

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

*State ex rel.* JILL CLITES,

Petitioner,

v.

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THE HONORABLE RUSSELL M. CLAWGES, JR. Chief Judge,  
17<sup>th</sup> Judicial Circuit, Division II,  
TELETECH CUSTOMER CARE MANAGEMENT (WEST VIRGINIA), Inc.,  
LOR WINDLE, and MICHELE EBERT,

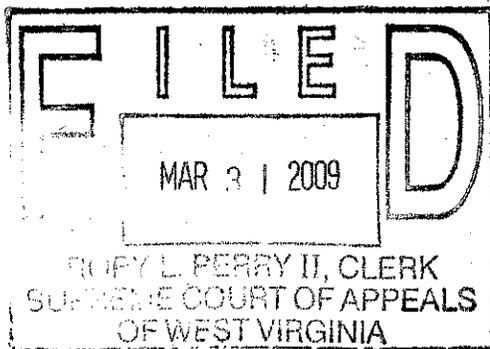
Respondents.

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PETITIONER'S MEMORANDUM IN SUPPORT OF  
PETITION FOR A WRIT OF PROHIBITION

From the Circuit Court of Monongalia County, West Virginia  
Civil Action No. 08-C-201

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Submitted by:

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**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF  
PETITION FOR A WRIT OF PROHIBITION**

Petitioner, Jill Clites (Plaintiff Below) by and through her counsel, Georgia Lee Gates, submits this Memorandum of Law in Support of her Petition for Writ of Prohibition, brought pursuant to West Virginia Code §53-1-3 and Rule 14(a) of the West Virginia Rules of Appellate Procedure.

**I.  
PRELIMINARY STATEMENT**

This Petition for a Writ of Prohibition arises from the circuit court's February 6, 2009 Order Granting Defendants' Motion for Stay and Denying Defendants' Motion to Dismiss. Ap.1. By this Order, the circuit court stayed all further proceedings in Petitioner Jill Clites' cause of action, commenced against the Respondents TeleTech Customer Care Management (West Virginia), Inc., Lor Windle and Michele Ebert (Defendants Below) (collectively TeleTech), for sexual harassment and retaliation under the Human Rights Act, West Virginia Code §5-11-1 *et seq.* (HRA), "pending arbitration as set forth in the subject Arbitration Agreement." Ap. 7.

In significant part, the circuit court stayed Ms. Clites' cause of action even though it found the Arbitration Agreement to be a contract of adhesion, and further, ineluctably, determined that the costs of arbitration, under the Agreement's terms, rendered it unconscionable. The circuit court necessarily found the Agreement unconscionable as, in order to render it enforceable, it rewrote the same so as to eliminate the Agreement's unreasonably burdensome arbitration costs. This rewrite incorporated into the Agreement a TeleTech post-suit, unilateral, amendment providing that, notwithstanding the language of the Agreement, the arbitration will now take place in Morgantown, West Virginia (rather than Denver, Colorado)

and “TeleTech will [now] pay for all costs and expenses that would not be incurred by the Plaintiff in court.” Ap. 7.

After rewriting the unconscionable Agreement, the circuit court went on to find that the Arbitration Agreement, as a whole, was now “not so one-sided as to render the Agreement unconscionable.” Ap. 7. The circuit court so found, despite the Arbitration Agreement’s revocation of an initial global promise by TeleTech to arbitrate all its disputes with its employee, pursuant to Paragraph 3 on page 1 of 6 of the Agreement. Ap. 53. TeleTech’s promise to arbitrate all claims against its employee is subsequently rendered illusory on page 3 of 6 of the Agreement. Ap. 54-55. Here, at Subparagraph 7.2, contrary to the express language of Paragraph 3, TeleTech reserves the right to seek judicial relief for all those claims it would most likely pursue against its employee. Specifically, Subparagraph 7.2 broadly permits TeleTech to pursue remedies in a court of law, “for injunctive relief arising out of irreparable injury from a *breach or threatened breach of any duty owed by the Employee to the Company.*” Ap. 55 (emphasis added). This exclusion for all those claims TeleTech would most likely pursue against its employee is included within the Arbitration Agreement’s terms even though Subparagraph 9.5 expressly grants to the arbitrator the requisite “jurisdiction to award any relief, including equitable relief,” such as the injunctive relief TeleTech unilaterally withholds from the Arbitration Agreement’s scope. Ap. 56.

In rendering its decision that the Arbitration Agreement was not unconscionable and therefore enforceable, the circuit court appears to have placed significant emphasis on the following partial quote from Reddy v. Community Health Foundation of Man, 171 W.Va. 368, 373, 298 S.E.2d 906, 910 (1982): “[T] failure to read a contract before signing it does not excuse

a person from being bound by its terms.” Ap. 4. Apparently because of this unconditionally stated “duty to read,” the circuit court dismissed as irrelevant the fact that the TeleTech employee responsible for explaining the Arbitration Agreement to new hires, including Ms. Clites, did not understand that either the right to a jury trial or the right to bring suit in court were waived by signing the Arbitration Agreement. Instead, the circuit court found controlling the following phrase contained in the six page adhesive Agreement: “the Company and the Employee give up the right to a jury trial” because it was underlined on page one. Ap 5-6.

Finally, the circuit court missed the point of Ms. Clites’ arguments concerning a knowing and voluntary waiver of her right to a jury trial under the HRA, pursuant to 77 CSR 6-3.2. Ap. 6. Ms. Clites did not argue that such right might never be waived, so as to contravene Preston v. Ferrer, 128 S.Ct. 978 (2008). Rather she argued that the right could not be waived, in conformance with the regulation, in the absence of a knowing and voluntary waiver and that she did not knowingly and voluntarily waive her right to a jury trial of her HRA claims.

## **II. PROCEDURAL HISTORY**

Petitioner, Jill Clites, commenced her cause of action against the Respondent TeleTech and others, on March 21, 2008. Her cause of action was brought pursuant to the HRA and arises from the sexual harassment to which she was directly subjected by the Respondent Windle. The Complaint further alleges that upon proper notice of the sexual harassment of Ms. Clites, the Respondents, TeleTech and Ebert, failed to take timely, requisite, remedial actions both to prevent and to correct the same, in violation of the HRA. Furthermore, after notice of the sexual harassment to which Ms. Clites was subjected, the Respondent TeleTech through its supervisory

employees, the Respondents Windle and Ebert, in direct contravention of the HRA, retaliated against Ms. Clites by unlawfully subjecting her to a reduction in force, as both a factual and legal result of her complaints of sexual harassment concerning the Respondent Windle.

On April 23, 2008<sup>1</sup>, the Respondents moved to dismiss Ms. Clites' Complaint, pursuant to W.V.R. Civ.P., Rule 12(b)(6), or in the alternative for a stay of proceedings. As grounds for this motion, the Respondents invoked the Arbitration Agreement at issue in this Petition. In opposition to the motion, Ms. Clites argued that the Arbitration Agreement was unenforceable because it was both a contract of adhesion and unconscionable.

After an initial round of briefing and oral argument on Respondents' motion to dismiss, the circuit court, although staying discovery generally pending its ruling on the Arbitration Agreement, granted the parties 60 days within which to conduct limited discovery on the question of the Agreement's enforcement. After the close of this short period of limited discovery, the parties filed supplemental briefs and appeared before the circuit court, on September 11, 2008, for oral argument. Thereafter, on February 6, 2009, the circuit court granted the Respondents' motion to stay Ms. Clites' cause of action "pending arbitration as set forth in the subject Arbitration Agreement." Ap. I.

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<sup>1</sup>On this same date, a holding company of TeleTech filed a Complaint in the United States District Court for the Northern District of West Virginia naming Ms. Clites as a Defendant. *TeleTech Holdings, Inc. v. Clites*, USDCNDWV 1:08-CV-108. The Complaint, was brought pursuant to the Federal Arbitration Act, 9 USC §1, *et seq.* The federal district court dismissed this cause of action, on October 16, 2008.

### III. STATEMENT OF FACTS

#### A. The Circumstances Under Which the Arbitration Agreement was Created and Signed

On or about October 1, 2004, Jill Clites applied for a position as a Customer Service Representative - 1 (CSR-1) with the Respondent TeleTech. Ap. 31-32. She was notified by TeleTech that she had been hired, on or about October 8, 2004. Ap. 30. When hired, Ms. Clites was instructed to report for her first day of work on Monday, October 25, 2004. Ap. 30. Her starting pay rate was \$8.00 per hour. When Ms. Clites reported for her first day as a TeleTech employee, she had been unemployed for nearly ten months, since December 31, 2003. Ap. 10 (Clites 11-12).

On that first day of work, on October 25, 2004, Ms. Clites reported to a classroom for TeleTech's "New Employee Orientation." This was the start of a six-week training period in which, at least, 20 to 25 new employees were educated as a group from 6:45a.m. until approximately 3:15p.m, each day, by various trainers and facilitators about job duties, TeleTech processes, and "how things worked at TeleTech so to speak." Ap. 21 Trovato (7-9); see also Ap. 11 Clites (35-36). On that first day of the "New Employee Orientation," and only the first day, a TeleTech Human Resources (HR) Generalist came into the classroom "for a portion of time, hour and a half, two hours . . . depending upon questions or how that group interacted and . . . present[ed] human resources information as well as [took] care of . . . new-hire paper work." Ap. 21 Trovato (8 & 9).

