formation." W. Va. Code §§ 39A-1-7(a) & (b) (2001) (Repl. Vol. 2010) (emphases added).

9. The problems raised by electronic commerce and the formation of contracts is a problem likely to increase in future

At common law, parties may incorporate into their contract the terms of some other writing. As the treatise *Williston on Contracts* makes clear, "[g]enerally, all writings which are part of the same transaction are interpreted together." 11 Richard A. Lord, *Williston on Contracts* § 30:25, at 295 (4th ed. 2011) (footnote omitted). "When a writing refers to another document, that other document . . . becomes constructively a part of the writing, and in that respect the two form a single instrument." *Id.* at 304. "Whether two writings are to be construed as a single contract, however, depends on the intent of the parties." *Van Orman v. American Ins. Co.*, 680 F.2d 301, 306 (3d Cir. 1982).

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years. As one commentator has said,

> Consumers making purchases on the Internet are well practiced at scrolling through and "agreeing" to "Terms and Conditions" with extraordinary speed and extraordinarily little thought. These terms frequently include an arbitration provision that deprives the consumer of the right to sue if a dispute arises. The combination of a significant contract provision with a particularly problematic method of contract formation raises serious problems for consumers and for contract law. These problems are exacerbated by the increasing likelihood that the consumer will be viewing and agreeing to on-line contract terms not through the large screen of a desktop computer, but rather through the tiny screen of a cell phone or similar device.

Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-Sign Notwithstanding*, 57 Cath. U. L. Rev. 377, 378 (2008).

The *Williston* treatise makes clear, however, that a mere reference in a writing to another document is not always sufficient to incorporate into the writing the referenced document. To achieve incorporation of a referenced document, a writing must make a "clear reference to the document" and "describe[] it in such terms that its identity may be ascertained beyond doubt[.]" 11 *Williston on Contracts* § 30:25, at 296. Conversely, "incorporation by reference is ineffective to accomplish its intended purpose when the provisions to which reference is made do not have a reasonably clear and ascertainable meaning." *Id*. at 302 (footnote omitted). *See also*, *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 189 (Tex. App. 2013) ("Plainly referring to a document requires more than merely mentioning the document . . . . The language in the signed document must show the parties intended for the other document to become part of the agreement." (citations omitted)). An oblique reference to a separate, non-contemporaneous document is insufficient to incorporate the document into the parties' final contract. *Shark Info. Servs. Corp. v. Crum & Forster Commercial Ins.,* 222 A.D.2d 251, 252, 634 N.Y.S.2d 700, 701 (1995) ("Incorporation by reference, of course, is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt.'. . . It is clear that none of the instant policy's oblique references to an otherwise unidentified 'Coverage Form' meet this exacting standard." (citations omitted)). Further, "in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented

to the incorporated terms[.]" 11 *Williston on Contracts* § 30:25, at 302-03 (footnote omitted). *See also* 17A C.J.S. *Contracts* § 402, at 294-95 ("For an incorporation by reference to be effective, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. A reference to another document must be clear and unequivocal, and the terms of the incorporated document must be known or easily available to the parties. . . . However, a mere reference to another document is not sufficient to incorporate that other document into a contract; the writing to which reference is made must be described in such terms that its identity may be ascertained beyond reasonable doubt." (footnotes omitted)); Stuart M. Boyarsky, *Deference to A Reference: Incorporating Arbitration Where It Ought Not Be*, 11 Fla. Coastal L. Rev. 387, 405 (2010) ("[I]ncorporation by reference of an arbitration agreement is permitted when: (1) the underlying contract clearly references a separate document, (2) the identity of the separate document is ascertainable, and (3) the incorporation of the arbitration clause can be foreseen and will not result in hardship." (footnote omitted)).

This Court has recognized that separate writings, including agreements to arbitrate, may be incorporated by reference into a contract.[10] However, there are no cases in

10. *See, e.g.*, Syl. pt. 2, *Rashid v. Schenck Constr. Co., Inc.*, 190 W. Va. 363, 438 S.E.2d 543 (1993) ("Under the Federal Arbitration Act, an arbitration agreement can be incorporated into a subcontract by reference in a general contract. Likewise, an agreement to arbitrate, when it is a part of a general contract, can be incorporated into a bond, by reference, to the general

West Virginia discussing what is required for a document to be properly incorporated into a contract by reference.[11] Other courts, however, have addressed the issue in detail.

A majority of courts hold that for the terms of one document to be incorporated by reference into a writing executed by the parties, "the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto[.]" *Scott's Valley Fruit Exch. v. Growers Refrigeration Co., Inc.*, 81 Cal. App. 2d 437, 447, 184 P.2d 183, 189 (1947).[12] Additionally, courts generally "allow an unsigned

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contract."); *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of West Virginia, Inc.*, 186 W. Va. 613, 616, 413 S.E.2d 670, 673 (1991) ("Nothing in West Virginia statutes or case law precludes incorporation of prior contract provisions by reference to an earlier contract."); *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 469, 223 S.E.2d 433, 437 (1976) ("It is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent.").

11. As the United States Court of Appeals for the Fourth Circuit recently noted, West Virginia "has not, as far as we can tell, articulated the requirements for effective incorporation by reference." *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 F. App'x 365, 367 (4th Cir. 2013).

12. *Accord One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 268 (5th Cir. 2011) ("Terms incorporated by reference will be valid so long as it is 'clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'... Notice of incorporated terms is reasonable where, under

