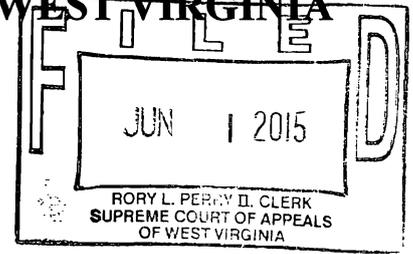


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 14-1288**



RICHARD PARSONS, )  
)  
Plaintiff-Petitioner, )  
)  
v. )  
)  
HALLIBURTON ENERGY SERVICES, )  
INC., )  
)  
Defendant-Respondent. )

Case No. 14-1288  
(On Appeal from Kanawha County  
Circuit Court, Civil Action No.: 13-  
C-2241 Judge Stucky)

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE CASE

In accordance with W.V. R. A. P. 10(d), Respondent adds the following facts omitted by Petitioner in his Statement of the Case and clarifies Petitioner's mischaracterization of multiple other facts, including Halliburton's purported "involvement" in the litigation process.

### Statement of the Facts

Petitioner, Richard Parsons ("Petitioner"), is a former employee of Halliburton Energy Services, Inc. ("Halliburton") where he worked as an Operator Assistant from June 25, 2013 until October 21, 2013. (APP003). In submitting his application for employment, Petitioner agreed as follows:

I agree that, in return for its consideration of my application for employment, any dispute between Halliburton and me related to the application process will be resolved under the Halliburton Dispute Resolution Program ("DRP"), and that I may obtain a copy of the DRP from the Human Resources Department. I understand that this means that disputes involving legal issues must be submitted to binding arbitration, and that I am waiving any right to maintain a lawsuit or have a jury trial for any such dispute. I also understand that this does not obligate Halliburton to employ me, but that if I am employed, *any dispute between Halliburton and me relating to my employment also will be subject to the DRP.*

(APP 151-152) (emphasis added).

On May 15, 2013, Halliburton offered employment to Petitioner, specifically conditioned on the following:

Your acceptance of employment means you also agree to and are bound by the terms of the Halliburton Dispute Resolution Program, [which] binds the employee and the Company to handle workplace problems through a series of measures designed to bring timely resolution. This will be true both during your employment and after your employment should you terminate.

(APP152). Petitioner accepted employment with Halliburton, thus agreeing to arbitrate any and all claims arising from the employment relationship. (*Id.*).

The DRP, to which Petitioner agreed and which was incorporated by reference into his offer letter, is clear and unambiguous with respect to the arbitration requirement. For example, the Plan and Rules explain:

All Disputes . . . shall be finally and conclusively resolved through arbitration under this Plan and the Rules, instead of through trial before a court.

\* \* \*

Proceedings under the Plan, including arbitration, shall be the exclusive, final and binding method by which Disputes are resolved.

*(Id.)*.

Halliburton's DRP requires disputes that are not resolved informally to be submitted to binding arbitration (individually and not on a class-wide basis) before an independent and neutral arbitrator appointed by the American Arbitration Association or other independent dispute resolution association. *(Id.)*. The DRP facilitates resolution of disputes without the expense and delay of court litigation, permits representation of the employee by legal counsel, provides for discovery in accordance with the Federal Rules of Civil Procedure, and authorizes an award of attorney's fees to employees who prevail in arbitration even in the absence of a statute authorizing such an award. *(Id.)*. In addition, Halliburton maintains an Employment Legal Consultation Plan that provides employees up to \$2,500 in fees and expenses for legal services used to resolve a work-related complaint under the DRP, regardless of the outcome of the proceeding. (APP152-153). Other than a minimal initiation fee, which in most instances is less than a court filing fee, Halliburton pays the administrative fees and expenses of the arbitration proceeding. (APP153).