The HR generalist, conducting the short HR portion of the "New Employee Orientation" attended by Jill Clites, on October 25, 2004, was Ellen Trovato. Ap. 12 Clites (38). In this short

HR session, Ms. Trovato went “over a whole bunch of stuff in a relatively short period of time.” Ap. 28 Trovato (37). Ms. Trovato presented a twenty (20) minute, video entitled “In This Together” during the session. The subject of the video was general harassment in the work place. Ap. 25 & 28 Trovato (22 & 37). In addition, Ms. Trovato passed out to each new employee folders containing documents. The folders included a stapled section of “15 to 20 pages” of “policy detail.” Ap. 21 Trovato (9). The new employees were permitted to retain the stapled group of “policy detail” for later reference. Ap. 27 Trovato (30). This stapled group of “policy detail” apparently included documents related to at least fourteen (14) different TeleTech policies as each new-employee was required to acknowledge through his or her signature that fourteen (14) TeleTech policies were received, read, and understood. Ap. 33.

In addition to the “15 to 20 page policy detail” included within each new-employee folder, were at least thirty-two (32) pages of new-hire paper work. Ap. 33-65; Ap. 22 Trovato (11). The new employees were required to sign the new-hire paper work.

Ms. Trovato explained that “New-employee orientation happened at TeleTech on a very regular basis. Typically, on each Monday a new-hire class began. Sometimes as many as 28 or 30, typically anywhere between 20 and 25, so a new batch of employees was coming in every week.” Ap. 21 Trovato (7). TeleTech conducted these “New Employee Orientation” sessions on a weekly basis because of an exceptionally high turnover rate in the Morgantown facility. The turnover rate was so high that the Morgantown TeleTech facility would turnover almost all of its employees, yearly. Ap. 29 Trovato (38).

The Morgantown HR Department “would keep hundreds [of the new-employee folders] ready all the time because of the consistent turnover.” Ap. Trovato (28). These hundreds of

folders containing the "policy details" and "new-hire paper work" were compiled by the HR Department in assembly-line fashion. *See* Ap. 27 Trovato (31-32). Accordingly, if an agreement required the signature of both the new-employee and the HR Manager, they would stamp the agreement with the HR Manager, Sally Wotring's, "stamped signature" on a master original form and then make photocopies for inclusion in the new-hire folders, passed out at each HR orientation session. Ap. 25 Trovato (24). Similarly, documents were signed by HR generalists who did not participate in the New-Employee Orientation sessions in which the new-hires signed the documents. Ap. 25 Trovato (24-25).

As previously noted, *supra*, in the HR session, each new-employee was provided with a folder containing numerous documents to read and/or complete and sign: both "policy detail" and "new-hire paper work." The documents signed and/or completed by Ms. Clites and the other "20 to 25" new-employees in attendance at this short HR session conducted by Ms. Trovato, on October 25, 2004, included but are not necessarily limited to the following:<sup>2</sup> (1) a federal I-9 form (Ap. 49); (2) a New Employee Information Sheet (Ap. 34); (3) a W-4 (Ap. 35); (4) a West Virginia Employee Withholding Exemption Certificate (Ap. 36); (5) an Applicant's Affidavit (Ap. 37); (6) a Repayment Agreement (Ap. 38); (7) a Monitoring Agreement (Ap. 39); (8) an

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<sup>2</sup>In discovery, the Defendants produced a Human Resources Procedure Manual which although not employed in the Morgantown TeleTech facility, provides a list of "New Hire Paperwork" to be completed and/or signed in the "New Employee Orientation" session. *See* Ap. 66-67. Included within this list is the Section 503 invitation to Self-Identify included within the list set forth *ante* within the body of this memorandum. Although this document is not included in Ms. Clites' personnel file, it is assumed that the document was presented to her in the Orientation as it is a typical initial employment form provided by larger employers, such as TeleTech.

In addition, there is included within the list a "Work Opportunity Questionnaire." Ms. Clites signed this document, on October 1, 2004, rather than in the October 25, 2004 Orientation session. Finally, Ms. Clites signed numerous documents not included within the Human Resources Procedure Manual "New Employee Orientation" "New Hire Paperwork" list. The additional documents signed by Ms. Clites are included in the list set forth within the body of this memorandum.

Agreement for At-Will Employment (Ap. 40); (9) an Arbitration Agreement (Ap. 53-58); (10) an Acknowledgment of Video (Ap. 50); (11) a Training Compensation Agreement (Ap. 41); (12) a Training Agreement (Ap. 42); (13) a Release of Name and Photograph (Ap. 43); (14) an IT Policies and Procedures Signoff Sheet (Ap. 44-46); (15) a Job Offer Letter (Ap. 47); (16) a Code of Conduct Acknowledgment Form (Ap. 51); (17) a Telephone Policies and Procedure Acknowledgment (Ap. 52); (18) an Acknowledgment of Receipt of Privacy Notice (Ap. 65); (19) a Confidentiality Agreement (Ap. 59-63); (20) a VEVRAA Invitation to Self Identify (Ap. 48); (21) a Policy and Procedure Acknowledgment (Ap. 64); (22) a Code of Conduct Acknowledgment Form (Ap. 51); and, although not included among the documents produced by Defendants, Ms. Clites more likely than not signed, (23) a Section 503 Invitation to Self Identify, as well. *See* (Ap. 67).

The new-employees, attending the October 25, 2004 HR portion of Orientation, were required to complete and/or sign all of the documents listed *ante*, in a limited period of time. The time was so limited that it allowed only for the “skimming” of documents more than a single page in length (two or three paragraphs). *See* Ap. 22 & 23 Trovato (11 & 15). The new-employees were not permitted to keep the documents they signed. Instead, the new-employees were required to return the documents they signed, as they became part of the personnel file. Ap. 23 Trovato (15). Nor were the new-hires provided with copies of the documents they signed in the Orientation session. Instead copies could be obtained under a general TeleTech policy that permitted employees to go “to the human resources office to review their file and, as long as it was something that they had signed, like a discipline or a policy or something, they could have a copy of it, yes.” Ap. 24 Trovato (20). In addition, Ms. Trovato typically told the new-hires that

“if you're uncomfortable about signing something because you've not had a chance to read it in its entirety, we'll set aside a time another day . . . and they could come later.” Ap. 25 Trovato (20) (emphasis added).

In the short time frame in which Ms. Clites and the other new-employees were signing documents, Mr. Trovato would not describe the documents in great detail but rather with a broad stroke because of the short amount of time available for completing the “new-hire paper work”:

Q. I asked you on the phone about some of this stuff and I think you referred to the fact that you went over this stuff in “broad stroke,” so nothing was referred to “in great detail”?

A. Not in great detail depending upon if there was a question, but there was a concern with time, obviously, and this was not exciting material at times so, oftentimes, we would explain in a very arched sort of broad way what that was, asking individuals if they had any questions or if they wanted to skim through it.

Q. So you would say, for instance, with the *Confidentiality Agreement*, “You’re going to be dealing with confidential information and you need to know that you can’t disclose that to anybody,”?

A. Correct.

Ap. 23 Trovato (14). Ms. Trovato’s “very arched sort of broad way” of explanation as to the purposes of the forms and agreements signed by the new-employees is evident in the TeleTech “New Employee Orientation: New Hire Paperwork” guide included in TeleTech’s *Human Resources Manual*. Of particular note is this guide’s description of the “Arbitration Agreement,” at issue in the case *sub judice*:

If a dispute arises between you and TeleTech which cannot be resolved within the company, TeleTech will bring in a 3<sup>rd</sup> party (*mediator*) to listen to both sides. This avoids going to court and saves on court costs. Sign and date on top line.

Ap. 66 (emphasis added). Noticeably absent from this TeleTech authored arched and broad

description of the Arbitration Agreement is any mention of an arbitrator. Instead, mediator is substituted for the term arbitrator. In addition, the description is such as to lead the listener to believe that the Agreement merely provides for an internal dispute resolution process in which a *third party mediator* simply "listens to both sides" so as to aid the parties, employee and TeleTech, in resolving a dispute between them. Finally, noticeably absent from this TeleTech authored description of the Arbitration Agreement is any mention that a new-employee who signs the Agreement is waiving either her right to a jury trial or her right to bring suit in court.

The TeleTech authored arched and broad description of the Arbitration Agreement is reflected in Ms. Trovato's understanding that the Agreement's purpose is to create a process whereby employees with problems and concerns might bring them to TeleTech's attention, which in no way involves waiver of the right to a jury trial in a court of law:

A. The Arbitration Agreement was TeleTech's process that allowed an individual to bring forward a concern and that it was a very generalized concern. It didn't necessarily have to be specific about this or that. If you were bothered by something or if there was a question that you had or a concern that you might have had, this might be a way to go about bringing forward that concern. It was really an agreement between the employee and TeleTech in terms of how that concern might be handled.

\* \* \*

Q. Was it your understanding that through signing that Arbitration Agreement a TeleTech employee gave up the right to a jury trial in a dispute with TeleTech?