the particular facts of the case, '[a] reasonably prudent person should have seen' them." (internal citations omitted)); *PaineWebber Inc. v. Bybyk,* 81 F.3d 1193, 1201 (2d Cir. 1996) (recognizing that the common law requires the parties to have had knowledge of and assented to the incorporated terms, also requiring that the incorporated document be referred to and described sufficiently so that it may be identified beyond all reasonable doubt); *Lamb v. Emhart Corp.*, 47 F.3d 551, 558 (2d Cir. 1995) ("In order to uphold the validity of terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms."); *Hertz Corp. v. Zurich Am. Ins. Co.*, 496 F. Supp. 2d 668, 675 (E.D. Va. 2007) (recognizing that "it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms," stating that the identity of the secondary document must be readily ascertainable, and holding that "it cannot be said that the parties had agreed on the terms of a rental agreement at the time" (internal quotations and citation omitted)); *United States v. Agnello,* 344 F. Supp. 2d. 360, 369 n.6 (E.D.N.Y. 2004) (requiring that it "be clear that the parties to the agreement had knowledge of and assented to the incorporated terms" (quotations and citation omitted)); *Ingersoll-Rand Co. v. El Dorado Chem. Co.*, 373 Ark. 226, 233, 283 S.W.3d 191, 196 (2008) (stating that the incorporated document "must be described in such terms that its identity maybe ascertained beyond reasonable doubt. . . . Furthermore, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms" (internal quotations and citations omitted)); *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091, 1095 (Colo. Ct. App. 2010) ("Pursuant to general contract law, for an incorporation by reference to be effective, 'it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'" (citation omitted)); *Housing Auth. of Hartford v. McKenzie*, 36 Conn. Supp. 515, 518-19, 412 A.2d 1143, 1145 (1979) ("The critical concern in determining the validity of the terms of a document incorporated by reference

document to be incorporated into a signed document as long as the signed paper specifically refers to the unsigned document and the unsigned document is available to the parties." National Consumer Law Center, *Consumer Arbitration Agreements*, § 5.2.2.5, at 112 (6th ed. 2011) (footnote omitted).[13] In other words, "[i]ncorporation by

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is whether the contracting parties knew of and assented to the additional provisions. The meeting of the minds and mutuality of assent are the most basic ingredients of a contract. Hence, the courts, while willing to enforce the incorporated terms, will do so only when the whole writing and the circumstances surrounding its making evidence the parties' knowledge of and assent to each term.").; *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510, 533, 983 A.2d 604, 617 (N.J. Super. Ct. App. Div. 2009) ("In order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms.'"); *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wash. App. 488, 7 P.3d 861 (2000) (quoting Williston and finding extrinsic evidence indicated that one of the parties was aware of the incorporated terms prior to signing the agreement).

13. Some courts

> are careful not to enforce arbitration clauses [incorporated by reference]... unless the incorporated document is delivered to the consumer. For example, a North Carolina appellate court held that an account holder was not bound by an arbitration clause in a bank services agreement, even though he had executed a signature card that incorporated the agreement by reference, when the bank had not

reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) (footnote omitted).

"In order to uphold the validity of terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." *Lamb v. Emhart Corp.*, 47 F.3d 551, 558 (2d Cir. 1995). "While a party's failure to read a duly incorporated document will not excuse the obligation to be bound by its terms . . . a party will not be bound to the terms of any document unless it is clearly identified in the agreement." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996) (citations omitted).[14]

> delivered a copy of the bank services agreement to him until after he commenced litigation and he was unaware of the arbitration clause.

National Consumer Law Center, *Consumer Arbitration Agreements*, § 5.2.2.5, at 112 (6th ed. 2011) (footnote omitted) (citing *Kennedy v. Branch Banking & Trust Co.*, 165 N.C. App. 275, 600 S.E.2d 520 (2004) (unpublished table dec.; full text reported at 2004 WL 1491197)).

14. A commonly cited example of poor identification of a document sought to be incorporated into a writing is *Weiner v. Mercury Artists Corp.*, 284 A.D. 108, 130 N.Y.S.2d 570 (1954). In *Weiner*, a seller tried to incorporate a 207-page booklet into a one- page contract by reference, and then later tried to avail itself of a "vague provision for arbitration" buried somewhere between pages 62 and 66 of the booklet. *Id.* at 109, 130 N.Y.S.2d at 571.

One scholar has suggested that incorporation by reference in drafting contracts can be problematic and "can create inconsistency or ambiguity that one would expect would not arise were the pertinent provisions more expressly detailed in a single writing[.]" Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 Baylor L. Rev. 651, 661 (2012). "[T]he cavalier drafting style, simply incorporating another document by reference, allows parties to elide the process of detailing precisely what they intended, creating ambiguity that may, or may not, be properly resolved in subsequent litigation." *Id.* at 663 (footnote omitted). Furthermore, attempts at incorporation by reference are sometimes used to "create contract forms in a way designed to mislead" and "may be used by a party to obtain the other's unknowing assent to onerous provisions." *Id.* at 665. "[T]his type of scheme long predated the internet. Judicial principles restricting this sharp dealing are also longstanding." *Id.* (footnote omitted).

After considering these authorities, we hold that, in the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the

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Because there had been no other mention of arbitration, the court found that the arbitration clause was not properly incorporated by reference into the parties' contract.

parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

Applying the foregoing holding to the facts of the case *sub judice*, we conclude that the circuit court correctly found that U-Haul was unsuccessful in its attempts to incorporate the Addendum into the Rental Contract. Both U-Haul's pre-printed Rental Contracts and electronic contracts succinctly referenced the Addendum. However, such a brief mention of the other document simply is not a sufficient reference to the Addendum to fulfill the proper standard. The reference to the Addendum is quite general with no detail provided to ensure that U-Haul's customers were aware of the Addendum and its terms, including its inclusion of an arbitration agreement. The lack of a detailed description is compounded by the fact that the Addendum itself was designed to look more like a document folder advertising U-Haul products, services, and drop-off procedures, rather than a legally binding contractual agreement. Finally, and most troubling to this Court, is the fact that U-Haul's practice was to provide customers a copy of the Addendum *only after* the Rental Agreement had been executed. Under these circumstances, there simply is no basis upon which to conclude that a U-Haul customer executing the Rental Agreement possessed the requisite knowledge of the contents of the Addendum to establish the customer's consent to be bound by its terms,

which terms include the arbitration agreement sought to be enforced by U-Haul in this case.[15]

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15. U-Haul has asserted an additional argument that the plaintiffs and circuit court violated a rule implied by the Federal Arbitration Act known as the "doctrine of severability." We disagree. In Syllabus point 4 of *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909 (2011), this Court held that,

> [u]nder the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause. However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

In this case, U-Haul sought to enforce an arbitration provision contained within the Addendum. The plaintiffs specifically challenged the enforceability of the Addendum by showing that the arbitration provision was never communicated to them. Additionally, the plaintiffs argued to the circuit court that the entire Addendum – including the arbitration provision – was never presented to them as part of the overall agreement of the parties, and, therefore, they never agreed to any of the terms in the Addendum. While there are other provisions in the Addendum, the plaintiffs did not challenge those provisions. The circuit court's analysis specifically centered on whether the parties mutually agreed to arbitrate their disputes. Thus, we find that the circuit court properly applied the doctrine of severability, and we find no error with this ruling.

