

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NUMBER: 15-1237

STATE OF WEST VIRGINIA ex rel.  
CREDIT ACCEPTANCE CORPORATION,

Petitioner,

v.

CIVIL ACTION NO. 14-C-2160

THE HONORABLE JAMES C. STUCKY,  
Judge of the Circuit Court of Kanawha County,  
West Virginia, and BRANDON ADKINS,

Respondents.

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CREDIT ACCEPTANCE CORPORATION'S  
VERIFIED PETITION FOR A WRIT OF PROHIBITION

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Nicholas P. Mooney II (WV Bar No. 7204)  
nmooney@spilmanlaw.com  
*Counsel of Record*  
Sarah B. Smith (WV Bar No. 11700)  
ssmith@spilmanlaw.com  
SPILMAN THOMAS & BATTLE, PLLC  
300 Kanawha Blvd., East (Zip 25301)  
P.O. Box 273  
Charleston, WV 25321-0273  
Telephone: 304.340.3800  
Facsimile: 304.340.3801

Attorneys for Petitioner  
Credit Acceptance Corporation

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## **I. QUESTION PRESENTED**

Did the trial court exceed its legitimate powers in contravention of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (“FAA”), by failing to conclude that plaintiff Brandon Adkins (“Adkins” or “Plaintiff”) waived his right to arbitrate the underlying civil action even though he filed a lawsuit, served multiple sets of discovery requests, participated in his deposition, engaged in subsequent motions practice, responded to discovery requests served by Credit Acceptance Corporation (“Credit Acceptance”) and threatened to use arbitration in an attempt to avoid his self-imposed damages limitation, all before actually seeking to compel arbitration?

## **II. STATEMENT OF THE CASE**

This case involves arbitration invoked solely as a means to strategically disadvantage and prejudice Credit Acceptance in this action. Before seeking to compel arbitration, Plaintiff engaged in litigation to his advantage by doing the following:

- filing his Complaint in the Circuit Court of Kanawha County, West Virginia on December 11, 2014 (A.R. 6);
- stipulating to limit his damages (to avoid the federal jurisdiction amount) so long as the case did not go to arbitration (A.R. 11-12);
- serving his first set of discovery requests on Credit Acceptance with service of his Complaint (A.R. 13);
- serving his second set of discovery requests on Credit Acceptance on April 27, 2015 (A.R. 291);
- preparing a proposed protective order for the parties’ use (*see* A.R. 26-28);
- answering Credit Acceptance’s counterclaims in the Circuit Court of Kanawha County, West Virginia, without asserting a single affirmative defense (including arbitration) (A.R. 23-24);
- demanding a jury trial in direct contravention to the arbitration provision at issue (A.R. 24);

- filing his notice of deposition for Credit Acceptance’s corporate representative on June 9, 2015 (A.R. 31-33);
- responding to discovery requests served by Credit Acceptance on June 11, 2015 (A.R. 294);
- engaging in negotiations as to the scope of the topics for Credit Acceptance’s corporate representative between June 9, 2015 and June 19, 2015 (A.R. 164-67);
- seeking, on June 20, 2015, Credit Acceptance’s agreement for Plaintiff to amend his Complaint to state additional claims against Credit Acceptance (A.R. 168);
- sitting for his deposition on June 23, 2015 (A.R. 151);
- attempting to force a settlement while still in the Circuit Court of Kanawha County, West Virginia under the threat that the “binding” damages stipulation would disappear in arbitration (A.R. 169-171);
- moving to quash subpoenas filed by Credit Acceptance as a result of Plaintiff’s deposition testimony (A.R. 298);
- serving a third set of written discovery requests on Credit Acceptance on July 1, 2015 (A.R. 296); and,
- serving a fourth set of written discovery requests on Credit Acceptance on August 6, 2015—nearly a full month after he filed his Motion to Stay the Proceedings and to Compel Arbitration (“Plaintiff’s Motion to Compel”) and six days before the hearing on Plaintiff’s arbitration motion (A.R. 297).

This case arises from an October 6, 2012 Retail Installment Contract (“Contract”) entered into between Plaintiff and Deskins Motor Company, Inc. (the “Dealership”) for the purchase of a used 2006 GMC Envoy, vehicle identification number IGKET63M262225438 (the “Vehicle”). (A.R. 102-03) Plaintiff would have been provided with a copy of the Contract when he entered into it. The Contract then was assigned to Credit Acceptance. (*Id.*) Credit Acceptance recorded a first lien on the Certificate of Title for a Motor Vehicle issued by the West Virginia Department of Transportation. (A.R. 104-05.)

