FILED
FEB 16 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 15-1121

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CITIBANK, N.A., SUCCESSOR TO CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

ROBERT S. PERRY,

Respondent.

From the Circuit Court of Boone County, West Virginia
Civil Action No. 10-C-218

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The circuit court erred when it denied the motion to compel arbitration filed by Citibank, N.A. on the ground that Citibank waived its right to compel arbitration by initiating a collection action in the Circuit Court of Boone County, West Virginia. This ruling was erroneous because the circuit court's findings and conclusions regarding waiver ignored the plain language of the agreement and were at odds with the elements necessary to establish implied waiver.

STATEMENT OF THE CASE

I. Introduction

This appeal arises out of the circuit court's failure to enforce the plain language of a valid arbitration clause in Cardholder Agreements between Petitioner, Citibank, N.A. ("Citibank"), and Respondent, Robert S. Perry ("Perry"). In 2010, Citibank initiated a debt collection action against Perry in the Circuit Court of Boone County, West Virginia. In response, Perry filed a *pro se* Answer acknowledging the debt was owed. Over four years later, Perry filed an Answer to Complaint and Class Counterclaim ["Counterclaim"] alleging, among other things, violations of the West Virginia Consumer Credit and Protection Act. When Citibank immediately sought to compel arbitration, the circuit court denied the motion, ruling that Citibank waived its right to arbitration by initiating the collection action in circuit court. However, the circuit court's ruling is reversible error because (1) under the arbitration agreement's binding terms, either party has the express right to file an action in circuit court, and then "[a]t any time" prior to the start of a trial or final judgment, ask the court to compel arbitration; (2) the arbitration agreement contains a non-waiver provision; and (3) implied waiver requires an intentional relinquishment of a known right, evidence of which was not reflected in the record.

II. The Account and Binding Arbitration Agreement

Citibank issued a MasterCard ending in account number 5837 to Perry in January 1998 (the "Account"). (A.R. 61). The Account is subject to written terms and conditions contained in the Card Agreement, and its subsequent amendments. (Id.).

An arbitration clause was added to Perry's Account in late 2001. (Id.). In or about October 2001, Citibank mailed to its cardholders, including Perry, a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement" (the "Arbitration Change-in-Terms"). (A.R. 62). The Arbitration Change-in-Terms was mailed to Perry with his October 2001 periodic statement for the Account as evidenced by the transaction detail for the October 2001 billing statement for the Account. (Id.). Additionally, the October 2001 billing statement sent to Perry included the following special message:

> PLEASE SEE THE ENCLOSED CHANGE IN TERMS NOTICE FOR IMPORTANT INFORMATION ABOUT THE BINDING ARBITRATION PROVISION WE ARE ADDING TO YOUR CITIBANK CARD AGREEMENT.

(Id.). Citibank's computer records confirm the Arbitration Change-in-Terms was sent to Perry with the October account statement. (Id.). Furthermore, in November 2001, a monthly periodic billing statement for the Account was mailed to Perry which included the following follow-up message:

> WITHIN THE LAST 30 DAYS YOU SHOULD HAVE RECEIVED AN IMPORTANT NOTICE ABOUT ADDING BINDING ARBITRATION TO YOUR CITIBANK CARD AGREEMENT. IF YOU WOULD LIKE ANOTHER COPY PLEASE CALL THE CUSTOMER SERVICE NUMBER LISTED ABOVE.

(Id.).

Perry, like other recipients of the Arbitration Change-in-Terms, was permitted to opt out of the arbitration clause by taking certain steps. (A.R. 64). Under the Arbitration Change-in-Terms, if Perry objected, he could opt out by submitting a written request for exclusion within a specified time period. (Id.). Perry did not opt out of the arbitration clause. (Id.).

The Arbitration Change-in-Terms also provided that the arbitration clause would become effective on the day after the Statement/Closing date indicated on Perry's November 2001 billing statement. (A.R. 65). The Statement/Closing date was November 14, 2001. (A.R. 65).

Thus, the arbitration clause became effective on November 15, 2001. Perry continued to use Account after the effective date of the Arbitration Agreement. (A.R. 66).