IV.

CONCLUSION

Because we find that the circuit court was correct in finding that the Addendum was not incorporated by reference into the U-Haul Rental Agreement executed by the plaintiffs, we further conclude that the circuit court properly refused to enforce the arbitration agreement included within that Addendum. Accordingly, we deny the requested writ of prohibition.

Writ Denied.

Appendix A

SER U-Haul Company v. Zakaib, No. 13-0181

Workman, J., concurring:

In this proceeding, the petitioner sought a writ of prohibition to prevent enforcement of a circuit court order that denied the petitioner's motion to compel arbitration. Justice Davis, writing for the majority, has denied the writ after determining that an arbitration agreement was not part of the contracts between the petitioner and the respondents. I concur with all of the majority's reasoning and concur in the judgment. I write separately, however, to address the dissent's position that the contracts fairly incorporated an arbitration provision because of the parties' "course of dealing" within Article 2A of the Uniform Commercial Code, West Virginia Code §§ 46-2A-101 to -532.

To begin, it should be noted that neither the parties nor the circuit court addressed "course of dealing." The dissent raises this issue *sua sponte*, in the absence of a record properly developed for resolution of a "course of dealing" claim.

The UCC sets out a concise definition of the phrase "course of dealing" in West Virginia Code § 46-1-303(b):

> A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

This definition is further explained in West Virginia Code § 46-1-303(d), which provides, in relevant part:

> A ... course of dealing between the parties ... is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

Finally, a legislatively approved limitation upon the phrase "course of dealing" is set out in the Official Comment for the statute as follows:

> 2. "Course of dealing," as defined in subsection (b), is restricted, literally, to a sequence of conduct between the parties previous to the agreement. A sequence of conduct after or under the agreement, however, is a "course of performance."

W. Va. Code § 46-1-303, Official Comment No. 2 (emphasis supplied).

As is readily apparent from an examination of these provisions, the UCC allows the introduction of evidence of pre-contract "course of dealing" between the parties in order to avoid application of the parol evidence rule in a situation where there is an ambiguity in a term of the contract.[1]

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1. "The parol evidence rule ... generally prohibits the introduction of any extrinsic evidence to vary or contradict the

> [The UCC] makes admissible evidence of course of dealing ... to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties ... were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used.

Scovill Fasteners, Inc. v. Northern Metals, Inc., 692 S.E.2d 840, 843 (Ga. App. 2010); *see also Deerfield Commodities, Ltd. v. Nerco, Inc.*, 696 P.2d 1096, 1109 (Or. App. 1985) ("[The UCC] provides that the terms of a completely integrated document may be explained or supplemented by three different means: specifically, evidence of (1) a course of dealing, (2) a course of performance or (3) usage of the trade."); *Morgan v. Stokely-Van Camp, Inc.*, 663 P.2d 1384, 1389-1390 (Wash.App. 1983) ("[C]ourse of dealing is used most frequently to clarify or perhaps alter the meaning of terms used in a contract.").

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terms of written contracts[.]" *Larew v. Monongahela Power Co.*, 199 W.Va. 690, 694, 487 S.E.2d 348, 352 (1997); *see* Syl. Pt. 1, *Kanawha Banking and Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947) ("Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.").

The petitioner in this case did not argue that pre-contract conduct between the parties explained the respondents' understanding of any term in the contracts, because the contracts did not even mention the term – an arbitration clause – at issue in this lawsuit. "[A] course of dealing ... can only give meaning to and supplement or qualify *the terms of an agreement between the parties*." *Circle A Automotive Service, Inc. v. American Rentals, Inc.*, 2001 WL 195006, *1 n.1 (Conn. Super. 2001) (emphasis supplied). "In such instances, the evidence of a course of dealing that explains or supplements a contract is competent evidence of the parties' intent and can become a part of a contract." *L.F. Brands Marketing, Inc. v. Dillard's, Inc.*, 314 S.W.3d 736, 739 (Ark.App. 2009).

In short, the dissent is attempting to pound a square peg into a round hole with its "course of dealing" analysis. The fact that the petitioner's prior contracts with the respondents made no mention of an arbitration clause does not establish a "course of dealing" between the parties; rather, it establishes a consistent but unilateral course of conduct on the part of the petitioner in attempting to hide the arbitration clause from its customers. To accept the dissent's position to the contrary would be to elevate the adage, "fool me once, shame on you; fool me twice, shame on me," to the status of a legal principle.

The real bottom line of the dissent's analysis seems to be the dissenting justice's belief that the respondents knew or should have known about the arbitration clause, having received copies of the Addendum after signing their previous contracts. There are two flaws in this

analysis, the first a matter of evidence and the second a matter of law.

First, the record indicates that after the respondents signed their contracts, they were handed a packet of materials that included copies of the Addendum – at the same time they were handed the car keys and were on the way outside to take possession of their vehicles. There is no evidence to indicate they were told to review the contents of the packets before getting into the vehicles, and no evidence to indicate they were told that anything in the packets added additional provisions to the contracts they had just signed. On this record, no appellate court could conclude in the first instance[2] that the respondents had knowledge of the arbitration clause contained in the Addendum because they had received copies of the document after the fact, i.e., after they had signed their contracts and taken possession of their vehicles.

Second, and more fundamentally, I am unwilling to conclude as a matter of law, as the dissent does in cursory fashion, that once the respondents were given those packets they had a duty to read everything contained in them. This Court has held that "'[a] party to a contract has a duty to read the instrument.' Syllabus point 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987)." Syl. Pt. 4, *American States Ins.*

2. Because "course of conduct" was not raised by the parties, the circuit court had no occasion to make specific findings of fact with respect to these critical facts.

Co. v. Surbaugh, 231 W. Va. 288, 745 S.E.2d 179 (2013).[3] But in this case the contract was completely silent with respect to arbitration; rather, the arbitration clause was contained in a separate document "hiding out" in a packet of unrelated information presented to the respondents *after* they had signed their contracts. I do not believe that the principle of *Soliva* and *Surbaugh* extends to this situation, and I do not believe that the issue can or should be decided in this case where the parties did not develop the record for this purpose.