A. I do not recall that being what I remembered about the agreement, no.

Q. Is that something you were telling the employees?

A. No.

Q. Did you tell the employees that they could not bring a cause of action in a State Court or any Court?

A. No.

Q. And that certainly is not your understanding of the agreement?

A. No, its not my understanding of the agreement.

Q. And your understanding of the agreement is it was a process of bringing things to TeleTech if employees were having problems; is that fair?

A. Correct.

Ap. 23-24 Trovato (16-18). Later in the course of her deposition, when questioned by Defense Counsel, Ms. Trovato parroted the TeleTech authored description's reference to a "third-party mediator."

Q. Do you recall much discussion about arbitration?

A. Sometimes. Sometimes someone would have read ahead and there's somewhere in there that talks about the cost of bringing *a third-party mediator* in and sometimes people would question about that.

Ap. 24 Trovato (21) (emphasis added).

Ms. Trovato's erroneous understanding of the terms of the Arbitration Agreement was maintained even though she, unlike the new-employees in the orientation session, had the benefit of time to sit and read it. Ap. 27 Trovato (32). Ms. Trovato maintained this misunderstanding of the Arbitration Agreement's purpose even after reading the six-page document, despite having a Bachelor of Science degree in Business Management with a major in personnel management and a twenty-plus year employment history in human resources. Ap. 20 & 21 Trovato (4 & 6-7). Ms. Trovato maintained her misunderstanding of the Agreement's purpose even though she was trained to facilitate new-employees in the completion and signing of the "new-hire paperwork," including the Arbitration Agreement. Ap. 27-28 Trovato (32-34).

In her deposition, Ms. Clites explained to Defense Counsel that she does not recall Ms.

Trovato saying anything about arbitration in the HR orientation session and that she has no recollection of ever having signed the Arbitration Agreement. Ap. 16 Clites (61). In addition, she explained that she had never heard of arbitration:

Q. Okay. Do you recall Ms. Trovato saying anything about arbitration?"

A. No.

Q. Okay. I'd ask you to turn to page 6 of 6 which has got the Bates stamp number 130 on it. Is that your signature?

A. It appears to be, yes.

Q. Okay. And it's dated October 25<sup>th</sup> of '04?

A. Yes.

Q. Okay. Now sitting here today, you don't have any recollection of having signed this document; is that correct?

A. Correct.

Q. Okay what about the concept of arbitration? Had you ever heard of arbitration before?

A. No.

Q. Sitting here today, what do you know about arbitration?

A. All I know is everything that I've learned from my lawyer or what's in front of me right now.

Ap. 16 Clites (61). In addition, Ms. Clites repeatedly explained to Defense Counsel that as the various "new-hire paper work" documents signed, including the Arbitration Agreement, "were in a stack of documents and all signed at one time" she has no specific recollection of signing any of the individual documents. Ap. 17 & 18 Clites (83, 87, 88); *see also* Ap. 13, (48-49), Ap. 14 (51), Ap. 14-15 (53-54, 56), Ap.16 (60).

## **B. The Terms of the Arbitration Agreement.**

The TeleTech Arbitration Agreement provides the following, in relevant part. First, the Parties to the Agreement are TeleTech Holdings, Inc., including all of its officers, directors, agents, employees, subsidiaries, and affiliates (TeleTech or the Company) and Jill Clites (Employee). Ap. 53 ¶1.

The third paragraph of the Agreement sets forth the Agreement to Arbitrate. This paragraph provides that TeleTech and the Employee agree that any disputes that arise between the Employee and the Company, shall be submitted to binding arbitration. Ap. 53 ¶3. Such arbitration is to be held in Denver, Colorado pursuant to the American Arbitration Association (AAA) Employment Dispute Resolution Rules. *See* AAA Locale Determinations Q&A <http://www.adr.org/sp.asp?id=22025>. Moreover, this paragraph of the agreement creates the legal fiction that the Employee (Ms. Clites) is employed in Denver, Colorado. Ap. 53 ¶3. Ms. Clites worked for TeleTech (W.Va), in Morgantown, West Virginia.

Subparagraph 7.1 of the Agreement provides a list of the “disputes” that are said to be subject to arbitration:

Except as specifically excluded in 7.2 below, this Arbitration Agreement covers any and all disputes between the Company and Employee. Such disputes include by way of example only and not limited to, disputes regarding Employee’s employment with the Company and termination thereof, employment discrimination, harassment and retaliation, wrongful discharge, defamation, invasion of privacy, negligence, intentional infliction of emotional distress, wages, benefits and overtime, leave, and disputes regarding formation and enforceability [sic] of this Arbitration Agreement.

Ap. 54 ¶ 7.1. Similarly, Paragraph 15 of the Agreement, styled “Substantive Rights” explains that: “Except for the right to a jury trial, the Employee retains all rights and remedies under Title

VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.” Ap. 57 ¶15. These compendia of disputes are each devoid of specific reference to causes of action arising under the HRA. Moreover, noticeably absent from the scope of Subparagraph 7.1, as well as Paragraph 15, are disputes which typically would give rise to the institution of a cause of action by TeleTech against an employee.

Subparagraph 7.2 of the Agreement specifically excludes disputes related to Workers Compensation and Unemployment Compensation. Moreover, causes of action which might be instituted by the Company against the Employee in a state or federal court are excluded from the Agreement. Specifically, the Agreement provides that “claims for injunctive relief arising out of irreparable injury from breach or threatened breach of any duty owed by Employee to the Company” are excluded from the Agreement. Ap. 54-55 ¶ 7.2. This paragraph permits, *for example*, the Company’s direct access to a state or federal court for the purposes of obtaining relief for alleged Employee breaches of trade secret provisions, non-compete provisions, confidentiality agreements, and any other conceivable breach. No such mutual avenue of relief is reserved to the employee. Furthermore, TeleTech reserves its right to seek injunctive relief against an employee in a court of law, even though Subparagraph 9.5 expressly grants to the arbitrator the requisite “jurisdiction to award any relief, including equitable relief.” Ap. 56 ¶ 9.5.

Paragraph 11 of the Agreement provides for the payment of arbitration fees and costs. All such costs are to be born by each of the parties to the Agreement. Ap. 57 ¶11.1. The costs of arbitration to employees, such as Ms. Clites, under the terms of the Agreement, are decidedly burdensome.

Initially, the Agreement selects a locale which adds expenses Ms. Clites would not be

required to pay if permitted to pursue her claim in the circuit court. "The Company and the Employee agree that any disputes that arise between the Employee, . . . and the Company, . . . shall be submitted to binding arbitration . . . in Denver Colorado, in the city in which Employee is employed by the Company."<sup>3</sup> Ap. 53 ¶3; See AAA Locale Determinations Q&A <http://www.adr.org/sp.asp?id=22025>. As under the express terms of the Arbitration Agreement, the forum is that of Denver, Colorado, Ms. Clites would necessarily incur airfare, lodging, meals, cab fares, long distance phone calls, postage and other expenses she would not incur while pursuing her claims in the circuit court.

Moreover, as the Agreement is not the result of an employer Plan, but an individual agreement between employer and employee, the AAA Rules for Employment Disputes direct that "unless the parties agree otherwise, arbitrator compensation, and expenses as defined in section (v) below, shall be borne equally by the parties." See AAA National Rules for Resolution of Employment Disputes (7/1/2006) (hereinafter AAA Rules), Rule 48, Interpretation and Application of Rules - "Costs of Arbitration (including AAA Administrative Fees) <http://www.adr.org/sp.asp?id=32904#emp>. The Agreement provides only that the arbitrator's fees (compensation) shall be paid by TeleTech Holdings, Inc. Ap. 57 ¶11.2.

**Costs** Each party shall bear its own fees and costs incurred in connection with the arbitration. The arbitrator, however, shall have the discretion to award fees and

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<sup>3</sup>The holding company, TeleTech Holding Inc.'s principal office is in Denver, Colorado. The AAA regional office for West Virginia is in Philadelphia. <http://www.adr.org/si.asp?id=4620>; <http://www.adr.org/si.asp?id=4634>.

<sup>4</sup>This interpretation of the locale selection provision of the Agreement is consistent with the AAA Q&A concerning Locale Determinations: Employment because the phrase "in Denver, Colorado," is used. See <http://www.adr.org/sp.asp?id=22025>. Any other construction of the Arbitration Agreement's terms would require that AAA locale determinations to be disregarded.

costs to the prevailing party in accordance with prevailing law.

**Fee of the Arbitrator** The arbitrator's fees shall be paid by the Company.

Ap. 57 ¶11.1. As a consequence, pursuant to the express terms of the Agreement Ms. Clites would be responsible for one half of all expenses incurred by the arbitrator.

The AAA rules also provide that absent an agreement, "the expenses of witnesses for either side shall be borne by the party producing such witnesses." AAA Rules, 45 (Expenses) <http://www.adr.org/sp.asp?id=32904#emp>. Accordingly, Ms. Clites would be required, to pay for the travel, lodging, and meal expenses of her witnesses traveling to Denver, Colorado.