The DRP does not restrict or limit an employee's substantive legal rights under any statute or other law and places no limitation on available remedies. (*Id.*) Rule 30 of the Plan, for example, provides that:

The arbitrator's authority shall be limited to the resolution of legal Disputes between the Parties. As such, the arbitrator shall be bound by and shall apply applicable law including that related to the allocation of the burden of proof as well as substantive law. The arbitrator shall not have the authority either to abridge or enlarge substantive rights available under applicable law. . . .

(*Id.*). In other words, arbitration affords Halliburton's current and former employees the same relief that is available in a court of law. (*Id.*).

On October 21, 2013, Petitioner's employment with Halliburton was terminated. (APP003).

### **Procedural History**

Notwithstanding his agreement to arbitrate, Petitioner, in December 2013, filed a lawsuit in the Circuit Court of Kanawha County, West Virginia, against Halliburton asserting claims on behalf of himself and a purported class for alleged violations of West Virginia's wage laws. (APP002). Simultaneously with his Complaint, Petitioner served his First Set of Interrogatories and Requests for Production of Documents (which, notably, Petitioner would have done irrespective of the date on which Halliburton moved to compel arbitration). (APP020). Upon receipt of the Complaint, former counsel for Halliburton, Craig Snethen, sent email correspondence to Petitioner's counsel indicating that Halliburton was investigating the claims and was "in the process of tracking down whether and to what extent employees in WV were not paid in accordance with the WPCL" and indicated that Halliburton would need an additional 45-60 days to undertake this task. (APP117). Petitioner's counsel agreed to the extension of time to respond to the Complaint. (APP116). At no time in this process did Halliburton promise to file

an Answer to the Complaint in lieu of any potential motion, nor did Halliburton agree to waive its right to arbitrate any claims. (APP116-117). On April 21, 2014, despite having had no further communication with or requests from Petitioner's counsel, Halliburton's counsel affirmatively contacted Petitioner's counsel by email, indicating that additional time was needed to continue analyzing the claims raised in the Complaint. (APP120).

It took Petitioner's counsel nearly one month to respond. (APP124). On May 16 and May 22, 2014, Petitioner's counsel emailed Mr. Snethen to inquire about the status of the case. (APP123). In the May 22, 2014 email, Petitioner's counsel, for the first time, identified a date by which he required some response before otherwise seeking court intervention. In the email, counsel stated, "If you fail to respond to this email by Tuesday, May 27, we will have no choice but to get the court involved so that we can get this litigation back on track." (*Id.*). In doing so, Petitioner tacitly admitted that *no* action had been taken in the litigation since the filing of his Complaint. (*Id.*). On that same day, Mr. Snethen responded to Petitioner's counsel's email and indicated that he was on an unexpected leave of absence and that he would forward the email to other attorneys in his office. (APP122-123). Notably, during these communications, Halliburton never once agreed to engage in formal discovery, never agreed to submit to the jurisdiction of the Court, and never agreed to waive its right to arbitrate claims falling within the scope of the DRP. (APP116-124).

On June 23, 2014, Marla N. Presley entered her appearance for Halliburton as lead counsel. (APP027). That same week, Ms. Presley communicated with Petitioner's counsel and indicated that Halliburton would be filing its response to the Complaint. (APP138-139). On July 7, 2014, within seven days of that communication, Halliburton filed its response to Petitioner's

Complaint in the form of a Motion to Dismiss and Compel Arbitration (“Motion”). (APP105, 138-139).

On September 26, 2014, Petitioner filed his opposition to Halliburton’s Motion. (APP125). For the very first time, Petitioner alleged that the extension of time to respond to the Complaint had lapsed and that he considered Halliburton to be in default. (APP108-124). Additionally, in his opposition<sup>1</sup>, Petitioner contended that Halliburton had waived its right to invoke arbitration. (*Id.*). Petitioner’s waiver argument stems directly from Halliburton’s alleged delay in seeking to compel arbitration, but Petitioner did not articulate in his briefing or otherwise that the alleged delay resulted in any actual prejudice. (APP108-124). Following oral argument, on October 1, 2014, the Circuit Court found that Halliburton did not waive its right to arbitrate and issued an Order dismissing the case and compelling arbitration. (APP151-166). This appeal followed. (APP167-188).