Accordingly, I concur in the majority opinion.

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3. Ironically, the dissenting justice in this case concurred in *Surbaugh*, clarifying that one "cannot escape the effect of exclusions in an insurance policy due to failure to read the policy, when the exclusions are *clear, unambiguous and conspicuous*." 231 W. Va. at ___, 745 S.E.2d at 191 (emphasis supplied). In the instant case, the arbitration provision at issue was not even contained in the contract; it was clearly, unambiguously and conspicuously *not there*.

Appendix A

No. 13-0181 – *State of West Virginia ex rel. U-Haul Co. of West Virginia, a West Virginia Corporation v. The Honorable Paul Zakaib, Jr., Amanda Ferrell, John Stigall, and Misty Evans*

Justice Ketchum, dissenting:

I respectfully dissent. The majority opinion, although well reasoned, fails to consider several West Virginia statutes which would have led to a different outcome in this case. A fair reading of these statutes requires that the plaintiffs' lawsuit be resolved in arbitration.

These statutes, which were not applied by the circuit court, are in Article 2A of the Uniform Commercial Code ("the UCC"), titled the "Uniform Commercial Code – Leases."[1] This article of the Uniform Commercial Code "applies to any transaction, regardless of form, that creates a lease."[2] By "lease," the Legislature meant "a transfer of the right to possession and use of goods for a term in return for consideration."[3]

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1. *W.Va. Code*, § 46-2A-101 to -532.

2. *W.Va. Code*, § 46-2A-102 [1996]. The official comment to *W.Va. Code*, § 46-2A-102 says that Article 2A was designed to govern "transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years."

3. *W.Va. Code*, § 46-2A-103(j) [2006]. This statute was amended to make some stylistic changes in 2012, but no changes were made to subsection (j).

The plaintiffs' rental of U-Haul's equipment was a "lease" governed by Article 2A of the UCC. The terms of the lease agreement between the plaintiffs and U-Haul should, therefore, have been addressed by the parties and the circuit court under Article 2A. The UCC states that a "lease agreement" has the following meaning (with emphasis added):

> "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or *by implication from other circumstances including course of dealing* or usage of trade or course of performance as provided in this article. . . .[4]

Plainly, the Legislature intended that a lease agreement may include not just the explicit terms of the writing signed by the parties, but also includes the parties' "course of dealing," that is, the sequence of conduct between the parties previous to the agreement. The parties' course of dealing may be regarded as establishing a common basis of understanding for interpreting the lease. The UCC offers the following definition of "course of dealing":

> A "course of dealing" is a sequence of conduct concerning previous transactions between the

4. *W.Va. Code*, § 46-2A-103(k) [2006] (emphasis added). *W.Va. Code*, § 46-2A-106 [1996] imposes limitations on the applicable law and judicial forums that can be chosen by the parties to a consumer lease, but the Official Comment to the statute makes clear that "this section does not limit selection of a nonjudicial forum, such as arbitration."

> parties to a particular transaction that is *fairly to be regarded as establishing a common basis of understanding* for interpreting their expressions and other conduct.[5]

The circuit court in this case found that the plaintiffs were not bound by the arbitration provision in the U-Haul Addendum because the circuit court found there was *nothing* in the record to show each plaintiff had knowledge of, and assented to, U-Haul's arbitration provision when they signed the Rental Contract. The plaintiffs argue that, as a company policy, U-Haul never presented, discussed, or noted the arbitration clause to its customers before the Rental Contract was signed. The plaintiffs therefore contend that a typical U-Haul customer signing a Rental Contract would never know they had agreed to arbitrate any disputes until *after* they had reviewed and agreed to the Rental Contract. If I relied solely on this presentation of the facts by the plaintiffs, at first blush the circuit court's reasoning would seem to be sound.

But the substantial record reveals additional facts beyond those cited by the plaintiffs that the circuit court clearly did not consider, and which misinformed the circuit court's construction of the parties' agreement. The record shows that these three plaintiffs did not make isolated, sporadic, or one-time transactions, but rather had an established "course of dealing" with U-Haul. The three plaintiffs had repeatedly signed agreements with U-Haul, and repeatedly received copies of U-Haul's Addendum.

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5. *W.Va. Code*, § 46-1-303(b) [2006] (emphasis added).

For example, one plaintiff signed Rental Contracts and received copies of the Addendum at least eleven times before filing the underlying lawsuit. Another plaintiff signed the Rental Contract and received the Addendum at least four times.[6] On this record, I cannot in good conscience countenance the circuit court's finding that the plaintiffs were oblivious to the existence, let alone the contents, of the U-Haul Addendum.

I firmly believe that "an agreement to arbitrate must be clear and direct, and must not depend upon implication, inveiglement or subtlety. . . . [It's] existence . . . should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."[7] But as the unique facts of this case have been presented to this Court, I believe that the circuit court exceeded its jurisdiction. The sequence of conduct concerning previous transactions between the plaintiffs and U-Haul established that the plaintiffs each received

6. The remaining plaintiff, Ms. Evans, brought suit alleging she was defrauded out of $1.00 in a transaction with U-Haul, yet even she returned to U-Haul, signed another Rental Contract and received another copy of the Addendum two months before the underlying lawsuit was filed in circuit court. Of the three plaintiffs, only her circumstances come close to a "course of dealing" under the UCC which would negate application of the arbitration provision in the Addendum. However, in light of the way the case was structured by plaintiff's counsel, and my review of the extensive record, I believe Ms. Evans also formed an agreement to arbitrate her disputes with U-Haul.

7. *Application of Doughboy Indus., Inc.*, 17 A.D.2d 216, 220, 233 N.Y.S.2d 488, 493 (N.Y. App. Div. 1962).

multiple copies of the Addendum and the arbitration provision. The Rental Contract makes a clear reference to the Addendum, and even if the identity of the Addendum was vague in the first transaction between the parties, the numerous subsequent transactions would have allowed the plaintiffs to ascertain the identity and contents of the Addendum beyond doubt. Their course of conduct should fairly be regarded as establishing a common basis for understanding the parties' agreement.