In addition, the AAA Filing Fees and Case Service Fees are far in excess of the Filing Fee which Ms. Clites was required to pay in order to institute her case in the circuit court. The fees are billed in accordance with a schedule promulgated by the AAA. These fees range from a minimum total of \$950 for a claim "above \$0 to \$10,000" and are "capped" at \$65,000. AAA Rules, 48 (Individually-Negotiated Agreements)(i) <http://www.adr.org/sp.asp?id=32904#emp>. The median AAA filing and Service Fee totals \$6000 for claims "above \$300,000 to \$500,000." Id. Furthermore, these "fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Id. Fees are only subject to a decrease if reduced before the first hearing. Id. Moreover, the fees described in section (i) "do not cover the rental of hearing rooms." AAA Rules, 48 (Individually-Negotiated Agreements)(iii) <http://www.adr.org/sp.asp?id=32904#emp>. Undersigned counsel was advised by the Denver, Colorado Regional Office of AAA that the fee for hearing rooms is \$100 per day. Ms. Clites would not be required to pay any monies for an appearance in the circuit court's court room.

The AAA rules also require that "any party desiring a stenographic record shall make

arrangements directly with a stenographer . . . The requesting party or parties shall pay the cost of the record.” AAA Rules, 20 <http://www.adr.org/sp.asp?id=32904#emp>. Ms. Clites would not be required to hire and pay an independent court reporter in order to properly preserve the record in circuit court. This AAA provision is reiterated by the Agreement: “either party has the right to have a written transcript made of the arbitration proceedings. The transcript shall be paid by the party requesting it.” Ap. 56 ¶10.2.

Moreover, the Arbitration Agreement establishes that discovery will be conducted in accordance with the Federal Rules of Civil procedure. *See* Ap. 55 ¶8. Accordingly, Ms. Clites will expend the same monies for discovery, experts and the like in the arbitral forum that she would expend in prosecuting the matter in the circuit court.

Furthermore, “the AAA may require deposits in advance of any hearings such sums of money as it deems necessary **to cover the expenses of the arbitration.**” AAA Rules, 46 (Deposits) (emphasis added) <http://www.adr.org/sp.asp?id=32904#emp>. No such advance of moneys is required for the circuit court to conduct a hearing.

Finally, and perhaps most chillingly, the AAA may terminate arbitration proceedings for non-payment of arbitrator compensation or administrative charges.

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend or terminate the proceedings.

AAA Rules, 47 (Suspension for Non-Payment) <http://www.adr.org/sp.asp?id=32904#emp>.

Aside from the modest jury impaneling fee which Ms. Clites must pay to the circuit court, she need not fear even an arguable basis for suspension or termination, in a state court proceeding.

### C. The Rewrite.

The Arbitration Agreement drafted by the Respondent TeleTech permits its amendment or modification only “by a writing executed by the Employee and by the President of TeleTech.” Ap. 57 ¶13 A. After the Respondents moved to dismiss Ms. Clites’ cause of action, after Ms. Clites challenged the enforceability of the Arbitration Agreement on grounds of unconscionability, and after Ms. Clites served discovery requests upon TeleTech which sought production of Arbitrator decisions detailing all AAA fees and expenses incurred by TeleTech employees, as well as arbitrator interpretations of the phrases “in Denver Colorado” and “arbitrator’s fee” as used in the Arbitration Agreement, an Assistant General Counsel of the holding company associated with TeleTech executed an affidavit averring the production request too burdensome. Ap. 68-70.

In the affidavit, the Assistant General Counsel also stated that her job duties include dealing with situations arising from civil actions involving the holding company “and *sometimes* its affiliates and subsidiaries,” such as TeleTech. Ap. 68 ¶12. And although she could not produce the arbitrator decisions requested in discovery, averred that the holding company “has never interpreted or attempted to enforce the Arbitration Agreement as requiring that arbitration take place in Denver, Colorado.” Ap. 69 ¶8. In addition, the Assistant General Counsel stated that the holding company “*generally* pays the fees and costs associated with an arbitration occurring under the Arbitration Agreement with employees.” Ap.69 ¶9 (emphasis added). And that “[s]pecifically, TeleTech Holding, Inc. *stipulates in this case* that it will pay any AAA filing fees, any required AAA deposits, the costs of the AAA arbitrator, including travel expenses, the court reporter and the costs associated with any room rental for the arbitration.” Ap.69-70 ¶9

(emphasis added). The Arbitration Agreement, as written, binds approximately 7,000 TeleTech employees. Ap. 68 ¶3.

#### IV JURISDICTIONAL STATEMENT

##### A. This Court has Original Jurisdiction.

“Prohibition will lie to hear claims relating to a court’s jurisdiction or to address non-jurisdictional issues where a court’s challenged ruling or action is clearly contrary to law and an appeal would not be as adequate as review in prohibition.” *State ex rel., Dunlap v. Berger*, 211 W.Va. 549, 555, 567 S.E.2d 265, 271 (2002), cert. denied, 537 U.S. 1087 (2002), *citing* Syl. pt 1, *Hinkle v. Black*, 154 W.Va. 112, 262 S.E.2d 744 (1979); Syl. pt. 1, 2, and 3, *State ex rel., Davidson v. Hoke*, 532 S.E.2d 50, 207 W.Va. 332 (2000). A writ of prohibition is an appropriate vehicle by which to prevent enforcement of a circuit court’s directive which requires a party to resolve her claims through arbitration. *See Dunlap*, 211 W.Va. at 555, 567 S.E.2d at 271 *citing State ex rel. United, Inc. v. Sanders*, 204 W.Va. 23, 25-26, 511 S.E.2d 134, 136-37 (1999).

Therefore, this Court has the requisite original jurisdiction to entertain Ms. Clites’ Writ of Prohibition which seeks to prevent enforcement of the circuit court’s order staying, but not dismissing, her cause of action for unlawful employment discrimination “pending arbitration as set forth in the subject Arbitration Agreement.” Ap. 7.

#### V STANDARD OF REVIEW

As the circuit court determines in the first instance, as a matter of law, whether a valid and enforceable arbitration agreement exists between the parties, this Court’s review of the circuit court’s legal determinations in support of enforcement of an arbitration agreement, is *de*

*novo.* Dunlap, 211 W.Va. at 555-556, 567 S.E.2d at 271-272.

## VI ARGUMENT

### **A. The Circuit Court Erred as a Matter of Law When it Re-Wrote the Arbitration Agreement Permitting TeleTech to Unilaterally Modify and Amend the Agreement's Express Terms as No Existing Rule of Law Permits a Party to Resuscitate a Legally Defective Contract Merely by Offering to Change it.**

As noted, *supra* in the Statement of Facts, Section III(b), the Arbitration Agreement drafted by TeleTech expressly provides that, with the exception of the arbitrator's fee, "[e]ach party shall bear its own fees and costs incurred in connection with the arbitration." As a result of this express contractual language, drafted by TeleTech, Ms Clites would incur costs, in connection with the arbitration TeleTech seeks to compel, so unreasonably burdensome to an unemployed person as to substantially deter her efforts to enforce and vindicate her rights and protections under the HRA. As a result, the Arbitration Agreement at issue is unconscionable and unenforceable, against Ms. Clites. *See* discussion, *infra*, at Section V(B); *see also* Syl. pt 4, Dunlap, 211 W.Va. at 551, 567 S.E.2d at 267.

After Ms. Clites opposed enforcement of the Arbitration Agreement on grounds that it imposed unreasonably burdensome costs upon her such as to render the Agreement unenforceable, TeleTech through an employee without authority to alter the Agreement's terms [*see* Ap. 57 ¶13] advised the circuit court that it would agree to unilaterally alter the express contractual provisions such that Ms. Clites would not incur any costs and expenses she would not otherwise incur by pursuing her HRA claims in court. The circuit court, thereafter, entered an Order incorporating the post-suit offer, thereby altering the Arbitration Agreement's terms. Ap. 6 & 7. By accepting TeleTech's post-suit, unilateral offer to alter the terms of the Arbitration

Agreement so as to eliminate the unduly burdensome costs occasioned by its express terms, the circuit court ruled in a manner that is clearly contrary to law.

In the case *sub judice*, TeleTech did not offer “to re-write a business contract that was knowingly entered by two sophisticated parties – where a court doing equity might seek to put the parties where they really intended to be, by correcting a provision in the contract that has become unconscionable because of a mistake or changed circumstances.” Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284. To the contrary, TeleTech offered to re-write a contract which the circuit court expressly found to be one of adhesion and ineluctably determined was unconscionable because it imposed costs too burdensome upon Ms. Clites. *See Dunlap*, 211 W.Va. at 568, 567 S.E.2d at 284; *see also* Syl. pt 4, Dunlap, 211 W.Va. at 551, 567 S.E.2d at 267. Nonetheless, despite its express finding of adhesion and its necessary but unarticulated finding (as a prerequisite to re-writing the Agreement) of unconscionability, the circuit court accepted and applied TeleTech’s post-suit offer of amendment and thereby strove to breathe life into the “dead on arrival” unconscionable, adhesion contract so as to render it enforceable despite its obvious mortal infirmities.

In Dunlap, this Court considered a similar effort by a defendant-drafter of an unconscionable adhesion contract to resuscitate an arbitration agreement which should, at the outset, have been declared DOA.