The Contract contained the parties' Arbitration Agreement. By its express terms, the Arbitration Agreement contained within the Contract allows either party to demand arbitration in the first instance or where one party has filed suit in court or filed a counterclaim, it allows the other party to demand arbitration. (A.R. 103.)

Plaintiff became in arrears on the account associated with his Contract ("Account"). Thereafter, Credit Acceptance sought to collect upon the Account. Ultimately, Plaintiff voluntarily surrendered the Vehicle to Credit Acceptance. (A.R. 100, 114.) However, a deficiency balance remained and Credit Acceptance sought to collect upon that balance in accord with the terms of the Contract.

On December 11, 2014, Plaintiff filed his Complaint initiating this civil action against Credit Acceptance. (A.R. 6) In the Complaint, Plaintiff asserted claims against Credit Acceptance for alleged violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), common law negligence, intentional infliction of emotional distress, and common law invasion of privacy. (*Id.*) Plaintiff stipulated to accept no more than \$75,000.00 in damages "so long as this case remains in West Virginia Court or an Article III Court . . . ." (A.R. 11-12.) At the same time, Plaintiff served his First Set of Discovery Requests on Credit Acceptance. (A.R. 13.)

On January 16, 2015, Credit Acceptance timely filed its answer denying Plaintiff's material allegations. (A.R. 14-22.) Simultaneously, Credit Acceptance asserted its Counterclaim against Plaintiff to collect upon the deficiency remaining on the Account after the post-surrender sale of the Vehicle. (*Id.*) On March 4, 2015, consistent with an extension granted by Plaintiff, Credit Acceptance served its responses to Plaintiff's First Set of Discovery Requests. (A.R.

289.) On March 6, 2015, Credit Acceptance served its amended responses to Plaintiff's First Set of Discovery Requests. (A.R. 290.)

On April 27, 2015, Plaintiff served his Second Set of Discovery Requests. (A.R. 291.) Plaintiff then prepared a proposed protective order, which the parties submitted to the Circuit Court on April 27, 2015, and the Circuit Court entered on May 5, 2015. (A.R. 26-28.) On May 1, 2015, nearly three months after a reply to the Counterclaim was due, Plaintiff filed his "Answer to Defendant's Counterclaims" ("Reply"). (A.R. 23-24.) Plaintiff's Reply did not assert arbitration as an affirmative defense. (*Id.*) In fact, Plaintiff asserted no affirmative defenses in the Reply. Rather, "Plaintiff demand[ed] a jury trial on all issues so triable." (A.R. 24.)

On May 15, 2015, Credit Acceptance noticed the deposition of Plaintiff for June 23, 2015, and served its "First Set of Interrogatories and Requests for Production to Plaintiff." (A.R. 29-30, 292.) Then, on June 1, 2015, Credit Acceptance served its responses to Plaintiff's Second Set of Discovery Requests. (A.R. 293.)

Thereafter, not only did Plaintiff fail to invoke arbitration, he continued to litigate his claims. More specifically, on June 9, 2015, Plaintiff filed his "Notice of Deposition of Defendant's Corporate Representative" and on that same day, his counsel requested dates for that deposition. (A.R. 31-33, 164.) On June 11, 2015, Plaintiff served his responses to Credit Acceptance's "First Set of Interrogatories and Requests for Production to Plaintiff." (A.R. 294.) None of those responses included any objection based on arbitration. (*Id.*) Nor did Plaintiff seek to compel arbitration at that time. (*See* A.R. 298.)

Rather, on that same day, Plaintiff's counsel relayed Plaintiff's settlement demand, which also said nothing about arbitration. (A.R. 165.) On June 19, 2015, Plaintiff's counsel wrote to

Credit Acceptance's counsel rejecting Credit Acceptance's proposed revisions and objections to the topics in his notice of deposition of Credit Acceptance. (A.R. 166.) Plaintiff communicated his intent to proceed with the deposition topics as noticed with one exception. (*Id.*) Plaintiff again failed to mention arbitration in this correspondence. (*Id.*)

Thereafter, rather than seek to compel arbitration, Plaintiff sought to amend his Complaint because Plaintiff wanted to assert more claims in the litigation. More specifically, on Saturday, June 20, 2015, his counsel asked Credit Acceptance to agree to an amendment of the Complaint to assert an additional cause of action against Credit Acceptance. (A.R. 168.)