It was therefore inconsistent for the circuit court to find the plaintiffs had absolutely no knowledge of the Addendum's existence or the terms of the arbitration provision, without violating the fundamental rule that "[a] party to a contract has a duty to read the instrument."[8] U-Haul has, in my judgment of the record, established that the agreement with the plaintiffs fairly incorporated an arbitration provision. A writ of prohibition is therefore warranted, and the majority opinion was wrong to deny the writ.

In addition, I believe this case is significantly flawed going forward. The plaintiffs in their complaint have asked the trial court to certify a class action. Under Rule 23(a) of the *Rules of Civil Procedure*, the plaintiffs bear the burden of establishing four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Based on the record submitted to this Court, I do not believe these plaintiffs are capable of showing commonality.

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8. Syllabus Point 4, *Am. States Ins. Co. v. Surbaugh*, 231 W.Va. 288, 745 S.E.2d 179 (2013) (quoting Syllabus Point 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986)).

We defined "commonality" in Syllabus Point 11 of *In re W.Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003):

> The "commonality" requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class certification show that "there are questions of law or fact common to the class." A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of "commonality" is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.

I do not see any evidence of commonality between these three plaintiffs and the members of their proposed class. Some of the plaintiffs or class members may have read the arbitration agreement they received, and others may not have read it. The U-Haul agent may have explained the agreement to some plaintiffs or class members but not others. Some plaintiffs or class members may have been educated and understood and accepted the arbitration process, while others may have been illiterate. Some plaintiffs or class members may have seen the arbitration clause and chosen to disregard it totally, while others may have never noticed that the Addendum contained supplemental contract terms.

In sum, I believe that these three plaintiffs present three unique, uncommon questions of law and fact. To

determine the application of the arbitration clause to each plaintiff would require individualized assessment of each plaintiff's particular facts – and likewise, an individualized assessment of each potential class member's situation. Even under the majority opinion's enlightened discussion of contract law, some plaintiffs and some class members knowingly agreed to arbitration, and their cases should be heard there and not in circuit court. I therefore think that, going forward, the circuit court should give weight to the fact that these three plaintiffs cannot establish commonality under Rule 23.

APPENDIX B — ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, DATED APRIL 10, 2013

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th of April, 2013, the following order was made and entered:

State of West Virginia ex rel. U-Haul Co. of West Virginia, a West Virginia corporation, Petitioner

vs.) No. 13-0181

Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County; and Amanda Ferrell, John Stigall and Misty Evans, Respondents

On a former day, to-wit, February 26, 2013, came the petitioner, U-Haul Co. of West Virginia, by Charles M. Love, III, Ronda L. Harvey, Floyd E. Boone, Jr. and James E. Scott, Bowles Rice LLP, its attorneys, and presented to the Court its petition praying for a writ of prohibition to be directed against the respondent, Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County, as therein set forth.

Thereafter, on March 21, 2013, came the respondents, Amanda Ferrell, John Stigall and Misty Evans, by Anthony J. Majestro, Powell & Majestro, PLLC; and James C. Peterson and Aaron L. Harrah, Hill, Peterson,

Carper, Bee & Deitzler, PLLC, their attorneys, and presented to the Court their respondent's brief.

Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered that a rule do issue directed against the respondents, commanding and directing the said respondents to show cause, if any they can, why a writ of prohibition should not be awarded against the Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County, as prayed for by the petitioner in its said petition.

It is further ordered that this matter be, and it hereby is, scheduled for consideration and oral argument under Rule 20 of the Revised Rules of Appellate Procedure to be held on Wednesday, September 25, 2013.

The Clerk will, at a later date, furnish the parties and counsel of record with a Notice of Argument pursuant to Revised Rule 20(b), which will contain additional information regarding the time for argument.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

APPENDIX C — ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, DATED JANUARY 16, 2013

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action NO. 11-C-1426
Judge Paul Zakaib, Jr.

AMANDA FERRELL, *et al.*,

Plaintiffs,

v.

U-HAUL CO. OF WEST VIRGINIA,
a West Virginia corporation,

Defendant.

ORDER ON RECONSIDERATION

On June 29, 2012, came the parties by their respective counsel for a hearing on Defendant's Motion to Reconsider this Court's March 27, 2012 Order Denying Motion to Compel Arbitration and to Stay Discovery and Circuit Court Proceedings Pending Reconsideration and, If Necessary, Proceedings Before the Supreme Court of Appeals. The Court, after reviewing the briefing filed by the parties and after hearing the arguments of counsel, DENIES the motion to reconsider the March 27, 2012 Order ("the Order") for the following reasons:

Appendix C

1. As an initial matter, the Court notes the appropriate standard of review. Defendant seeks reconsideration of the Court's interlocutory ruling denying its motion to compel arbitration after full briefing and argument. While Rule 54(b) gives this Court the power to amend previous interlocutory rulings, *Hubbard v. State Farm Indem. Co.,* 213 W.Va. 542, 550-551, 584 S.E.2d 176, 184-185 (2003), this power is limited to situations where "justice requires" reconsideration. *Id.* at 551, 584 S.E.2d at 185 (internal quotations omitted). This standard does not permit de novo reconsideration:

> We have limited district courts' reconsideration of earlier decisions under Rule 54(b) by treating those decisions as law of the case, which gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.,* 327 F.2d 944, 953 (2d Cir.1964). Thus, those decisions may not usually be changed unless there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir.1992) (internal quotation marks omitted).

Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167

(2d Cir. 2003). When reconsideration is sought based on newly discovered evidence or a supposed change in law, the proponent of the motion must show that the supposed new evidence and law were not previously available to him. *Rothwell Cotton Co. v. Rosenthal & Co.,* 827 F.2d 246, 252 (7th Cir. 1987). When "[e]verything submitted with the opening brief on reconsideration was in existence before the original motion was decided," and the proponent of the motion fails to give "any satisfactory explanation as to why the information could not have been produced earlier," the motion should be denied. *Id.; see also Coopers & Lybrand, LLP, supra* (evidence in existence at time original motion was heard was not new evidence). In this case, the Defendant has failed to meet this standard.

2. The Court FINDS that the majority of the Defendant's supposed grounds for reconsideration were actually presented to the Court in connection with the initial motion and hearing. As such, they do not proper present proper grounds for reconsideration and the Court again rejects these arguments (1) because they are procedurally improper grounds for reconsideration and (2) for the same substantive reasons set forth in the Order.

