IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JEFFREY N. EVANS, Individually and in his capacity as an Employee, Servant, or Agent of Ameriprise Financial Services, Inc., AMERIPRISE FINANCIAL SERVICES, INC., KRISTINA NICHOLLS, Individually, and STEPHEN BAYLES, Individually,
Defendants Below,

Petitioners,

v. No. 15-0600

DEBRA K. BAYLES,
Plaintiff Below,

Respondent.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Respondent's response brief is chock full of duplicating Petitioners' main brief and short on legal substance. She strains to argue that her negligent inducement and detrimental reliance claims are somehow distinct from the subject IRA accounts, when in fact the IRA accounts are the predicate for such claims. Moreover, Respondent is dismissive of the Circuit Court's finding of incorporation by reference during the hearing below, and the true effect of such a finding under West Virginia law.[1]

II. THE IRA ACCOUNTS ARE THE PREDICATE FOR ALL OF RESPONDENT'S CLAIMS, WHICH ARE SUBJECT TO THE PREDISPUTE ARBITRATION CLAUSE.

Striving to avoid *de novo* review herein and arbitration at all costs, Respondent avers that her negligent inducement and detrimental reliance claims against Evans precede this controversy and, by extension, are not subject to arbitration.

The reality here is that this controversy concerns the IRA accounts of the decedent. Respondent brought her civil action to recover monies allegedly due to her under the IRA accounts. Her claims against Petitioners derive from the IRA accounts. Surely, Respondent would not assert negligent inducement and detrimental reliance claims in the absence of the IRA accounts. Moreover, Respondent would not assert such claims in the absence of the signed Brokerage Application and Portfolios Application, which incorporate a predispute arbitration clause by reference

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[1] Respondent dismisses incorporation by reference because it does not appear in the May 19, 2015 Order. *Appendix I at 132-136.* Notably, she prepared and submitted the Order for entry. In any event, it is clear from the February 27, 2015 hearing transcript that the Circuit Court found incorporation by reference in ruling on the arbitration motion. *Appendix II at 22-23.* The finding of incorporation by reference is dispositive of this appeal under West Virginia jurisprudence.

appropriately. Truly, Respondent's efforts to distract this Court from the core arbitration issue are unavailing.

III. WEST VIRGINIA ARBITRATION JURISPRUDENCE RECOGNIZES INCORPORATION BY REFERENCE

This Court has long recognized the contract doctrine of incorporation by reference and has applied the same in arbitration matters.

Nearly 40 years ago, this Court in *Ashland Oil, Inc. v. Donahue,* 159 W.Va. 463, 223 S.E.2d 433 (1976) held that even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same, and the relationship between the documents is clearly apparent. And over 20 years ago in *Rashid v. Schenck Constr. Co., Inc.,* 190 W.Va. 363, 438 S.E.2d 543 (1993), this Court established that an arbitration agreement can be incorporated by reference under the Federal Arbitration Act.

More recently, in *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 232 W.Va. 432, 752 S.E.2d 586 (W.Va. 2013), this Court reaffirmed that parties may incorporate into their contract the terms of some other writing. Writings which are part of the same transaction are interpreted together. Moreover, when a writing refers to another document, that other document becomes constructively a part of the writing to where the two documents form a single instrument. *See U-Haul,* 752 S.E.2d at 595. To achieve incorporation by reference, a writing must make a clear reference to another document and describe it in such terms that its identity may be ascertained beyond doubt. To uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. *Id.*

Critically, this Court in *U-Haul* also recognized that courts generally allow an unsigned document to be incorporated into a signed document, as long as the signed paper specifically refers to the unsigned document and the unsigned document is available to the parties. *See U-Haul*, 752 S.E.2d at 596-597, citing National Consumer Law Center, *Consumer Arbitration Agreements,* § 5.2.2.5 at 112 (6th edition).

This is precisely the situation before this Court. The signed Brokerage Application refers to the predispute arbitration clause appearing in the Brokerage Agreement, clearly and specifically, as found by the Circuit Court. *Appendix II at 22-23.* The Brokerage Agreement was available to the decedent and was given to him by Evans. *Appendix I at 128-129.* Consequently, the unsigned Brokerage Agreement does not detract from the enforceability of the predispute arbitration clause. And, above all, the within incorporation by reference precludes the Circuit Court's invocation of *contra proferentem.* Indeed, the incorporation of the predispute arbitration clause by reference in the signed Brokerage Application establishes that arbitration is the required forum for the adjudication of Respondent's claims.

IV. THIS COURT'S NOVEMBER 4, 2015 MEMORANDUM DECISION IN *NAVIENT SOLUTIONS, INC., et al. v. ROBINETTE* IS INSTRUCTIVE AND SUPPORTS REVERSAL OF THE CIRCUIT COURT.