Plaintiff raised the possibility of arbitration for the first time on June 23, 2015, after his deposition that morning. Specifically, Plaintiff's counsel threatened to seek arbitration (despite having litigated his claims in court) if Credit Acceptance was not "interested in settling this case quickly." (A.R. 169.) Plaintiff's counsel argued that "the stipulation on file [in which he voluntarily limited his recovery to \$75,000] has no binding authority in arbitration based on the language in the stipulation." (*Id.*) On June 25, 2011, Plaintiff's counsel again inquired about settlement or arbitration advising that "[t]his is your clients [sic] opportunity to resolve this case inexpensively." (A.R. 170.) Thus, Plaintiff plainly and improperly invoked arbitration after months of litigation only as a means of pressuring Credit Acceptance to settle.

As a result of Plaintiff's deposition testimony, Credit Acceptance issued subpoenas for records from Plaintiff's counsel and Plaintiff's telephone service provider. On June 25, 2015, Credit Acceptance noticed the deposition of Plaintiff's ex-wife and undertook to serve her with a Rule 45 subpoena. (A.R. 34-49, 54, 58.) Credit Acceptance also issued a second subpoena to Plaintiff's counsel. (A.R. 50-54, 58.)

Having threatened arbitration, Plaintiff nevertheless continued to litigate his claims in court. On July 1, 2015, Plaintiff served his “Third Set of Interrogatories to Defendant Credit Acceptance Corporation” (“Third Set of Discovery Requests”). (A.R. 296.) Further, Plaintiff moved to quash the subpoenas issued to his counsel and his ex-wife. (A.R. 298.)

Plaintiff finally filed Plaintiff’s Motion to Compel on July 9, 2015, nearly seven months to the day after filing suit. (A.R. 66-95.) This was the first time Plaintiff invoked in Court his alleged right to arbitration. Plaintiff sought to compel arbitration of both his claims and Credit Acceptance’s Counterclaim. (*Id.*) Credit Acceptance filed its motion for partial summary judgment on July 14, 2015. (A.R. 98-117.)

On August 6, 2015, six days before the hearing on Plaintiff’s Motion to Compel, he served his “First Set of Requests for Admissions and Third Set of Requests for Production to Defendant” (“Fourth Set of Discovery Responses”) (A.R. 297.)

In an Order issued on November 12, 2015, the Circuit Court granted Plaintiff’s Motion to Compel arbitration of both Plaintiff’s claims and the Counterclaim. The Court relied almost entirely upon the decision of the Circuit Court in *Credit Acceptance Corp v. Dillon*, No. 14-C-856 (Cir. Ct. Cabell Cnty. March 2, 2015). Order at ¶ 2. In that respect, the Circuit Court’s analysis below was limited to the statement that “[t]he order [in *Dillon*] was granted compelling arbitration pursuant to a contract that contains an arbitration clause which appears to be identical to the one at issue in this case.” (A.R. 1-3.) Significantly, the Court failed to discuss, much less address, whether the procedural posture of both cases were identical and, in fact, they were anything but as explained below.

### III. SUMMARY OF THE ARGUMENT

There is no dispute that Plaintiff commenced suit in the Circuit Court against Credit Acceptance on December 11, 2014, did not seek arbitration of his claims at that time, engaged in discovery by, among other things, sitting for his own deposition and seeking the deposition of Credit Acceptance, answered the Counterclaim of Credit Acceptance without seeking arbitration and with a demand for a jury trial, and only sought to compel arbitration seven months after commencing suit. Although Plaintiff had chosen to litigate in court and remain in court even after Credit Acceptance filed its counterclaim, he belatedly sought to compel arbitration in a forum that permits limited discovery under vastly different procedures only after it became apparent that Credit Acceptance would not surrender to his settlement demands. Under well-settled law, including a decision of this Court, Plaintiff waived his right to compel arbitration by failing to plead arbitration in his answer to Credit Acceptance's Counterclaim and engaging in discovery such that he "so substantially utiliz[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009) (quotations omitted).

Nevertheless, the Circuit Court granted Plaintiff's Motion to Compel both his claims and the counterclaim. The Circuit Court relied almost entirely upon an earlier decision of another Circuit Court which, in a materially different context, found that Credit Acceptance – the plaintiff in that action – had not waived the right to compel arbitration of a counterclaim. That prior decision is inapplicable as Credit Acceptance had the express right under the terms of the arbitration agreement to seek to compel arbitration of the counterclaim and it timely exercised its express right without engaging in any discovery. Accordingly, that decision has no bearing on the instant case.