3. The Defendant next argues that the Order should be reconsidered based on newly discovered evidence consisting entirely of an affidavit from its President, Jeff Bowles, who had previously filed two affidavits in support of the original motion. The Defendant offers no explanation why this information regarding the operation of its computer systems was not provided prior to the Court ruling on the motion. Indeed, at the March 6, 2012

hearing on the original motion the Defendant, without objection, indicated it would file a post-hearing affidavit refuting Plaintiffs' evidence that the arbitration clause was electronically provided to Plaintiffs prior to their signing the electronic box. Yet, instead of filing the affidavit following the hearing, it instead submitted a proposed order. It filed the supplemental affidavit over a month after the Court ruled without ever providing any grounds why the affidavit was not filed sooner. The Court FINDS that, to the extent that the third affidavit signed by Mr. Bowles contains evidence not previously considered, it was available to the Defendant at the time of the initial motion and, for this reason cannot support a proper motion to reconsider.

4. Furthermore, in the response to the third affidavit signed by Mr. Bowles, the Plaintiffs submitted evidence from their investigator which shows that the Defendant updated the electronic boxes used by the Defendant following the transactions that give rise to this case. *See* Affidavit of H.E. "Gene" Sigman (Plaintiffs' Reconsideration Exhibit A). If the Court would consider the third affidavit of Mr. Bowles on the merits, the Court would FIND that the Defendant has failed to meet its burden of establishing that prior to March 2012, Defendant used an electronic box that allowed the customers to read the contractual terms prior to signing. Because the Defendant offered no admissible evidence to counter the specific allegations in Mr. Sigman's affidavit, the Court credits these over the vague allegations in the three affidavits provided from Mr. Bowles.

5. Finally, the Court rejects the Defendant's reliance on supposed new law. All the authorities cited by the Defendant predate the original briefing leading up to the Order and are therefore, not new. Furthermore, the Court FINDS the supposedly new law cited is distinguishable as, unlike here, none of the authorities involved material contractual terms attempted to be incorporated by reference prior to either making the terms available or notifying the customer of their existence.

WHEREFORE, for the reasons stated herein, the Court denies the Defendant's Motion to Reconsider this Court's March 27, 2012 Order Denying Motion to Compel Arbitration and to Stay Discovery and Circuit Court Proceedings Pending Reconsideration and, If Necessary, Proceedings Before the Supreme Court of Appeals.

The Court, at the request of the Defendant, hereby STAYS this ruling for 30 days to permit the Defendant to seek a Writ of Prohibition.

The Court notes the objections of the Defendant to all adverse rulings.

The Clerk is hereby directed to send certified copies of this Order to all counsel of record.

ENTERED: January 16, 2013

/s/_____
Judge Paul Zakaib, Jr.

APPENDIX D — ORDER DENYING MOTION TO COMPEL ARBITRATION IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, FILED MARCH 28, 2012

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Civil Action No. 11-C-1426

AMANDA FERRELL, JOHN STIGALL, MISTY EVANS,

Plaintiffs,

v.

U·HAUL CO. OF WEST VIRGINIA, a West Virginia corporation,

Defendant.

Judge Paul Zakaib, Jr.

ORDER DENYING MOTION TO COMPEL ARBITRATION

Pending before the Court is Defendant U-Haul Co. of West Virginia's Motion to Compel Arbitration and Dismiss or Stay the Case. The Court, having fully considered the motion and supporting memorandum, the Plaintiffs' response, the Defendant's Reply, and the arguments and evidence presented at the hearing held on March 6, 2012, the Court DENIES the motion based upon the following findings of fact and conclusions of law:

Appendix D

FINDINGS OF FACT

1. This case is a consumer protection action brought by three individuals against U-Haul Co. of West Virginia ("U-Haul") alleging that U-Haul adds a $1.00 to $5.00 environmental fee to the rental contracts of its customers which while allegedly masquerading as a governmental fee which instead allegedly amounts to U·Haul surreptitiously shifting its overhead to its customers. *See* Complaint at ¶¶ 11-13.

2. The Defendant's motion to compel arbitration is based upon its inclusion of an arbitration clause in a document it entitles Rental Contract Addendum ("RCA"). U-Haul has produced signed Rental Contracts ("RC") signed by each of the three plaintiffs. The RC contains the terms of the rental and states before the signature line: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." Nothing on the face of the RC warns the customers that U-Haul is attempting to bind them to an arbitration clause not contained in the RC.

3. Each of the plaintiffs has filed an affidavit stating that the RCA was not provided to them prior to signing the RC. U-Haul has not contested these affidavits. Indeed, its affidavits seemingly confirm the plaintiffs' testimony by stating that the "routine business practice" of U-Haul was to provide the RCA to customers only "prior to receiving possession of any rental property." *See* Bowles Affidavit of 10-25-11 (Bowles I) at 16; Bowles Affidavit of 3-2-12 (Bowles II) at ¶ 10 (same); *see also* Bowles II at ¶ 12 (signed

RC was folded and placed into RCA by U-Haul employee); Bowles II at ¶ 15 (copies of the RCA "are usually provided to customers after they sign the Rental Contract."). Based upon the record herein, the Court finds that the RCA was not provided to the plaintiffs prior to their signing the rental agreement.

4. At the hearing on Defendant's motion, Plaintiffs filed the March 5, 2012 Affidavit of Amanda M. Ferrell (Ferrell II). In this Affidavit, Ms. Ferrell stated that, after presenting her credit card and driver's license to the U-Haul agent, she was directed to sign an "electronic box." Ferrell II at ¶¶ 3-4. Thereafter, she was provided, for the first time, a copy of the RC upon which was placed an electronic copy of her signature. *Id.* at ¶ 5.

5. At the hearing, defendant requested the right to respond to the affidavit. No further affidavits have been filed by the Defendant disputing Ms. Ferrell's statements. Indeed, Defendant's affidavit is consistent with this statement. *See* Bowles I at ¶ 10 (noting U-Haul uses electronic system to electronically capture "signatures affixed by its customers"). There is no evidence that the statement contained in the printed RC that the customer agreed to the terms and conditions of the RCA was ever provided to customers prior to their electronically signing the "electronic box."