## **I. SUMMARY OF THE ARGUMENT**

Petitioner agreed to arbitrate any employment claims against Halliburton pursuant to a clear and unambiguous arbitration agreement. That agreement provides that arbitration is the sole method for resolving employment-related disputes and requires all claims to be arbitrated individually, not as class actions. Petitioner’s claims in this case fall squarely within the scope of his agreement to arbitrate. Indeed, Petitioner does not argue otherwise but instead contends that Halliburton waived its right to arbitrate. The Circuit Court correctly rejected that theory, finding that Halliburton had not substantially participated in the litigation process and that Petitioner had not suffered any actual prejudice.

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<sup>1</sup> Notably absent from Petitioner’s opposition was any argument regarding the conscionability of the DRP, a seeming concession that the agreement is both procedurally and substantively conscionable. (APP 108-124).

The Circuit Court's ruling is consistent with this Court's precedent. It is well settled that arbitration is highly favored and that the party seeking to demonstrate waiver of the right to arbitrate bears a heavy burden. Though that burden is not insurmountable, the facts here are diametrically at odds with the cases where waiver has been found. To sustain its burden of showing that the Court erred in finding that Halliburton did not waive its right to enforce arbitration, Petitioner must show that Halliburton acted inconsistently with its right to arbitrate *and* that Petitioner would suffer actual prejudice if the case was compelled to arbitration. *Schumacher Homes of Circleville, Inc. v. Spencer*, No. 14-0441, 2015 W. Va. LEXIS 562, \*31 (W. Va. Apr. 24, 2015). This is a burden that Petitioner has not, and cannot, meet.

Aside from Petitioner's initial Complaint and Halliburton's initial response in the form of a Motion seeking dismissal of the case in favor of arbitration, there has been *no* further litigation undertaken by *either* party. There have been no additional pleadings filed in this matter, no affirmative written discovery propounded by Halliburton, no responsive discovery (either in the form of interrogatories or requests for production) served by Halliburton, no discovery motions filed by either party, no motions for summary judgment, no engagement in any alternative dispute resolution process, no court conferences, no scheduling orders, and no depositions. Petitioner's counsel tacitly admits as much in his May 22, 2014 email. (APP123). In fact, Halliburton's Motion to Dismiss and Compel Arbitration is the *only* pleading or motion of any substance ever filed in this case. This, in and of itself, "weighs against a finding of waiver' as it shows the parties have not been engaged in costly motions practice.'" *Schall v. Adecco*, No. 10-2526, 2011 U.S. Dist. LEXIS 8884, \*4 (E.D. Pa. Jan. 28, 2011) (citing *FCMA, LLC v. Fujifilm Recording Media U.S.A., Inc.*, No. 09-cv-4053, 2010 U.S. Dist. LEXIS 79129 (D. N.J. Aug. 5, 2010) (granting the defendants' motion to compel arbitration where the defendants filed no prior

motions for affirmative relief)). Simply put, this case is in the precise position it would have been in had arbitration been invoked on the very day Halliburton received Petitioner's Complaint. Not only is this lack of engagement in the litigation process sufficient evidence to show that Halliburton never acted inconsistently with its right to arbitrate, it is also proof of the lack of *any* actual prejudice suffered by Petitioner. Petitioner's failure to even assert prejudice in opposing Halliburton's Motion before the Circuit Court should be viewed for what it is – an admission that Petitioner has suffered no actual prejudice. Thus, Petitioner's waiver argument should be rejected, and the Circuit Court's Order affirmed.

## **II. STATEMENT REGARDING ORAL ARGUMENT**

Respondent submits that oral argument is not necessary pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure because the facts and legal arguments are adequately presented in the parties' briefs and record on appeal, and the decisional process would not be aided by oral argument.