This Court should grant the writ to dispel any confusion concerning the appropriate standard to be applied when deciding waiver with respect to a motion to compel arbitration.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Credit Acceptance requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves the trial court's clear disregard of a well-established body of federal law on waiver. Oral argument is necessary in light of the importance to remind the trial courts that they must follow established federal law.

#### **V. ARGUMENT**

##### **A. STANDARD WITH RESPECT TO THE WRIT**

A Circuit Court order compelling arbitration is not subject to immediate appeal absent the issuance of a writ of prohibition. *See McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 221, 681 S.E.2d 96, 106 (2009). When determining whether to grant such a writ, this Court considers whether there is a "substantial" and "clear-cut" legal error and a high probability the trial court will be reversed. *Id.* (citation omitted). This Court will also consider the following five factors: (1) whether the party seeking the writ has no other, adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower court's order is clearly erroneous as a matter of law; (4) whether the lower court's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower court's order raises new and important problems or issues of law of first impression. *Id.* at 106-07 (citation omitted).

An order compelling arbitration will be reversed after a *de novo* review when "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.* at 107.

Under those tests, this Court should issue the writ of prohibition and the decision of the Circuit Court should be reversed.

**B. PLAINTIFF'S CONDUCT AMOUNTS TO A CLEAR CUT WAIVER OF HIS ARBITRATION RIGHTS.**

**1. Plaintiff Failed to Preserve Arbitration As A Defense And Acted Wholly Inconsistently With Arbitration**

Under the express terms of the parties' Arbitration Agreement, Plaintiff had the option of commencing a lawsuit in court or commencing an arbitration in the first instance. He chose to file suit in court. (*See* A.R. 6.) Credit Acceptance, likewise, could have moved to demand arbitration or litigated in court. It chose the latter and filed its Answer and Counterclaim on January 16, 2015. (A.R. 14-22.) Plaintiff could have chosen to seek arbitration of the Counterclaim under the plain terms of the Arbitration Agreement. (A.R. 103.) Once again, he did not and did not even plead arbitration as an affirmative defense in his answer to the Counterclaim. (*See* A.R. 23-24.)

Plaintiff also failed to exercise the option of seeking arbitration of Credit Acceptance's Counterclaim once it was filed. Rather, consistent with his bringing this action in court in the first instance, Plaintiff failed to move to compel arbitration of Credit Acceptance's Counterclaim or even plead arbitration as an affirmative defense to the Counterclaim. Critically, this Court has previously ruled that "[a]s an affirmative defense, arbitration must be asserted in the answer or it may, under appropriate circumstances, be deemed waived pursuant to W. Va. R. Civ. P. 8(c)." *State of West Virginia ex rel. the Borden & Robeson Corp. v. Hill*, 208 W. Va. 163, 539 S.E.2d 106, 111 (2000) (citing cases).

Credit Acceptance is not arguing that merely filing a lawsuit in court waives a party's right to arbitration. However, where that party files a lawsuit in court and then continues to litigate its claims in court for several months, it unquestionably forces its opponent to decide on and develop a litigation strategy to defend against the claims brought against it. Permitting the party to then change the forum and most of the rules that apply to the dispute necessarily results in unfair prejudice to the responding party. By filing suit in court while also subsequently neglecting to raise arbitration as an affirmative defense to Credit Acceptance's Counterclaim, requesting a jury trial, and extensively litigating this case in his chosen forum, Plaintiff waived the right to compel arbitration under well-settled law. The decision of the Circuit Court, therefore, constitutes "clear-cut, legal error" and the writ should be issued and its decision reversed.