6. The RC contains no statement warning the customer that, by signing the RC, the customer is agreeing to be bound by the terms of an arbitration clause.

7. As for the RCA, it is made of cardstock and is a multicolor document that is folded to serve as a document holder for the RC. On the front cover of the RCA, in bold large type appears the title: "RENTAL CONTRACT ADDENDUM" with the next line stating in bold and slightly smaller type "DOCUMENT HOLDER." A few small lines of text appear next stating: "Additional Terms and Conditions for Equipment Rental." These lines are followed by a large block of text in reverse type stating "RETURNING EQUIPMENT." The remainder of the front cover focuses on instructions for returning the rental equipment. The back cover of the folded RCA contains an advertisement for additional services offered by the Defendant. An example of the RCA was introduced into evidence at the hearing as Plaintiffs' Exhibit 3.

8. The language making up Defendant's arbitration clause is contained inside the RCA. Nothing on the cover of the RCA notifies or alerts a customer that U-Haul is attempting to bind the customer to arbitration with language contained inside the RCA.

9. The Court finds that the Plaintiffs were not provided with either the RCA or the arbitration clause prior to contracting with the Defendant.

10. The Court finds that the Plaintiffs were not aware of the arbitration clause in the RCA prior to contracting with the Defendant.

11. The Court finds that the Plaintiffs did not agree to be bound by the arbitration clause prior to entering into a contract with the Defendant.

12. The Court finds that the Defendant's arbitration clause is a clause purporting to require mandatory arbitration of any claims against the Defendants. As that clause purports to waive significant rights to a jury trial and to appeal, this term is a material term.

13. The Court finds that the Plaintiffs did not agree to the inclusion of this material term requiring arbitration after contracting with the defendant.

CONCLUSIONS OF LAW

14. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909, 917-18 (W.Va. 2011) (footnote omitted). The determination of whether a valid arbitration agreement exists between the parties is evaluated under state law principles of contract formation. *Id.* at 918.

15. In syllabus point 3, of *Board of Ed. of Berkeley County v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977), the Supreme Court of Appeals explained that "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." *See also Richmond American Homes,* 717 S.E.2d at 919 n. 29 (quoting *W. Harley Miller, Inc.)*

16. "The fundamentals of a legal 'contract' are competent parties, legal subject-matter, valuable consideration, and mutual assent." *See Wellington Power Corp. v CNA Surety Corp.,* 217 W.Va. 33, 37, 614 S.E.2d 680, 684 (2005). (1926)). "It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.,* 158 W.Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other." *Ways v. Imation Enterprises Corp.,* 214 W.Va. 305, 313, 589 S.E.2d 36, 44 (2003) (quoting *Bailey v. Sewell Coal Co.,* 190 W.Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993)).

17. Once a contract has been made, a modification of the contract requires the assent of both parties to the contract as "mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract." *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.,* 157 W.Va. 93, 97-98, 199 S.E.2d 308, 311 (W.Va. 1973) (citations omitted).

18. This is particularly the case when a party attempts to include an additional term into the agreement that is material. *See, e.g., Supak & Sons Mfg. Co. v. Pervel Indus., Inc.,* 593 F.2d 135, 136 (4th Cir. 1979) (when a

written confirmation form contains material terms in addition to those reached in the oral sales contract the additional terms do not become part of the contract absent assent).

19. Arbitration clauses are uniformly held to be material. In *Supak*, the Fourth Circuit concluded: "Moreover, courts of last resort of both states [New York and North Carolina] have held that the addition of an arbitration clause constitutes a *per se* material alteration of the contract . . . .Thus, under the law of either state, the arbitration clause did not become part of the contract." 593 F.2d at 136. (citations omitted); The Fifth Circuit reached the same conclusion on similar facts in *Coastal Industries, Inc. v. Automatic Steam Products Corp.,* 654 F.2d 375, 379 (5th Cir. 1981) holding: "By requiring evidence of an express agreement before permitting the inclusion of an arbitration provision into the contract, a court protects the litigant who will be unwillingly deprived of a judicial forum in which to air his grievance or defense."

20. Courts distinguish cases like this where the arbitration clause was presented after agreement. *See Electrical Box & Enclosure, Inc. v. Comeq, Inc.,* 626 So. 2d 1250, 1252 (Ala. 1993) (distinguishing *Coastal Industries* on the grounds that the arbitration clause was presented to Electrical Box during the negotiations of the contract). *See also Diskin v. J.P Stevens & Co.,* 836 F.2d 47 (1st Cir. 1987) (similar facts and same holding as in *Supak & Sons); N&D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 727 (8th Cir. 1977) ("we cannot say on this record that the District Court was clearly erroneous in holding that the

arbitration provision in DHJ's acknowledgement form was a 'material alteration.'"); *Universal Plumbing and Piping Supply, Inc. v. John C. Grimberg Co.,* 596 F. Supp. 1383, 1385 (W.D. Pa. 1984) (similar facts and same holding as in *Supak & Sons* noting "[o]ther courts have held that an arbitration clause is a material alteration requiring the parties' assent."); *Fairfield-Noble Corp. v. Pressman-Gutman Co.,* 475 F. Supp. 899, 903 (S.D.N.Y. 1979) ("Thus, arbitration was a term 'additional to or different from' those agreed upon. As such, the arbitration provision, unilaterally inserted by the defendant, was a material alteration of the contract and accordingly did not become a part thereof."); *Duplan Corp. v. WB. Davis Hosiery Mills, Inc.,* 442 F. Supp. 86 (S.D.N.Y. 1977) (similar facts and same holding as in *Supak & Sons); Valmont Indus. v. Mitsui & Co.,* 419 F. Supp. 1238, 1240 (D. Neb. 1976) (similar facts and same holding as in *Supak & Sons); John Thallon & Co. v. M&N Meat Co.,* 396 F. Supp. 1239 (E.D.N.Y. 1975) (very similar facts and same holding as in *Supak & Sons* "the arbitration clause and the correlative forfeiture by plaintiff of its right to trial by jury in the courts, 'alter[ed] the original bargain' and involved an 'element of unreasonable surprise.'" (citations omitted)); *J&C Dyeing, Inc. v. Drakon, Inc.,* 93 Civ. 4283, 1994 U.S. Dist. LEXIS 15194 at *6, *8 (S.D.N.Y. 1994) ("it is clear that an arbitration clause is a material addition which can become part of a contract only if it is expressly assented to by both parties. . . . Although Drakon did not object to the arbitration clause, the mere retention of confirmation slips without any additional conduct indicative of a desire to arbitrate cannot bind Drakon, for it does not rise to the level of assent required to bind parties to arbitration