## **III. STANDARD OF REVIEW**

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.” *New v. GameStop, Inc.*, 232 W.Va. 564, 571, 753 S.E.2d 62, 69 (2013) (citing Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 773, 461 S.E.2d 516, 519 (1995)). However, to the extent that the court made underlying factual findings, those may be afforded deference. *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 342 (4th Cir. 2009) (citing *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001)).

The Court will reverse an order granting a party's motion to compel arbitration

[O]nly after a *de novo* review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a

clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

*Id.* (citing Syl. pt. 4, *McGraw v. American Tobacco Co.*, 224 W.Va. 211, 214, 681 S.E.2d 96, 99 (2009)).

#### IV. ARGUMENT

##### A. **The Circuit Court correctly held that Respondent never acted inconsistently with its right to arbitrate.**

To meet the high burden to demonstrate waiver of the right to arbitrate, “a party must show: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Spencer*, 2015 W. Va. LEXIS 562, at \*31 (citing *U.S. v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009)). “In light of the strong federal policy favoring arbitration, waiver will ‘not be lightly inferred.’” *American Heart Disease Prevention Found. v. Hughey*, No. 96-1199, 1997 U.S. App. LEXIS 1806, \*6-7 (4th Cir. Feb. 4, 1997) (quoting *In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981) (en banc) (*aff’d sub nom. Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983))). In this Circuit, regardless of the stage of a particular case, the party opposing arbitration “bears the heavy burden of proving waiver.” *American Recovery Corp. v. Computerized Thermal Language, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996).

This high burden derives from the Federal Arbitration Act<sup>2</sup> itself and the federal and state policy favoring arbitration. *Maxum Found., Inc. v. Salus Corp.*, 779 F.2d 975, 981 (4th Cir.

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<sup>2</sup> “[N]o matter how confounding the Supreme Court’s arbitration decisions may seem, [the Supreme Court of Appeals of West Virginia is] constitutionally bound to apply them to arbitration clauses that involve interstate transactions.” *Spencer*, 2015 W. Va. LEXIS 562, at \*4-5.

1985). Any doubts must be 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.” *MicroStrategy*, 268 F.3d at 249 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

A party waives its right to invoke arbitration if and only if the party “so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Maxum*, 779 F.2d at 981. Given the presumption in favor of arbitrability and the corollary principle that waiver of arbitration “should not be lightly inferred,” *id.*, both state and federal courts in West Virginia consistently reject waiver-of-arbitration arguments. *See, e.g., Ruckdeschel v. Falcon Drilling Co., L.L.C.*, No. 07-C-49M, 2008 W.V. Cir. LEXIS 15 (Oct. 30, 2008); *Hughey*, 1997 U.S. App. LEXIS 1806. This is true regardless of whether the cases were removed, answers filed, counterclaims asserted, or even whether limited discovery was taken. *Id.* Nothing short of a showing of actual prejudice will support a waiver argument. *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987). Because Petitioner did not meet his burden to show that Halliburton substantially engaged in the litigation process *and* that Petitioner suffered actual prejudice, both of which are required, the Circuit Court did not err in granting Halliburton’s Motion to Dismiss and Compel Arbitration.

- 1. The Circuit Court correctly held that there is no record evidence to establish that Halliburton waived its right to arbitrate because it did not commit to engage in the litigation process.**

To demonstrate waiver of the right to arbitrate, the party opposing arbitration first must establish that the party seeking arbitration “act[ed] inconsistent[ly] with that existing right.” *Spencer*, 2015 W. Va. LEXIS 562, at \*31 (citing *Park Place Assocs., Ltd.*, 563 F.3d at 921). In attempting to demonstrate that Halliburton somehow acted inconsistently with its right to

arbitrate, Petitioner contends that Halliburton “initiated discovery on a class-wide basis by reaching out to [Petitioner’s] counsel and promising the disclosure of class information.” (Pet. Brief p. 9). This assertion is patently untrue. Never once did Halliburton “initiate discovery” or agree to participate in discovery on a class-wide basis.