*Credit Acceptance Corp v. Dillon*, No. 14-C-856 (Cir. Ct. Cabell Cnty. March 2, 2015), relied upon by the Circuit Court and Plaintiff, is not to the contrary. (*See* A.R. 80-94.) Indeed, it supports a finding of waiver here. In *Dillon*, Credit Acceptance brought suit and, after the defendant filed a counterclaim, immediately moved to compel arbitration of that counterclaim as expressly permitted by the parties' arbitration agreement. (*Id.*) As arbitration agreements must be enforced as written and the parties' arbitration agreement expressly provided Credit Acceptance the right to compel arbitration of the counterclaim upon its filing, it appropriately sought to do just that. Without taking any further action beyond filing the Complaint, and less than one month after the Dillons asserted their counterclaim, Credit Acceptance timely moved to compel arbitration of the counterclaim. (*Id.* at ¶ 10.) Further, fewer than two weeks later, and without participating in discovery other than to file objections premised solely upon arbitration, Credit Acceptance moved to stay discovery pending a ruling on its arbitration motion. (*Id.* at

¶ 9.) The *Dillon* Court then properly compelled arbitration finding that Credit Acceptance had not waived the right to compel arbitration consistent with the express terms of the parties' arbitration agreement.<sup>1</sup> (*Id.* at ¶¶ 26-32.)

The present case presents a stark contrast. Plaintiff did not promptly move to compel arbitration of the Counterclaim. Instead, he answered it, failed to plead arbitration as an affirmative defense, specifically demanded a jury trial, and then engaged in extensive discovery, including serving four sets of written discovery, serving a notice of deposition for Credit Acceptance's corporate representative, sitting for his own deposition, and filing multiple motions to quash subpoenas that were issued as a result of Plaintiff's testimony at his deposition. (*See* A.R. 6, 11-12, 13, 291, 26-28, 23-24, 31-33, 294, 164-67, 168, 151, 169-71, 298, 296, 297.) He then waited nearly seven months from the date he filed his Complaint to move to compel arbitration of the entire case and not just the Counterclaim. (A.R. 66-95.) Accordingly, *Dillon* not only fails to support Plaintiff's position herein, it actually supports a finding of waiver.

## **2. Plaintiff Also Waived The Right To Compel Arbitration Through His Delay And Resulting Prejudice To Credit Acceptance**

The Circuit Court also erred in failing to find Plaintiff waived the right to compel arbitration as Credit Acceptance has been and will be prejudiced by his seven-month delay in

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<sup>1</sup> It is well-settled that the institution of litigation, as permitted by an arbitration agreement, does not constitute the waiver of the right to compel arbitration of a **subsequent** claim or counterclaim. *See, e.g., Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) (lender's civil action to collect debt through proof of claim could not constitute waiver of right to compel arbitration of subsequent adversary complaint because the parties' arbitration agreement explicitly permitted lender to file such a claim); *Citifinancial, Inc. v. Farmer*, No. 06-4LR, 2006 WL 1273712, at \*2 (S.D. Miss. May 9, 2006) (institution of collection action could not constitute waiver of right to compel arbitration of subsequent counterclaim in light of the express language of the arbitration agreement permitting such); *Credit Acceptance Corp. v. Davisson*, 644 F. Supp. 2d 948, 957-58 (N.D. Ohio 2009) (same); *Fidelity Nat'l Corp. v. Blakely*, 305 F. Supp. 2d 639, 642 (S.D. Miss. 2003) (same).

seeking arbitration after engaging the “litigation machinery” by taking actions such as serving four sets of written discovery request, demanding a jury trial, seeking to amend his Complaint, noticing a deposition (and requesting another), and filing motions with the court. If Credit Acceptance is forced to arbitrate absent intervention by this Court, such prejudice will not be correctable on appeal because Credit Acceptance will be thrust into a forum in which such extensive discovery (which Credit Acceptance has not yet completed) will not be available. Indeed, such decision may not even be reviewable on appeal under 9 U.S.C. § 16 of the FAA.

When deciding whether a party waived the right to compel arbitration, courts<sup>2</sup> consider whether it took actions completely inconsistent with any reliance on an arbitration agreement and whether it delayed its assertion of arbitration to such an extent that the opposing party incurs actual prejudice. *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2008); *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 338 (6th Cir. 2010). Prejudice exists “when a party too long postpones his invocation of his contractual right to arbitration, and thereby