provisions."); *DeMarco California Fabrics, Inc. v. Nygard International,* No. 90 Civ. 0461, 1990 U.S. Dist. LEXIS 3842 at *7 (S.D.N.Y. 1990) ("provision for arbitration is 'clearly a proposed additional term' to the parties' agreement which 'materially alters' the agreement ...."); *Windsor Mills, Inc. v. Collins & Aikman Corp.,* 25 Cal. App. 3d 987, 995, Cal. Rptr. 347, 352 (1972) ("it is clear that a provision for arbitration inserted in the acceptance or confirmation of an offer to purchase goods 'materially alters' the offer."); *Matter of Marlene Indus. Corp. v. Carnac Textiles, Inc.,* 408 N.Y.S.2d 410, 45 N.Y.2d 325, 380 N.E.2d 239 (1978) ("the inclusion of an arbitration agreement materially alters a contract for the sale of goods . . . . [B]y agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" (citation omitted)); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.,* 204 S.E.2d 834, 842 (N.C. 1974) ("Beyond question, [the addition of an arbitration clause] would be a material alteration of [the contract]."); *Just Born, Inc. v. Stein Hall & Co.,* 59 D. & C.2d 407 (Pa. D. & C. 1971) (similar facts and same holding as *Supak & Sons)* (cited in *Universal Plumbing,* 596 F. Supp. at 1385); *Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co.,* 697 A.2d 323, 329 (R.I. 1997) ("We are of the opinion that a provision compelling a party to submit to binding arbitration materially alters the terms of the parties' agreement.").

21. U-Haul argues that the doctrine of incorporation by reference allows it to impose its arbitration clause on the

plaintiffs. First, unlike the cases cited by the Defendant, the contract at issue here does not use the phrase "incorporation by reference" or any similar language. While West Virginia recognizes the doctrine, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.,* 186 W.Va. 613, 616-617, 413 S.E.2d 670, 673-674 (1991), incorporation by reference still requires offer and acceptance of the terms of the incorporated contract. *Id.* Indeed, in *Art's Flower Shop, Inc.,* the terms of a prior contract were incorporated by reference. There was no argument that the disputed terms had not been previously communicated **and** accepted by the parties. Similarly, in *Rashid v. Schenck Const. Co., Inc.,* 190 W.Va. 363, 367, 438 S.E.2d 543, 547 (1993), there was no dispute that the contracts incorporated by reference had not been communicated to the parties sought to be charged prior to agreement. The cases cited by U-Haul involve documents incorporated that were provided prior to agreement, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co. of W.Va., Inc.,* 186 W.Va. 613, 616-17, 413 S.E.2d 670, 673-74 (1992), *Rashid v. Schenck Construction Co., Inc.,* 190 W.Va. 363, 438 S.E.2d 543 (1993); sophisticated parties, *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC,* --- F.Supp.2d ---2012 WL 171375, at *4 (S.D. W.Va. Jan. 20, 2012), or documents that specifically put the customer on notice that an arbitration clause was being incorporated into the document. *In re Raymond James & Associates, Inc.,* 196 S.W.3d 311, Tex. App.—Houston [1 Dist.], 2006; *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, U.S., 2012. These cases are distinguishable. They are also distinguishable to the extent that the purported agreement to incorporate the RCA was not provided until after the customer electronically "signed" the RC.

22. Finally, U-Haul argues that the lack of assent to the RCA is a challenge to the entire contract. Under the severability rule, U-Haul contends that the Court is limited to considering arguments that challenge only the arbitration clause. According to U-Haul, because the plaintiffs' challenge to the RCA would also invalidate the language in RCA relevant to optional insurance coverage, the challenge violates the severability rule. The Supreme Court of Appeals described the severability rule as follows:

> The doctrine of severability means this: If a party challenges the enforceability of the entire contract (including the arbitration clause)—that is, the party does not sever the arbitration clause from the rest of the contract and make a "discrete challenge to the validity of the arbitration clause"—then the court is completely deprived of authority and only an arbitrator can assess the validity of the contract, including the validity of the arbitration clause.

Richmond American Homes, 717 S.E.2d at 918. Significantly, the Court rejected the argument that severability required the Court to limit its review to the arbitration clause. *Id.* at 919 (noting that "the law of this state—and virtually every other state—is that [a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract *as a whole*") (emphasis in original; citation, footnote, and internal quotation omitted)).

23. In this case, while there are other purported provisions in the RCA, the plaintiffs do not challenge those provisions. The disputed environmental fee is contained in the RC, not the RCA. Moreover, unlike the arbitration clause which appears only in the RCA, the optional insurance coverages appear in the RC. Finally, the severability doctrine seeks to bar judicial challenges to an entire contract masquerading under the guise of a challenge to an arbitration agreement. In this case, the issue raised by the Plaintiffs is whether the parties actually agreed to arbitrate not whether the arbitration clause is enforceable. The Defendant has not cited a case holding that failure to assent to additional contractual language containing an arbitration clause and other provisions not at issue in the cases constitutes a violation of the severability doctrine. Under *Richmond American Homes, supra,* the Court can look at the circumstances surrounding the execution of the contract *as a whole.* The Court's conclusion that the arbitration clause contained in the RCA is not part of the contracts at issue here is consistent with this authorization.

24. Because, the Defendant has failed to meet its burden of establishing the existence of an agreement to arbitrate, the Court must deny and hereby does deny the Motion to Compel Arbitration and Dismiss or Stay the Case. The remaining motions to bifurcate and for a protective order are denied as moot.

25. The Court hereby directs the parties to contact the Court to obtain a date for a scheduling conference so that a scheduling order may be entered in this matter.

26. The objections of all parties to adverse rulings are noted and preserved.

27. The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED: March 27, 2012

/s/
JUDGE PAUL ZAKAIB, JR.