In support of his position, Petitioner relies heavily on *Bower v. Inter-Con Security Systems, Inc.*, 232 Cal. App. 4th 1035 (Cal. App. 2014), wherein the court found that the employer’s conduct in *requiring* the employee to engage in extensive discovery before invoking arbitration (including responding to over 100 document requests—46 of which sought documents pertaining to the putative class) constituted waiver. *Bower* is completely inapposite to this case. Here, Halliburton never propounded *any* discovery or otherwise required Petitioner to engage in the litigation process. Furthermore, it never agreed to engage in class-wide discovery, and, at best, agreed to undertake a preliminary investigation into Petitioner’s claims. More importantly, even if Halliburton *had* propounded discovery (which it did not), the vast majority of courts, including courts in this Circuit, have refused to find waiver of the right to arbitrate where the party invoking arbitration engaged in some discovery. *See, e.g., Patten Grading & Paving, Inc. v. Skanska United States Bldg., Inc.*, 380 F.3d 200, 204-208 (4th Cir. 2004) (finding no waiver despite the parties having engaged in discovery, and despite the court having heard and resolved three other motions prior to the motion to compel arbitration).

In cases in which the courts have concluded that the party seeking to compel arbitration acted inconsistently with its right, the party has engaged in much more than simply agreeing to provide a plaintiff with some limited, preliminary information related to his claims. *See, e.g., In re S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 84 (2d Cir. 1998) (finding waiver where the movant filed a counterclaim in response to the complaint and sought to dismiss claims

and the parties engaged in extensive discovery and attended two settlement conferences); *Smith v. IMG Worldwide, Inc.*, 360 F. Supp. 2d 681, 686-688 (E.D. Pa. Mar. 9, 2005) (finding that defendant had waived its right to arbitrate after engaging in motion practice, propounding and answering discovery, and assenting to court orders); *Wilson Sporting Goods Co. v. Penn Partners*, No. 03-c-5236, 2004 U.S. Dist. LEXIS 17469, \*12-13 (N.D. Ill. Aug. 31, 2004) (finding that engaging in extensive discovery for months constituted actions inconsistent with a desire to arbitrate); *Grumhaus v. Comerica Secs., Inc.*, 223 F.3d 648, 651 (7th Cir. 2000) (finding waiver where parties engaged in six months of discovery); *St. Mary's Medical Center, Inc. v. Disco Aluminum Products Co.*, 969 F.2d 585, 589 (7th Cir. 1992) (finding waiver where the parties conducted ten months of discovery); *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753,756-57 (7th Cir. 2002) (four months of litigation and participation in bankruptcy reorganization deemed a waiver).

Halliburton's actions in this case are also at odds with the conduct that the Fourth Circuit has deemed sufficient to constitute waiver. In *Fraser*, for instance, the defendant engaged in four years of discovery before moving to move to compel arbitration. 817 F.2d at 252. At least thirty-five depositions had been noticed by both sides, and the district court had considered at least eight discovery motions. *Id.* at 251. The defendant also had filed two motions in limine, one motion for partial summary judgment, and three motions to dismiss. *Id.* The parties had participated in four status conferences with the court, five hearings on pending motions, and two pretrial conferences. *Id.* Two trial dates had been cancelled prior to the arbitration motions being filed. *Id.*

Similarly, in *Forrester*, the defendant waited more than two years from the filing of the plaintiffs' complaint to move to compel arbitration. 553 F.3d at 341- 42. In the intervening time,

the parties engaged in the full panoply of discovery and motion practice, including the filing of cross-claims, the taking of depositions, and a motion for summary judgment. *Id.* The parties also met on multiple occasions to discuss settlement and conducted a mediation. *Id.* at 342. The parties went so far as to file motions in limine, proposed jury instructions, verdict forms, voir dire, and exhibit and witness lists, all “in anticipation of the scheduled trial.” *Id.* at 341- 42. The *Forrester* Court found that the defendant’s two years of litigating had caused the plaintiffs “actual prejudice” because the defendant’s actions had required plaintiffs to “expend significant time and money responding to [defendant’s] motions and preparing for trial,” had permitted the defendant to “defeat several of [plaintiffs’] claims on summary judgment,” and had forced the plaintiffs to “reveal their trial strategy.” *Id.* at 343.