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<sup>2</sup> This Court has never had the occasion to opine on the precise standard to be utilized when determining whether a party has waived its right to compel arbitration. In fact, when addressing the issue of waiver, the *Dillon* court advised the parties that it would welcome this Court giving a definitive ruling on the issue. *Credit Acceptance Corp. v. Dillon*, Civ. Action No. 14-C-856, Tr. of Hrg. on Scheduling Conference and Mot. to Compel at 22:20-23 (Cir. Ct. Cabell Cnty., W. Va. Feb. 4, 2015). Although this Court has never opined on waiver, numerous state supreme courts have taken the opportunity to consider the standard for, and what conduct constitutes, a waiver of the right to compel arbitration. See, e.g., *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543 (Ky. 2008); *Good Samaritan Coffee Co. v. LaRue Distribut., Inc.*, 275 Neb. 674, 748 N.W.2d 367 (2008); *Saint Agnes Medical Ctr. v. PacifiCare of California*, 31 Cal. 4th 1187, 1195 (2003); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828 (Miss. 2003); *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Bryant v. Am. Exp. Fin. Advisors, Inc.*, 595 N.W.2d 482 (Neb. 1999); *Fidelity Nat’l Title Ins. Co. of Tenn. v. Jericho Mgmt., Inc.*, 722 So.2d 740 (Ala. 1998); *Prudential Secs. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995). This case presents an opportunity for this Court to clarify the law regarding the waiver of the right to compel arbitration and bring West Virginia decisions in line with well-established federal authority.

causes his adversary to incur unnecessary delay or expense.” *KenAmerican Resources, Inc. v. Potter Grandchildren LLC*, 916 F. Supp.2d 799, 802 (E.D. Ky. 2013) (finding the plaintiff waived right to arbitration by, among other things bringing suit and engaging in discovery). *Accord Johnson Assoc. Corp. v. HL Operating Corp.* 680 F.3d 713, 719-20 (6th Cir. 2012).

**a. Plaintiff unreasonably delayed in invoking his arbitration rights.**

Plaintiff in this case obtained what he wanted from Credit Acceptance through discovery under the West Virginia Rules of Civil Procedure, filed several motions and objections which were never ruled upon to obstruct Credit Acceptance from utilizing the same Rules to conduct discovery, and only after doing so did he seek to move the case to arbitration (where, his supposedly “binding” stipulation limiting any recovery in this case to \$75,000 would no longer apply). Plaintiff waited for seven months to invoke arbitration in this case. (*See* A.R. 298.) When Plaintiff filed his Complaint on December 11, 2014, he included in it a stipulation that contemplated arbitration. (A.R. 6, 11-2.) Yet, even when Plaintiff filed an untimely reply to Credit Acceptance’s Counterclaim on May 1, 2015, he did not preserve arbitration as a defense. (A.R. 23-24.) When Credit Acceptance produced a copy of the Contract containing the arbitration clause in discovery on June 1, 2015, Plaintiff did not invoke the arbitration clause. No, Plaintiff waited for more than a month before filing Plaintiff’s Motion to Compel. During that time, Plaintiff served more discovery requests on Credit Acceptance, sought Credit Acceptance’s agreement to amend the Complaint so that he could assert more claims in the litigation (in the Circuit Court of Kanawha County, West Virginia), and allowed Credit Acceptance to depose him. (*See* A.R. 298.) In fact, by June 23, 2015, more than three weeks after Credit Acceptance produced the Contract in discovery, Plaintiff was unquestionably aware of the arbitration clause’s existence, for he attempted to use it and the his allegedly “binding”

stipulation to manipulate Credit Acceptance into a quick settlement. (A.R. 169-71.) Still, Plaintiff did not move to compel arbitration. Rather, Plaintiff served more discovery requests on Credit Acceptance. (A.R. 296.) Only then, more than five weeks after Credit Acceptance produced the Contract containing the arbitration clause, and more than two weeks after attempting to use that arbitration clause for his (failed) attempt at leveraging a settlement, and more than a week after serving yet another set of discovery requests did Plaintiff finally file his Motion to Compel. (*See* A.R. 298.)

If Plaintiff wanted to arbitrate this case, he had ample opportunity to pursue that option in December 2014, or again in May 2015, or in early June 2015. (*See id.*) Instead, Plaintiff waited until the middle of July 2015—just days before Credit Acceptance filed its motion for summary judgment. There is no excuse for such delay, during which time Credit Acceptance was led to believe that it was litigating in court, pursuant to the West Virginia Rules of Civil Procedure. In the present case, there can be no question, for the reasons explained above, that Plaintiff took actions completely inconsistent with arbitration by filing suit, answering Credit Acceptance’s Counterclaim without invoking his right to compel arbitration, and engaging in discovery. For those reasons alone, waiver should be found and the Circuit Court’s decision reversed. *See, e.g., Central Trust Co., N.A. v. Anemostat Prods. Div.*, 621 F. Supp. 44, 46 (S.D. Ohio 1985) (“the filing of a complaint is notice to a defendant that the plaintiff is refusing to arbitrate.”).