Friedman’s *et al.* argue that if this Court finds that any provisions of Friedman’s purchase and financing agreement unconscionably limit Mr. Dunlap’s rights and remedies, this Court should remand to the circuit court with instructions to compel Mr. Dunlap to go to arbitration on his claims against Friedman’s *et al.* under altered terms and conditions in which Mr. Dunlap could fully and effectively vindicate his rights in the arbitral forum.

Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284. Applying neutral principles of contract law, this Court soundly rejected the Dunlap defendants' efforts at post-suit reconstruction of the Arbitration Agreement so as to compel arbitration. In so doing, the Court cited with approval *In re Managed Care Litigation*, 132 F. Supp.2d 989, 1001 (S.D.Fla. 2000) and its determination that "[p]rinciples of justice and fair play . . . lead to the conclusion that one party unilaterally cannot alter *post litem motam* terms of an agreement." Dunlap, 211 W.Va. at 567, 567 S.E.2d at 283. In addition, through recitation to Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83 (2000), this Court made clear that the post-suit amendments to Arbitration Agreements, such as that sought in Dunlap as well as in the case *sub judice*, are inconsistent with general contract theories, such as the prerequisite that "a meeting of the minds" be reached before a contract is formed.

[W]hether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such willingness "can be seen, at most, as an offer to modify the contract; an offer never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it."

Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284 *citing* Armendariz, 24 Cal.4th at 697. Finally; this Court, through recital to Flyer Printing Co. v. Hill, 805 So.2d 829 (Fla. App. 2001) made manifest the proposition that the prohibition against unilateral *post litem motam* alteration of an adhesion contract's terms applies with equal force to arbitration agreements which, pursuant to their terms, impose unduly burdensome costs: "Flyer Printing Points out that it offered to pay all the costs of arbitration notwithstanding the language of the agreement. Hill rejected this unilateral offer to amend the agreement, however, and we are not authorized to remake the

parties' contract." Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284 *citing* Flyer Printing Co. v. Hill, 805 So.2d at 833.

After its review of the foregoing relevant, persuasive authority concerning post-suit efforts to re-write an adhesion contract with "conscionable" terms so as to render an unconscionable contract enforceable, this Court in Dunlap found as follows: "we think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt." Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284. Ultimately, this Court, concluded that the circuit court in Dunlap erred in refusing to exercise its jurisdiction over the plaintiff's claims. Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284.

Dunlap's prohibition against post-suit alteration of unconscionable contractual terms prevents the author of an adhesion contract from overreaching when drafting the agreement's express terms and then avoiding the consequences of the unlawful overreach through procedural gamesmanship. More pertinently, Dunlap's proscription against a court redrafting an unconscionable adhesion contract deters employers from drafting such agreements in the belief that most employees will either not challenge the agreement's terms and thereby submit to its onerous contractual consequences, or in the rare event of employee challenge, be guaranteed that the agreement will simply be judicially rewritten so as to render the unconscionable, conscionable.

Thus, TeleTech's *post litem motam* manipulation of the Arbitration Agreement's terms through its declaration of: "that's not what we really meant – we take it all back," is of no moment, in light of Dunlap. This rationale for foreclosing the circuit court's resuscitation of the DOA Arbitration Agreement is particularly compelling, in this case, as at least 7,000 other

TeleTech employees are currently bound to the unconscionable costs expressly drafted into the Agreement's terms by TeleTech. Therefore, this Court should grant Ms. Clites' Petition for a Writ of Prohibition and remand this case to the circuit court with instructions to exercise its jurisdiction over her claims, brought pursuant to the HRA.

**B. The Evidence of Record Amply Supports the Circuit Court's Unarticulated, Ineluctable Finding that TeleTech's Arbitration Agreement is Unconscionable Because it Imposes Unduly Burdensome Costs Upon Ms. Clites.**

In Syllabus Point 4 of Dunlap, this Court held that unreasonably burdensome costs imposed by an adhesion contract, upon a person seeking to vindicate statutory rights such as those guaranteed by the HRA, render the agreement unconscionable and unenforceable.

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Syl. pt. 4, Dunlap, 211 W.Va. at 551, 567 S.E.2d at 267.<sup>5</sup> In this case, the circuit court held that the Arbitration Agreement, at issue, is an adhesion contract. Moreover, in the case *sub judice*, Ms. Clites met her burden of showing the costs she would likely incur under the express terms of TeleTech's adhesive Arbitration Agreement.

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<sup>5</sup>Respondents may cite to Merrill Lynch, Pierce, Fenner, & Spencer v. Coe, 313 F.Supp.2d 603 (S.D.W.V. 2004) and aver that the Federal Arbitration Act, 9 USC §1, *et seq.*, preempts the holdings of Dunlap. However, even the Coe court acknowledged that Syllabus Point 4 of Dunlap was a sound neutral principle of state contract law which did not give rise to preemption issues. Coe, 313 F.Supp.2d at 616.

As previously noted, the Arbitration Agreement drafted by TeleTech expressly provides that, with the exception of the arbitrator's fee, "[e]ach party shall bear its own fees and costs incurred in connection with the arbitration." Ap. 57 ¶11. As the Agreement is not the result of an employer Plan, and, therefore, is an individual agreement between employer and employee, the AAA Rules for Employment Disputes establish unreasonably burdensome filing and case service fees as they are far in excess of the fees Ms. Clites was required to pay in order to file her cause of action in the circuit court. *See Dunlap*, 211 W.Va. at 565, 567 S.E.2d at 281 *citing Armendariz*, 24 Cal 4<sup>th</sup> at 110.

The minimum AAA Fee associated with an employment dispute is \$950 for a case valued above \$0 to \$10,000. The AAA fees are capped at \$65,000 with the median fee set at \$6,000 for claims above \$300,000 to \$500,000. The AAA Filing and Service Fees, alone, are sufficient to render TeleTech's adhesion contract unconscionable within the meaning of Dunlap. However, the Agreement, as written, imposes additional administrative costs and fees upon employees, such as Ms. Clites, which would not be borne in a circuit court. Such costs and fees include, but are not necessarily limited to, AAA deposits in advance of hearings, the Denver Colorado arbitrator's expenses, the costs of hiring and paying an independent court reporter, room rental fees, and travel to and from Denver. *See discussion, supra*, at Section III (B). Moreover, should any of the AAA administrative fees not be timely paid, the AAA arbitrator may stop the arbitration proceedings and order suspension or termination. Clearly then, the costs imposed upon Ms. Clites are far in excess of those she would incur in the course of pursuing her cause of action in the circuit court.

The circuit court found that TeleTech's Arbitration Agreement was a contract of

adhesion. Ms. Clites met her burden of showing the costs likely to be imposed upon her under the express terms of the adhesive Arbitration Agreement drafted by TeleTech. The circuit court necessarily found those costs, as demonstrated by Ms. Clites, to be unreasonably burdensome, within the meaning of Dunlap, as it, contrary to Dunlap's admonition, rewrote the Arbitration Agreement in an attempt to sanitize the unconscionable cost provisions. *See* Argument, *supra*, at Section VI (A). Moreover, it is apparent that the magnitude of the costs associated with pursuing her claims under the Arbitration Agreement, as written, would have a substantial deterrent effect upon the unemployed Ms. Clites when seeking to enforce and vindicate her rights and protections under the HRA.

Accordingly, Ms. Clites has satisfied all of the elements established by Syllabus Point 4 of Dunlap. As a consequence, it was incumbent upon the circuit court to declare TeleTech's Arbitration Agreement an unenforceable unconscionable contract of adhesion and, thereby deny TeleTech's motion for a stay. Thus, the circuit court's order directing Ms. Clites to pursue arbitration constitutes a clear error of law. Therefore, this Court should grant Ms. Clites' Petition for a Writ of Prohibition and remand this case to the circuit court with instructions to exercise its jurisdiction over her claims, brought pursuant to the HRA.

**C. The Circuit Court Committed a Clear Error of Law When it Imposed Upon Ms. Clites a Duty to Read TeleTech's Unconscionable Contract of Adhesion.**

In Dunlap, this Court specifically discussed contracts of adhesion and in so doing invoked the Restatement of Contracts Second.

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial

number of customers retained counsel and reviewed the standard terms. Employees regularly using the form often have only limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. *But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.* [citations omitted, primary emphasis in original, secondary emphasis added].

Dunlap, 211 W.Va. at 558, 567 S.E.2d at 274 (secondary emphasis added) *citing with approval* Restatement (Second) Contracts §211, cmt. b. This comment to the Restatement reveals that the drafters of adhesion contracts neither anticipate nor want the adhering party to read or even understand the terms of the agreement. As a consequence, logic dictates that the “duty to read” is without application in the context an adhesion contract.

The fact that there is no “duty to read” a contract of adhesion, however, does not mean that all such contracts may be avoided simply through an assertion that there was no conscious agreement to the contract’s terms – no meeting of the minds. To the contrary, the Restatement explains that there is a conditional assent to the terms by the non-reading adhering party. The non-reading adhering party “trust[s] to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated [and] . . . *understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.*” Restatement §211, cmt. b (secondary emphasis added). Thus, a contract of adhesion will not be enforced against a non-reading adhering party when it: (1) “does not fall within the reasonable expectations of the weaker or adhering party”; or (2) “even if consistent with the reasonable expectations of the parties . . . is unduly oppressive or ‘unconscionable.’” Dunlap, 211 W.Va. at 557, n.4, 567 S.E.2d at 273, n.4.