Halliburton’s post-Complaint actions here do not remotely compare to the defendants’ actions in either *Forrester* or *Fraser*. Petitioner cannot show that Halliburton substantially utilized the litigation machinery such as to actually prejudice him if arbitration is compelled at this time, and the Court’s Order dismissing the case and compelling arbitration should be affirmed.

**2. The Circuit Court correctly held that Halliburton did not waive its right to arbitrate because it invoked arbitration before engaging in the litigation process and without any undue delay.**

Petitioner further contends that Halliburton waived its right to arbitrate by waiting seven months before filing its motion to compel arbitration. It is no oversight that Petitioner’s Brief contains no case to support his position that a seven-month delay constitutes waiver, because no court has so held. In fact, courts have found just the opposite. *See, e.g., Schall*, 2011 U.S. Dist. LEXIS 8884, at \*4 (holding that “a seven-month delay does not weigh heavily in [the opposing party’s] favor”). Instead of addressing the litany of cases by Halliburton, Petitioner cites to

*Barden & Robeson v. Hill*, 208 W.Va. 163, 539 S.E.2d 106 (2000), a case factually inapposite to the case at issue.

In *Barden & Robeson*, after the defendant failed to respond to the complaint, the plaintiff moved for, and was granted, a default judgment. 208 W.Va. at 165. The defendant moved to set aside the judgment on the grounds that its delay in answering the complaint resulted from excusable neglect and the circuit court lacked subject matter jurisdiction as a result of the arbitration agreement. *Id.* After the circuit court indicated that it would deny the defendant's motion, the defendant sought a writ of prohibition to order the circuit court to vacate the default judgment based on the lack of subject matter jurisdiction stemming from the arbitration provision. *Id.* The Court undertook a detailed analysis of the interplay between subject matter jurisdiction and arbitration agreements, before addressing the possibility that a party may waive its right to arbitrate *after* entry of a default judgment for failing to respond to a complaint. *Id.* at 166-68. In reaching this conclusion, the Court never addressed any supposed time limits for invoking arbitration, instead limiting its analysis *only* to the availability of arbitration *after* judgment had been entered in favor of the plaintiff. *Id.* The Petitioner's contention that the Court held "that the defendant waived its right to arbitration by standing silent for a period of less than two months" (Pet. Brief p. 10), is intentionally misleading.

Furthermore, several Circuit Courts, including the Fourth Circuit, have consistently found that a delay of several months, without more, is insufficient to demonstrate actual prejudice. *See, e.g., Patten*, 380 F.3d at 205 (finding no waiver despite a delay of between four and eight months after filing of complaint, despite the parties having engaged in discovery, and despite the court having heard and resolved three other motions prior to the motion to compel arbitration); *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 696, 703-04 (4th Cir. 2012) (finding no

waiver despite a delay of six and one half months and the defendant removing the action, filing an answering, proposing a bifurcated discovery plan, and taking the plaintiff's deposition); *MicroStrategy*, 268 F.3d at 254 (finding no waiver despite the fact that six months had elapsed between filing of the first action by the plaintiff and the plaintiff's arbitration request); *Maxum*, 779 F.2d at 982 (finding no waiver despite a three-month delay between the plaintiff's filing of a second amended complaint and the defendant's filing of a motion to dismiss); *Hughey*, 1997 U.S. App. LEXIS 1806, at \*7-8 (finding no waiver despite a 16-month delay in which the defendant contested venue, filed a motion to disqualify counsel and a motion to disqualify an expert witness, engaged in discovery, and moved to dismiss claims); *cf Forrester*, 553 F.3d at 343-44 (finding a default where the litigation had proceeded for over two years before the moving party sought arbitration); *Fraser*, 817 F.2d at 252-53 (finding a default where the litigation had proceeded for over four years before the moving party sought arbitration).