**b. Plaintiff’s delay in invoking arbitration prejudiced Credit Acceptance.**

Plaintiff’s delay in invoking arbitration has cost Credit Acceptance far more than the long seven months that it has spent attempting to move this case forward toward a resolution. Rather, Credit Acceptance has lost opportunity, strategy, and resources.

Credit Acceptance has lost opportunity and strategy because discovery in arbitration differs vastly from discovery under the West Virginia Rules of Civil Procedure. The Arbitration Agreement at issue provides for arbitration through the American Arbitration Association (“AAA”) or JAMS. (A.R. 103.) Both of these forums operate under their own rules, not the West Virginia Rules of Civil Procedure. (*Compare* A.R. 172-215 and 216-54 *with* W. Va. R. Civ. P.) Under the West Virginia Rules of Civil Procedure, the parties are permitted to serve up to 40 interrogatories, an unlimited number of requests for production of documents and requests for admission, notice depositions, and issue subpoenas. On the other hand, neither the AAA nor JAMS automatically permit the kinds of extensive discovery that Plaintiff has conducted. (A.R. 172-215 and 216-54.) Rather, under the AAA, the arbitrator directs the flow of discovery needed for the case. (A.R. 191.) JAMS prescribes a basic framework for the exchange of documents and limited deposition rights, which the arbitrator may adapt to the specific needs of a case. (A.R. 250-54.)

Further, Credit Acceptance has lost opportunity, strategy, and financial resources because certain discovery that it attempted to conduct is not transferable to an arbitration forum. Credit Acceptance undertook the time and expense of serving subpoenas on non-parties pursuant to Rule 45 of the West Virginia Rules of Civil Procedure. (A.R. 34-49, 50-58.) Those subpoenas are now not only stale, but they cannot be relied upon or even necessarily reissued in a new forum. Indeed, such discovery subpoenas are not even contemplated in the arbitration forums. Whether Credit Acceptance would be permitted to serve any such discovery subpoenas would rest in the discretion of an arbitrator. Changing forums mid-stream, after this much discovery and litigation has taken place, is unquestionably disruptive to litigation strategy and results in a total waste of the resources Credit Acceptance has expended on discovery efforts that will not

transfer to a new forum. This alone constitutes prejudice which can “be found where a party has gained a strategic advantage by obtaining something in discovery that would be unavailable in arbitration.” *Johnson Assoc. Corp.*, 680 F.3d at 719.

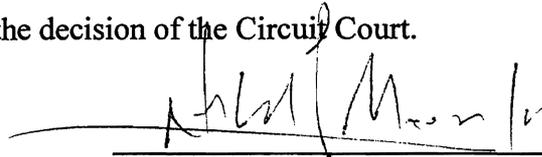
Courts routinely find prejudice when the parties have engaged in discovery precipitated by the party belatedly seeking to compel arbitration. *See, e.g., Southern Sys., Inc. v. Torrid Oven Ltd.*, 105 F. Supp. 2d 848, 856 (W.D. Tenn. 2000) (finding waiver and prejudice where defendant engaged in extensive discovery before invoking any arbitration rights); *Uwaydah v. Van Wert Cnty. Hosp.*, 246 F. Supp. 2d 808, 813 (N.D. Ohio 2002) (finding waiver and prejudice where plaintiff filed suit, and engaged in extensive discovery before seeking to compel arbitration); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (finding waiver where the defendant filed an answer, did not raise arbitration in any of the “initial court papers it filed” and engaged in discovery); *KenAmerican Resources, Inc. v. Potter Grandchildren, LLC*, 916 F. Supp. 2d 799, 802 (E.D. Ky. 2013) (finding waiver and prejudice where defendant forced to engage in discovery and engage in motion practice); *Nat’l Found. for Cancer Research*, 821 F.2d 778 (D.C. Cir. 1987) (finding waiver where defendant delayed in seeking arbitration and engaged in discovery); *N. Cent. Constr., Inc. v. Siouxland Energy & Livestock Coop.*, 232 F. Supp. 2d 959, 965 (N.D. Iowa 2002) (finding waiver where plaintiff sought to compel arbitration two months after filing suit). Courts have stressed that a party wishing to invoke arbitration may not sit idle while the other party is forced to incur costs in connection with the action and, if it does, it will be found to have waived its right to compel arbitration. *See, e.g., Hurley v. Deutsche Bank Trust Co.*, 610 F.3d 334, 339 (6th Cir. 2010) (arbitration right waived by failure to timely invoke and b engaging in litigation); *Manasher v.*

*NECC Telecom*, 310 Fed. App'x 804, 806 (6th Cir. 2009) (arbitration right waived by engaging in discovery and motion practice). That admonition applies with equal force here.