On November 4, 2015, this Court entered a Memorandum Decision in *Navient Solutions, Inc., et al. v. Robinette,* No. 14-1215. *Navient* concerned a motion to compel arbitration. The Circuit Court of Raleigh County denied Navient's motion to compel arbitration. Upon review of the entire record, this Court reversed the Circuit Court of Raleigh County and remanded the case for entry of an order granting the arbitration motion.

While the Circuit Court determined that Navient's promissory note was incorporated by reference into a loan application document, it held that the arbitration clause contained in the promissory note was unenforceable on multiple grounds. Robinette complained that the arbitration clause went beyond the scope of the promissory note, which she did not sign. She also complained she was never advised of the addition of an arbitration clause to the promissory note. The Circuit Court of Raleigh County sustained these complaints and further found that the arbitration clause was not in the body of the loan application signed by Robinette. The trial court also found that the incorporation of the promissory note did not clearly notify that an arbitration clause was included. Consequently, the arbitration motion was denied.

Navient appealed. It argued that the loan application and promissory note constituted one document. The lender also argued that the documents were presented to Robinette at the time of the loan's execution. This Court found a single unified contract. Importantly, this Court looked to references to the promissory note in the signed application, which contained the arbitration clause. In so doing, this Court drew significance from the fact that by signing the application, Robinette expressly agreed to be bound by the terms contained in the promissory note. This Court also found clarity in Robinette's declaration that she read and agreed to the terms of the promissory note accompanying her application. Robinette's signature left no doubt that the promissory note was a critical part of the executed transaction. Accordingly, this Court reaffirmed its jurisprudence on the application of clear and unambiguous contract terms [2] and reversed the trial court's denial of the arbitration motion.

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[2] "It is not the right or province of a court to alter, pervert or destroy the clear meaning

Applying *Navient* here leads to one conclusion, namely, the enforcement of the subject predispute arbitration clause.

The signed Brokerage Application reflects the decedent's acknowledgment that he *received* and *read* the Brokerage Agreement, and agreed to abide by its terms and conditions. The signed Brokerage Application also reflects the decedent's consent to all terms and conditions in the Brokerage Agreement with full knowledge and understanding of the information contained in the document. Moreover, the signed Brokerage Application states that the IRA account is governed by a predispute arbitration clause found in Section 26 on Page 3 of the Brokerage Agreement. And, crucially, the Brokerage Application signed by the decedent acknowledges receipt of the predispute arbitration clause. *Appendix I at 11-12, 28, and 132-133.* Actual receipt occurred when Evans delivered the Brokerage Agreement to the decedent during the June meeting. *Appendix I at 128-129.*

Thus, under *U-Haul* and *Navient*, the signed Brokerage Application and Brokerage Agreement are read together, constitute one transaction, and confirm that Respondent's claims are subject to arbitration.

V. CONCLUSION

Accordingly, for reasons heretofore stated, Petitioners' respectfully request entry of an Order reversing the May 19, 2015 decision of the Circuit Court of Marshall County,

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and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them". Syllabus Point 3, *Cotiga Development Co. v. United Fuel Gas Co.,* 147 W.Va. 484, 128 S.E.2d 626 (1962). *See also* Syl. Pt. 1, *Hatfield v. Health Mgmt. Assocs. of W. Virginia,* 233 W.Va. 259, 672 S.E.2d 395 (2008). Moreover, "[w]here the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden,* 153 W.Va. 721, 172 S.E.2d 126 (1969). *Navient* Memorandum Decision at Page 6.

and remanding this matter for entry of an Order granting Petitioners' Motion to Dismiss and Compel Mandatory Arbitration.

JEFFREY N. EVANS, AMERIPRISE FINANCIAL SERVICES, INC., KRISTINA NICHOLLS, and STEPHEN BAYLES

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v. **No. 15-0600**

DEBRA K. BAYLES,
Plaintiff Below,

Respondent.

CERTIFICATE OF SERVICE

I, Edward P. Tiffey, counsel for Petitioners herein, do certify that on November 25, 2015, I served the foregoing **PETITIONERS' REPLY BRIEF** upon counsel of record, by depositing the same in the United States Mail, postage prepaid, in envelopes addressed as follows:

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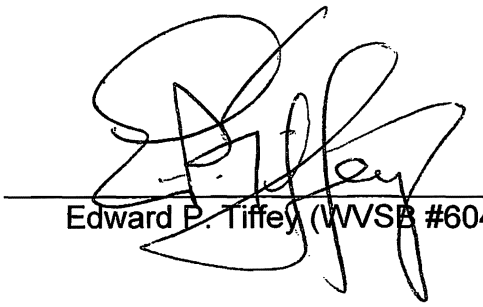

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