In its Order the circuit court ignored Dunlap's discussion of when contracts of adhesion will not be enforced against a non-reading adhering party and instead invoked the general contract principle of Reddy v. Community Health Foundation of Man, 171 W.Va. 368, 298 S.E.2d 906 (1982): "*In the absence of extraordinary circumstances*, the failure to read a contract before signing it does not excuse a party from being bound by its terms." Reddy, 171 W.Va. at 373, 298 S.E.2d at 910 (emphasis added). Reddy's general principle, however, has no application to the adhesion contract, at issue in the case *sub judice*. Initially, Dr. Reddy did not argue that the contract containing the non-compete clause he contested was one of adhesion. Furthermore, the Court specifically found that "the record indicates that the parties entered into the fourth contract [the contract at issue] freely, knowingly and in good faith." Reddy, 171 W.Va. at 373, 298 S.E.2d at 910. Moreover, although never directly addressed within the opinion, pursuant to Reddy, it would appear that one of the "extraordinary circumstances" that will excuse a failure to read is adhesion: "if the entire contract fails, for lack of consideration, fraud, duress, *adhesion*, or other contractual excuse, the covenant is also without effect." Reddy, 171 W.Va. at 376, 298 S.E.2d at 915 (emphasis added). This, conclusion, of course, is entirely consistent with this Court's adoption of the Restatement in Dunlap.

Thus, because there is no "duty to read" a contract of adhesion, the circuit court erroneously ignored Ms. Clites' explanations as to why she did not knowingly and voluntarily waive her right to pursue her cause of action in the circuit court [*see* Statement of Facts §III (A)] with the following: "It is irrelevant what Ms. Trovato [the HR Generalist] did or did not understand regarding the Agreement. Plainly stated and underlined on page one (1) of the Agreement is the phrase, 'the Company and the Employee give up the right to a jury trial.'" Ap.

5. The Court erred in imposing the adhesion contract's terms upon Ms. Clites in conformance with the "duty to read" because, to paraphrase Dunlap, reliance upon an underlined phrase in the first page of the contract misses the point. The legal enforceability of a contract of adhesion has little to do with whether there is underlining of a contractual provision on the first page of a document that is not going to be read, and everything to do with whether the adhesion contract's provisions would operate unconscionably. See Dunlap, 211 W.Va. at 560, n.6, 567 S.E.2d at 276, n.6.

The foregoing demonstrates that the circuit court violated enforcement of contract principles adopted by this Court in Dunlap. Thus, the circuit court's order, imposing upon Ms. Clites a "duty to read" TeleTech's contract of adhesion, is a clear error of law. Therefore, this Court should grant Ms. Clites' Petition for a Writ of Prohibition and remand this case to the circuit court with instructions to exercise its jurisdiction over her claims brought pursuant to the HRA.

**D. The Circuit Court Committed a Clear Error of Law When it Held that TeleTech's Adhesion Contract Was Not Unconscionable and Therefore Enforceable.**

The circuit court found that the Arbitration Agreement drafted by TeleTech was a contract of adhesion: "The Court FINDS that the Arbitration Agreement that Plaintiff signed is a contract of adhesion in that it is a standardized contract form, containing no individualized terms, offered essentially on a take it or leave it basis." Ap. 7. However the circuit court also found, generally, TeleTech's Arbitration Agreement valid and enforceable despite reserving to itself the right to avoid arbitration of those claims it would most likely bring against its employees: "the Court also CONCLUDES that the Arbitration Agreement is valid and enforceable. The terms of

the Arbitration Agreement are not unreasonably favorable to TeleTech and not so one-sided as to render the Agreement unconscionable.” Ap. 7. In reaching this conclusion, the circuit court ignored relevant persuasive authority holding that an exclusion for an employer seeking injunctive relief against its employees (an exclusion virtually identical to that contained within the TeleTech Arbitration Agreement) rendered the agreement unconscionable and unenforceable. See Ferguson v Countrywide Credit Industries, Inc., 298 F.3d 778 (9<sup>th</sup> Cir. 2002).

The standard for determining whether a contract is unconscionable in West Virginia is broadly stated in the first instance as follows: “When the gross inadequacy in bargaining power present with an adhesion contract combines with terms that unreasonably favor a stronger party then the contract provisions should be found unconscionable and unenforceable.” Saylor, 216 W.Va. 766, 774, 613 S.E.2d 914, 922 (2005). The court’s actual determination as to whether a contract is unconscionable focuses on four specific elements: (1) “the relative positions of the parties”; (2) “the adequacy of bargaining position”; (3) “the meaningful alternatives available to the plaintiff”; and, (4) “the existence of unfair terms in the contract.” Saylor, 613 S.E.2d at 922. In the instant case, these elements establish TeleTech’s Arbitration Agreement as unconscionable.

**(i) The Relative Positions of the Parties Supports a Finding that TeleTech’s Adhesive Arbitration Agreement is Unconscionable as a Matter of Law.**

TeleTech is a sophisticated corporate entity which likely drafted the Arbitration Agreement to include the subject exclusion, at the direction of legal counsel, so as to meet its needs. Ms. Clites, by contrast, had never even heard of “arbitration” until after suit was filed in the circuit court. In addition, in drafting the Arbitration Agreement TeleTech included so much

“legal gobbledeygook” [see Dunlap, 567 S.E.2d at 269 n.2] that the HR Generalist charged with facilitating New Employee Orientation and teaching new hires about the Agreement’s purpose did not even understand it. Accordingly, TeleTech ensured that new-hires, like Ms. Clites, would, more likely than not, never know of the Agreement’s true terms until after sustaining an injury at its hands and commencing a cause of action for relief.

Moreover, TeleTech ensured the new-hires would not feel “uncomfortable” about signing the Arbitration Agreement without reading it, by misleading the new-hires as to its purpose. TeleTech accomplished this end by erroneously advising that they would “bring a 3<sup>rd</sup> party (mediator) to listen to both sides of a dispute.” In addition, TeleTech never advised the new-hires that they were waiving their right to a jury trial in a court of law. Accordingly, TeleTech rendered yet more disparate the unequal bargaining positions of the parties through the dissemination of misleading information in relation to the Arbitration Agreement’s purpose, mindful that it had created circumstances of its submission in which it would not be read or understood. Accordingly, the relative positions of the parties to the case at bar supports a conclusion that the Arbitration Agreement is unconscionable.

**(ii) The Inadequacy of Ms. Clites’ Bargaining Position Supports a Finding that TeleTech’s Adhesive Arbitration Agreement is Unconscionable as a Matter of Law.**

No language in the Arbitration Agreement informs that a new-hire has the right to consult counsel before signing it. In addition, there is no provision for negotiating the terms of the Agreement with any representative of TeleTech directly available in the Morgantown facility. In deed, the Agreement may only be “modified” by a writing executed on behalf of TeleTech, “by the President of TeleTech.” Ap. 57 ¶13 (emphasis added). Thus, TeleTech has ensured that even

the most tenacious new-hire would never be afforded the opportunity to bargain.

Furthermore, it is obvious that individuals seeking employment at a pay rate of \$8.00 per hour are not in a position to bargain away new found employment so as to negotiate an Agreement they were not given any real opportunity to read. Accordingly, it is apparent from the circumstances of this case, that the unemployed Ms. Clites' bargaining position was clearly inadequate. Therefore, this factor, too, supports the conclusion that the Arbitration Agreement is unconscionable under Saylor.

**(iii) No Meaningful Alternatives Were Available to Ms. Clites, Therefore this Factor too Supports a Finding that TeleTech's Adhesive Arbitration Agreement is Unconscionable as a Matter of Law.**

Ms. Clites' sole choice in the matter, even assuming she had read the Arbitration Agreement, was in the nature of a "Hobson's Choice." Remain unemployed, beyond ten months, or accept the terms of the Agreement. Such choice is no choice at all. Thus, no alternative was available save to sign the "stack of documents." Therefore, this factor, too, supports the conclusion that the Arbitration Agreement is unconscionable, within the meaning of Saylor.

**(iv) The Existence of Unfair Terms in TeleTech's Contract of Adhesion Supports a Finding that TeleTech's Arbitration Agreement is Unconscionable as a Matter of Law.**

The final Saylor factor assesses whether there exist unfair terms in the contract. Unfair, at its core, means not evenhanded. *See* THE AMERICAN HERITAGE DICTIONARY (3<sup>rd</sup> ed. 1992) (not just or evenhanded). Under the Arbitration Agreement drafted by TeleTech, the parties are not evenhandedly bound to seek relief through arbitration as despite an initial promise to the contrary, TeleTech excludes from the scope of arbitration all those claims it is most likely to pursue against its employee while at the same time steadfastly obligating the employee to

arbitrate all claims she might bring against it.

Page 1 of 6, Paragraph 3 of the Arbitration Agreement sets forth its essential purpose and expressly provides that “the Company and the employee agree that any disputes that arise between the Employee, on the one hand, and the Company, . . . on the other hand . . . which cannot be resolved within the Company, shall be submitted to binding arbitration.” Ap. 53 ¶3.