Accordingly, the fact that Halliburton did not immediately file its motion in no way demonstrates that it waived its right to arbitrate.<sup>3</sup> And, in fact, even if the Court finds that Halliburton acted inconsistently by any alleged delay, that alone, without actual prejudice, is *insufficient* to demonstrate waiver.

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<sup>3</sup> Petitioner also now contends that he suffered prejudice because the case would have shifted towards settlement or Petitioner would have propounded additional discovery if Halliburton had not invoked arbitration. Not only do Petitioner's contentions not rise to the level of actual prejudice (being that Petitioner is in the exact same position as he was upon the filing of the Complaint), his argument also presupposes that his class claims would have survived judicial scrutiny. The recent opinion by Judge Groh all but forecloses that possibility. *See Paulino v. Dollar General Corp.*, No. 3:12-cv-75, 2014 U.S. Dist. LEXIS 64233, at \*8 (N.D. W.Va. May 9, 2014) (Groh, J.) (holding that "the proposed class definition must not depend on subjective criteria . . . or require an extensive factual inquiry to determine who is a class member") (citing *Cuming v. S.C. Lottery Comm'n*, No. 05-cv-03608, 2008 U.S. Dist. LEXIS 26917, \*5 (D. S.C. Mar. 31, 2008)). Such an undertaking is exactly what Halliburton's counsel would have had to engage if Petitioner's class claims would have survived.

**B. The Circuit Court correctly held that, even if Halliburton acted inconsistently with its right to arbitrate, Petitioner did not suffer actual prejudice.**

In his brief on appeal, Petitioner boldly asserts that a showing of prejudice is not required to establish waiver. (Pet. Brief p. 12). However, as the Court recently reiterated in an opinion last month, a party contesting arbitration unquestionably has the burden of proving actual prejudice. *Spencer*, 2015 W. Va. LEXIS 562, at \*31 (citing *Park Place Associates, Ltd.*, 563 F.3d at 921). Even assuming, *arguendo*, that Petitioner has sufficiently proven that Halliburton acted inconsistently with its right to arbitrate (which Halliburton denies), Petitioner has not and cannot demonstrate that he suffered actual prejudice as a result of Halliburton's inconsistent conduct.

This Court's approach is consistent with that of other circuits, all of which label prejudice as the "touchstone" in the arbitration waiver analysis. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007); see also *Page v. Moseley Hallgarten Estabrook & Weeden Inc.*, 806 F.2d 291, 293 (1st Cir. 1986) ("[M]ere delay in seeking arbitration without some resultant prejudice to a party cannot carry the day."); *Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 105 (2d Cir. 2002) ("The key to a waiver analysis is prejudice"); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (noting that "however unjustifiable [a defendant's] conduct, there can be no waiver unless that conduct has resulted in prejudice to the other party"). Even in "cases where the party seeking arbitration has invoked the litigation machinery to some degree, the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*." *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 587 (4th Cir. 2012) (citing *Microstrategy*, 268 F.3d at 249) (emphasis in original). In analyzing whether a party has suffered "actual prejudice," the Court is

to examine the “amount of ‘delay and the extent of the moving party’s trial-oriented activity.’” *Id.* (citing *Microstrategy*, 268 F.3d at 249).