Accordingly, Plaintiff waived his right to invoke arbitration in this matter and the Circuit Court should have denied his motion.

## **VI. CONCLUSION**

For all of the foregoing reasons, Credit Acceptance respectfully requests that the Court grant its Petition and reverse the decision of the Circuit Court.



Nicholas P. Mooney II (WV Bar No. 7204)

[nmooney@spilmanlaw.com](mailto:nmooney@spilmanlaw.com)

*Counsel of Record*

Sarah B. Smith (WV Bar No. 11700)

[ssmith@spilmanlaw.com](mailto:ssmith@spilmanlaw.com)

SPILMAN THOMAS & BATTLE, PLLC

300 Kanawha Blvd., East (Zip 25301)

P.O. Box 273

Charleston, WV 25321-0273

Telephone: 304.340.3800

Facsimile: 304.340.3801

Attorneys for Petitioner

Credit Acceptance Corporation

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NUMBER: \_\_\_\_\_

STATE OF WEST VIRGINIA ex rel.  
CREDIT ACCEPTANCE CORPORATION,

Petitioner,

v.

CIVIL ACTION NO. 14-C-2160

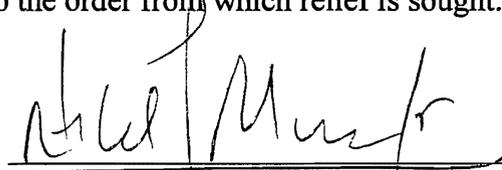
THE HONORABLE JAMES C. STUCKY,  
Judge of the Circuit Court of Kanawha County,  
West Virginia, and BRANDON ADKINS,

Respondents.

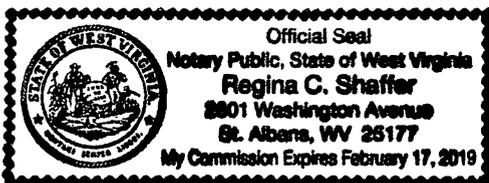
VERIFICATION

I, Nicholas P. Mooney II, verify that I am counsel for Credit Acceptance Corporation, in this matter pending before the Circuit Court of Kanawha County, West Virginia, and styled Brandon Adkins v. Credit Acceptance Corporation, Civil Action Number 14-C-2160.

I further verify that the information contained in **Credit Acceptance Corporation's Verified Petition for Writ of Prohibition** and Appendix thereto filed herewith are true and that I am familiar with the proceedings leading to the order from which relief is sought.

  
\_\_\_\_\_  
Nicholas P. Mooney II (WV State Bar No. 7204)

Subscribed and sworn before me this 28<sup>th</sup> day of December, 2015.



  
\_\_\_\_\_  
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NUMBER: \_\_\_\_\_

STATE OF WEST VIRGINIA ex rel.  
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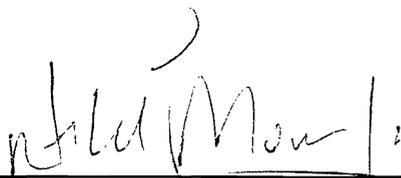
Respondents.

**CERTIFICATE OF SERVICE**

I, Nicholas P. Mooney II, counsel for Credit Acceptance Corporation, do hereby certify that true and exact copies of **Credit Acceptance Corporation's Verified Petition for Writ of Prohibition** and accompanying **Appendix Record** have been served upon counsel of record via the regular course of the United States Mail, postage prepaid this 28th day of December, 2015, and addressed to the following:

Benjamin Sheridan, Esquire  
Klein Sheridan & Glazer, LC  
Clyffeside Professional Building  
3566 Teays Valley Road  
Hurricane, WV 25526  
(304) 562-7111  
*Counsel for Plaintiff*

The Honorable James C. Stucky  
Circuit Court of Kanawha County, WV  
Kanawha County Judicial Building  
PO Box 2351  
Charleston, WV 25301  
(304) 357-0364

  
\_\_\_\_\_  
Nicholas P. Mooney II (W. Va. Bar No. 7204)