A(). On first blush it appears that TeleTech, just as the employee, has agreed to submit all claims it might have against its employee to arbitration. In other words, it appears from this paragraph of the Agreement that TeleTech has made a mutual promise “to be bound by the same rules” as those imposed upon Ms. Clites. *See Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4<sup>th</sup> Cir. 1998). However, the TeleTech promise to be “bound by the same rules” is illusory. The promise is illusory because what Paragraph 3 giveth, Paragraph 7 taketh away.

Paragraph 7 is styled “Scope of Arbitration.” Although Sub-paragraph 7.1 again declares that “this Arbitration Agreement covers any and all disputes between the Company and the Employee,” in its enumeration of the “Disputes Included” within the Agreement’s scope, the dispute list is limited to those claims for which an employee would most likely bring suit against her employer. *See Ap. 54 ¶7.1.* Conspicuously absent from the enumerated disputes are any claims which would commonly give rise to a cause of action commenced by the employer against its employee. For example, absent from the list are claims for employee breaches such as intellectual property and non-compete violations, the use or disclosure of trade secrets, and use or disclosure of confidential information.

Such disputes include by way of example only and not limited to, disputes regarding the Employee’s employment with the Company and termination thereof, employment discrimination, harassment and retaliation, wrongful discharge,

defamation, invasion of privacy, negligence, intentional infliction of emotional distress, wages, benefits and overtime, leave, and disputes regarding the formation and enforceability of this Arbitration Agreement.

Ap. 54 ¶7.1.

Not only are the claims TeleTech is most likely to bring against its employee absent from the “Disputes Included” list, but, to reinforce the disparate obligations established by the adhesive Arbitration Agreement, Subparagraph 7.1 specifically excludes from TeleTech’s *faux* global promise to arbitrate all those claims enumerated in Subparagraph 7.2. A review of the Subparagraph 7.2 claims listed reveals the claims to be those which TeleTech would most likely pursue against its employee.

The following *categories* of disputes are excluded from the cope of coverage of the arbitration agreement: (1) Workers Compensation and unemployment compensation claims; and (2) *claims for injunctive relief arising out of irreparable injury from the breach or threatened breach of any duty owed by Employee to the Company.*

Ap. 55 ¶7.2 (emphasis added). Curiously, when drafting the Arbitration Agreement TeleTech saw fit to exclude from the scope of arbitration all claims it might have for injunctive relief against its Employee while at the same time ensuring that Subparagraph 9.5 of the Agreement expressly grants to the arbitrator the requisite “jurisdiction to award any relief, including equitable relief.” Ap. 56 ¶9.5. Such equitable relief would, of course, include the injunctive relief reserved to TeleTech (but not Ms. Clites) from the “Scope of Arbitration.” As a consequence, despite its initial promise to arbitrate all claims, Subparagraph 7.2 permits TeleTech, “to rush to court” when it believes “the prospect of arbitration is uninviting.” See Hightower v. GMRI, Inc., 272 F.3d 239, 241 (4<sup>th</sup> Cir. 2001).

In Ferguson the court considered the effect of an exclusionary provision which, like the

TeleTech Arbitration Agreement, exempted from the scope of disputes, governed by the agreement, claims for injunctive relief initiated against the employee by the employer:

**Claims Not Covered by This Agreement:** This Agreement does not apply to or cover claims for workers' compensation or unemployment compensation benefits; claims resulting from the default of any obligation of the Company or the Employee under a mortgage loan which was granted or serviced by the Company; *claims for injunctive relief and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information*; or claims based upon an employee pension or benefit plan that either (1) contains an arbitration or other non-judicial resolution procedure, in which case the provisions of such plan apply, or (2) is underwritten by a commercial insurer which decides claims.<sup>6</sup>

Ferguson, 298 F.3d at 781, n. 2 (emphasis added). Based upon this exclusionary provision limiting the scope of the defendant employer's promise to arbitrate, the Ferguson court held the arbitration agreement unconscionable under neutral principles of California contract law.<sup>7</sup>

In its determination of whether the Ferguson agreement was unconscionable and unenforceable, the court first determined the "manner in which the contract was negotiated and the circumstances of the parties at the time." Ferguson, 298 F.3d at 783. The court found the arbitration agreement was an adhesion contract because the parties were in a position of unequal bargaining power and the terms of the agreement were "cast in a 'take it or leave it' light and

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<sup>6</sup>The ERISA claims enumerated could not be included in the arbitration agreement as overridden by any Plan term inconsistent with arbitration. Similarly, no third party underwriter could be party to the arbitration agreement. Accordingly, these exclusions, like the workers' compensation and unemployment compensation exclusions, are of no moment. See Ferguson, 298 F.3d at 785, n.6.

<sup>7</sup>California, unlike West Virginia, bifurcates analysis of unconscionability into "procedural" and "substantive." See Ferguson, 298 F.3d at 783 & 784; compare, Troy Mining Corp. v. Itmann Coal Co., 346 S.E.2d 749, 753 (W.Va. 1986). The difference in nomenclature notwithstanding, West Virginia and California's unconscionability rules are interchangeable, with the exception of the "shocks the conscience" standard. This standard imposes a far higher hurdle than the West Virginia unconscionability rule.

presented as standard non-negotiable provisions.” Ferguson, 298 F.3d at 784. The procedural unconscionability analysis employed by the Ferguson court is in keeping with West Virginia law governing contracts of adhesion. See Saylor, 613 S.E.2d at 921. And, in the case *sub judice*, the circuit court, like the Ferguson court, specifically found the Arbitration Agreement, at issue, to be adhesive.

The Ferguson court next analyzed the terms of the agreement so as to determine whether it was substantively unconscionable. This analysis “focuses on the terms of the agreement and whether those terms are so one-sided as to *shock the conscience*.” Ferguson, 298 F.3d at 784 (emphasis in original). Applying the “*shocks the conscience*” standard (a standard far more rigorous than the “existence of unfair terms” standard developed in West Virginia jurisprudence)<sup>8</sup> to the agreement’s terms, the Ferguson court held the arbitration agreement unconscionable.

More specifically, in its analysis, the court first looked to those claims which the employee was required to arbitrate, pursuant to the terms of the adhesion contract, so as to ascertain the operative scope of the arbitration agreement in relation to the employee.

**Agreement to Arbitrate; Designated Claims:** The Claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits . . . and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy.

Ferguson, 298 F. 3d at 781, n.1. A review of TeleTech’s Arbitration Agreement and employee claims which fall within the “Disputes Included” provision, as set out *supra*, establishes that the

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<sup>8</sup>See Saylor, 613 S.E.2d at 922.

employee claims included are just as (if not more) expansive than the employee claims enumerated by the agreement, at issue, in Ferguson.

The Ferguson court then compared the employee claims specifically included within the scope of arbitration to those the employer expressly excluded from its scope and, thereby, concluded that the arbitration agreement in Ferguson was substantively unconscionable because the comparison revealed the agreement's terms compelled employees to arbitrate those causes of action an employee was most likely to institute against the employer but excluded from arbitration the claims the employer would most likely file in a court of law against its employee. In other words, the arbitration agreement did not evenhandedly impose the obligation to arbitrate upon both the employer and employee. Accordingly, the court found the arbitration agreement to be so one-sided as to shock the conscience, under neutral principles of California contract law.

Countrywide's arbitration agreement was unfairly one-sided and, therefore, substantively unconscionable because the agreement "compels arbitration of the claims employees are most likely to bring against Countrywide . . . [but] exempts from arbitration the claims Countrywide is most likely to bring against its employees."

Ferguson, 298 F.2d at 785.

In the case *sub judice*, the circuit court fails even to mention the highly relevant, persuasive authority of Ferguson. Moreover, the circuit court, rather than focusing on the central issue of whether there exist unfair terms (whether the obligation to arbitrate is applied evenhandedly under the terms of the agreement) simply declares that the TeleTech "exception is a very narrow and specific exclusion" allowing TeleTech to obtain quick, emergency, injunctive relief. Notably, the circuit court does not appear to include within its decisional calculus the fact that the, as described, "very narrow specific exclusion" has application to every "*breach or*

*threatened breach of any duty owed by Employee to the Company.” Ap. 55 ¶7.2.* Accordingly, the scope and reach of the exclusion, contrary to the circuit court’s finding, is not narrow, at all.

Furthermore, the circuit court’s finding that the exceptions to arbitration embodied within Subparagraph 7.2 permits TeleTech to “quickly obtain” relief begs the question as to why TeleTech would be unable to obtain the same relief in the arbitral forum. Recall that Paragraph 9.5 of the Arbitration Agreement provides that “the arbitrator shall have the jurisdiction to award any relief, including equitable relief, as may be authorized by law.” Ap. 56 ¶9.5. Moreover, as noted by the circuit court, a party purportedly does not forgo any substantive rights under the Arbitration Agreement; a party only submits their resolution to an arbitral, rather than a judicial forum. Ap. 6. Despite such assurances, it would appear that TeleTech prefers the arbitral to judicial forum only when it appears as a defendant and not when standing in the shoes of a plaintiff seeking relief.