Petitioner makes two contrived arguments in an attempt to show actual prejudice, neither of which address “the amount of the delay” or the “extent of the moving party’s” litigation activities. Petitioner argues that: (1) he “granted multiple extensions of time to Halliburton and forbore his right to seek a default judgment, to the great detriment of his claims and the claims of the potential class members” and (2) Halliburton will no longer be obligated to provide class discovery. (Pet. Brief p. 12). These arguments, even taken as true, do not rise to the level of actual prejudice. First, Petitioner was under no obligation to grant Halliburton one or more extensions of time to respond to the Complaint. Petitioner’s claim that he could have, or would have, sought a default judgment is nothing more than a red herring. The fact remains that the parties were operating under an extension of time until the Motion was filed, no intervening litigation was undertaken, and Petitioner suffered no actual prejudice. Secondly, Halliburton would *never* have been obligated to provide class discovery – whether it had filed its Motion on the day the Complaint was served or whether it had waited until months later. Petitioner concedes in his brief that the DRP “unambiguously prohibits class actions” which serves to foreclose class action discovery altogether. (Pet. Brief p. 8).

Petitioner’s argument is devoid of *any* evidence that he has suffered actual prejudice, because no such prejudice occurred. The laundry list of activities sufficient to prove actual prejudice – responding to motions for summary judgment, responding to multiple motions to dismiss, engaging in extensive pretrial preparations, engaging in multiple depositions, preparing motions in limine, and filing an array of pretrial pleadings<sup>4</sup> – are all but absent here. As

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<sup>4</sup> See *Wheeling Hosp., Inc.*, 683 F.3d 577, 587 (4th Cir. 2012).

explained *supra*, courts, including the Fourth Circuit, routinely have compelled arbitration in cases with delays longer than seven months coupled with significantly more pre-trial activity. *See supra* p. 14-15. Quite simply, no facts exist to show that Halliburton either unreasonably delayed or engaged in substantial litigation activity so as to demonstrate actual prejudice.

**C. The Circuit Court correctly held that allowing Halliburton to arbitrate is consistent with public policy, which highly favors arbitration.**

Petitioner contends that Halliburton’s “change in strategy” is contrary to public policy, disfavored by the courts, and supports his contention that Halliburton “waived” its right to arbitrate. (Pet. Brief p. 13). As a preliminary matter, there is no record evidence to support Petitioner’s contention that Halliburton changed its litigation strategy. Halliburton’s *only* post-Complaint activity was conducting an investigation into Petitioner’s claims – and nothing more. (APP117). Quite simply, Halliburton never substantially invoked the litigation process.

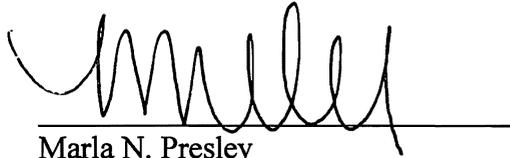
Even if Halliburton’s litigation strategy had changed, which it did not, Petitioner nevertheless has to prove that he was prejudiced by such change. Something that Petitioner just cannot do. *See supra* p. 14-16.

Finally, the Circuit Court’s Order is directly in line with the strong public policy favoring arbitration. Arbitration affords parties the ability to efficiently and cost-effectively resolve disputes. None of Halliburton’s conduct contravenes these principles. In fact, despite not immediately invoking its right to arbitrate, the parties are in the same position they were in when the Complaint was filed.

## V. CONCLUSION

As set forth above, Petitioner has not identified any legal precedent for reversing the Circuit Court's decision. The well-established law of this state, and country, favors arbitration. Petitioner signed an arbitration agreement with Halliburton, and he has offered no reason at all for this Court not to enforce that agreement. Accordingly, for all of the foregoing reasons, this Court should affirm the Circuit Court's decision compelling arbitration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Presley', written over a horizontal line.

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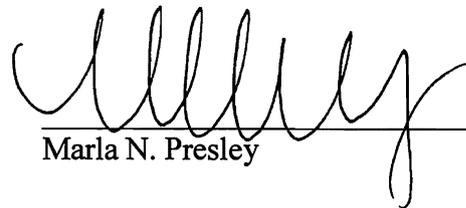
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of *Respondent's Brief* was served on Petitioner's counsel by First Class U.S. mail, postage prepaid mail this 29<sup>th</sup> day of May, 2015, as follows:

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