When TeleTech drafted the adhesive Arbitration Agreement, it neither expected nor desired its adhering employees to read it. *See Dunlap*, 211 W.Va. at 558, 567 S.E.2d at 274 *citing with approval* Restatement (Second) Contracts §211, cmt. b. As a consequence, TeleTech knew it was free to risk overreaching with a carefully crafted Agreement aimed at excluding from the arbitral forum those causes of action which it felt might be prosecuted to better advantage before the judiciary, without need for articulation of purpose, justification, or fear that the adhering employee would be in a position to negotiate terms equally advantageous. In other words, TeleTech took unfair advantage of its position as the drafter of an adhesive contract so as to ensure that those causes of action it would most likely commence against its employee were not subject to whatever disadvantages it perceived in the arbitral forum it had chosen. *See Ap.53 ¶3*

(the dispute “shall be submitted to binding arbitration before a sole neutral arbitrator of the American arbitration Association (‘AAA’) in Denver, Colorado”).

It is the unfairness inherent in the drafter of a contract of adhesion excluding from the scope of arbitration those claims, whatever they may be, which it, inescapably, perceives might be more advantageously pursued in a judicial forum which lies at the heart of the Ferguson court’s holding of unconscionability. In the case *sub judice*, the circuit court, although mechanistically finding TeleTech’s Arbitration Agreement to be one of adhesion, apparently failed to consider the unfair advantage taken by TeleTech when, in drafting the adhesive Agreement, it compelled employees to arbitrate all those causes of action an employee would be most likely to institute against it but excluded from arbitration all those claims it would most likely file, in a court of law, against its employee.

The foregoing demonstrates that the circuit court’s holding, that the adhesive Arbitration Agreement did not contain terms unreasonably favorable to TeleTech, constitutes a clear error of law. Therefore, this Court should grant Ms. Clites’ Petition for a Writ of Prohibition and remand this case to the circuit court with instructions to exercise its jurisdiction over her claims, brought pursuant to the HRA.

**E. The Agreement Violates the West Virginia Human Rights Commission Legislative Rules Governing the Knowing and Voluntary “Waiver of Rights.”**

The West Virginia Human Rights Commission (HRC) has determined that “an individual may not waive any right or claim under the HRA *unless the waiver is knowing and voluntary*. 77 CSR 6-3.1 (emphasis added). Moreover, pursuant to HRC legislative rules, a waiver of any such right “shall not be considered knowing and voluntary” unless seven conditions precedent

are met. 77 CSR 6-3.2. Those seven mandatory conditions precedent are:

(1) The waiver is part of an agreement between the individual and the employer that is written in plain English and in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question;<sup>9</sup>

(2) The waiver specifically refers to rights or claims arising under the West Virginia Human Rights Act;

(3) The waiver does not extend to rights or claims that may arise after the date the waiver is executed;

(4) The individual waives a right only in exchange for consideration that is in addition to anything of value to which the individual already is entitled;<sup>10</sup>

(5) The individual is advised in writing to consult with an attorney prior to executing the agreement and is provided with the toll free telephone number of the West Virginia State Bar Association (1-800-642-3617); and,

(6) The individual is given a period of at least twenty-one (21) days within which to consider the agreement; and

(7) The agreement provides that for a period of at least seven (7) days following execution of such agreement, the individual may revoke the agreement in writing, and the agreement shall not become effective or enforceable until the revocation period has expired.

77 CSR 6-3.2 (a) - (g).

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<sup>9</sup>The circumstances under which the waiver was obtained supports the conclusion that §6-3.2 is violated as the Agreement was not proffered in a manner calculated to promote understanding. Rather it was presented in a manner which presupposed it would not be read.

<sup>10</sup>TeleTech Holdings, Inc.'s decision to avoid arbitration for claims it might have against the Employee supports the conclusion that §6-3.2.d is violated as there is no mutual promise to submit all claims against the employee to arbitration. Consequently, Ms. Clites received nothing of value in exchange in addition to what she was already entitled. See e.g., Hill v Peoplesoft, USA, Inc., 412 F.3d 540, 544 (4<sup>th</sup> Cir 2005). Moreover, the offer of employment and continued employment cannot support the Agreement as something of additional value because an employee's knowledge of the offer is a necessary prerequisite to the inference of acceptance of the consideration. Here Ms. Clites did not know of the Agreement until after suit was filed. See, Hightower v. GMRI, 272 F.3d 239, 241 (4<sup>th</sup> Cir. 2001).

Through a 1983 amendment to the HRA the West Virginia Legislature granted to citizens aggrieved by human rights violations the right to bring suit in the circuit courts of this state. W.Va. Code §5-11-13(c); *see also* Syl pt. 1, Price v. Boone County Ambulance Authority, 337 S.E.2d 913 (W.Va. 1985). Accordingly, that right so conferred may not be waived by any contract unless the HRC mandated seven conditions, for knowing and voluntary waiver, are satisfied.

A review of the Agreement establishes that arguably none of the seven mandated conditions was satisfied by TeleTech when it sought waiver of Ms. Clites right, under the HRA, to pursue her claims in the circuit court. However, in the interests of brevity, Ms. Clites directly addresses only those factors for which there is no possible argument in support of satisfaction: (1) the waiver of Ms. Clites' right to a judicial forum makes no specific reference to the HRA; (2) the waiver of Ms. Clites' right to a judicial forum extends to rights or claims which arise after, October 25, 2004, the date on which the Agreement was executed; (3) the Agreement does not advise Ms. Clites to consult with an attorney prior to executing the agreement and does not provide the toll-free number of the West Virginia State Bar Association (1-800-642-3617); (4) the Agreement does not give Ms. Clites a period of at least twenty-one (21) days within which to consider the agreement prior to execution; and, (5) the Agreement does not provide Ms. Clites with a right to revoke the agreement in writing, for a period of at least seven days following its execution, and the agreement does not provide that it would not become effective or enforceable until after the seven-day revocation period expired.

The foregoing demonstrates that TeleTech sought waiver of Ms. Clites' right to proceed in a judicial forum, under the HRA, without first satisfying all seven of the conditions mandated

by 77 CSR 6-3.2 for a knowing and voluntary waiver. Therefore, TeleTech violated 77 CSR 6-3 when it employed its adhesive Arbitration Agreement so as to obtain Ms. Clites' unknowing waiver of her right to have her HRA claims heard in a state court. As a result, the Arbitration Agreement may not be enforced against her.

In its Order, the circuit court failed to differentiate between the mandate for knowing and voluntary waiver of a right, under the HRA, and the waiver of rights generally. Citing Preston v Ferrer, 128 S.Ct. 978 (2008) and Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc. 473 U.S. 614 (1985), the circuit court opined that "a party does not forgo the substantive rights afforded by the statute; he or she only submits their resolution in an arbitral forum, rather than judicial, forum." Ap. 6. The question presented, however, is not whether Ms. Clites might contractually waive her right to a judicial forum; the question presented is whether Ms. Clites may waive her right to a judicial forum without knowing and voluntarily doing so, within the meaning of 77 CSR 6-3.

In its order compelling Ms. Clites to arbitrate her claims, under the HRA, the circuit court failed to consider the impact of 77 CSR 6-3 and its requirement that any waiver of rights must be knowingly and voluntarily made as a condition precedent to any purported contractual waiver. The circuit court's failure to determine whether Ms. Clites knowingly and voluntarily waived her right to a judicial forum, under the HRA, constitutes a clear error of law. Therefore, this Court should grant Ms. Clites' Petition for a Writ of Prohibition and remand this case to the circuit court with instructions to exercise its jurisdiction over her claims, brought pursuant to the HRA.

## VII

### CONCLUSION

The circuit court's order compelling Petitioner Jill Clites (Plaintiff Below) to arbitrate her cause of action brought under the HRA is clearly contrary to law and an appeal would not be as adequate as review in prohibition because the circuit court's Order staying all proceedings leaves Ms. Clites with no other adequate means, such as direct appeal, by which she might continue to pursue her cause of action in a judicial forum. Accordingly, Ms. Clites respectfully requests this Honorable Court to issue a rule to show cause against Respondents The Honorable Russell M. Clawges, Jr. Chief Judge, 17<sup>th</sup> Judicial Circuit, Division II, TeleTech Customer Care Management (West Virginia), Inc., Lor Windle, and Michele Ebert, asking them why a Writ of Prohibition should not be granted.

Respectfully submitted,  
Petitioner Jill Clites by counsel

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(304) 367-1137

**PETITIONER'S MEMORANDUM IN SUPPORT OF  
PETITION FOR A WRIT OF PROHIBITION**

**CERTIFICATE OF SERVICE**

**From the Circuit Court of Monongalia County, West Virginia  
Civil Action No. 08-C-201**

I hereby certify that on the 27<sup>th</sup> day of March, 2009 I served a true copy of the foregoing  
Petitioner's Memorandum in Support of Petition for a Writ of Prohibition upon the Respondents  
by depositing the same in the United States mail, postage prepaid, to the following addresses:

The Honorable Russell M. Clawges,  
Chief Judge, 17<sup>th</sup> Judicial Circuit, Division II  
Monongalia County Courthouse  
243 High Street  
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