In February 2005, Citibank mailed to Perry a "Notice of Change-in-Terms, Right to Opt Out, and Information Update" (the "February 2005 Change-in-Terms") for the Account. (A.R. 65). The February 2005 Change-in-Terms made certain amendments to the Arbitration Agreement, removing JAMS as an arbitration provider and revising the severability clause. (Id.). Citibank recorded the mailing of the February 2005 Change-in-Terms to Perry in its computer system records for his Account. (Id.). Just like before, Perry had the opportunity to opt out of the changes to the arbitration clause, but did not do so. (Id.). Instead, Perry continued to use and make payments on his Account after receiving the February 2005 Change-in-Terms. (Id.).

On or about July 22, 2005, the Account was converted from a Citi Platinum Select Card to a Citi PremierPass Card and a new complete Card Agreement was mailed to Perry ("July 2005 Card Agreement"). (A.R. 65-66). Citibank recorded the conversion of the Account in its computer system records for Perry's Account. (A.R. 66). Notes dated July 22, 2005 indicate the July 2005 Card Agreement was mailed to Perry. (Id.). Perry continued to use the Account after July 2005 as evidenced by transaction details reflected on periodic billing statements for the Account for the period August 15, 2005 through September 15, 2005. (A.R. 66-67).

On or about September 25, 2006, during a call with Perry, a pricing change was made to the Account, and as a result, a new Card Agreement was mailed to Mr. Perry ("2006 Agreement"). (A.R. 67). Perry continued to use the Account after September 26, 2006 for transactions between October 17, 2006 and November 14, 2006 (A.R. 66-67).

The 2006 Agreement contains the most recent arbitration clause ("the Arbitration Agreement"), which provides that either party could elect mandatory binding arbitration. (A.R. 66, 107, 613). The Arbitration Agreement states in salient part:

ARBITRATION

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. **IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.**

Agreement to Arbitrate: Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

Claims Covered

What Claims are subject to arbitration? All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. *A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party.* Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

Whose Claims are subject to arbitration? Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir assignee, or trustee in bankruptcy.

* * *

Broadest Interpretation. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

* * *

How Arbitration Works:

> **How does a party initiate arbitration?** . . . *At any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. . . Even if a party fails to exercise these rights at any particular time, or in connection with any particular claims, that party can still require arbitration at a later time or in connection with any other claims.*

(emphasis supplied)(A.R.110, 616)(bolding in original). The Arbitration Agreement also includes terms excluding small claims court actions and allowing for the reimbursement and/or advancement of arbitration fees. (Id.) Also, per the Card Agreement, the "agreement is binding on you unless you cancel your account within 30 days after receiving the card and you have not used or authorized use of your account." (Id.). Perry used the Account after receiving the Card Agreement and did not cancel, close or reject the Account or Card Agreement. (A.R. 66-67) Finally, the Arbitration Agreement further states that "[n]o portion of this arbitration provision may be amended, severed, or waived absent a written agreement between you and us." (A.R. 110, 616).

III. Procedural Background

On September 20, 2010, Citibank filed a collection action against Perry to collect the balance owed on the Account. (A.R. 3). In response, on or about October 1, 2010, Perry filed a *pro se* Answer acknowledging the debt was owed. (A.R.4). Over four years later, on or about December 8, 2014, attorneys with the Giatras Law Firm, PLLC filed a Notice of Appearance on behalf of Perry. (A.R. 1). Thereafter, an Agreed Scheduling Order: Civil ["Scheduling Order"] was entered setting forth, in part, the following deadlines:

> 1. (a) Trial Date: November 17, 2015 Time: 9:00 am
> (b) Pretrial Conference: November 9, 2015 Time: 9:00 am
>
> ...
>
> 8. Third party complaints, counterclaims, joinder, and amended pleadings to be filed and served on or before: May 1, 2015

(A.R. 12).

On May 1, 2015, Perry filed the Counterclaim[1]. (A.R. 13) Though Perry's October 1, 2001, *pro se* Answer acknowledged owing the debt, Perry's May 1, 2015 filing generally denied Citibank was entitled to the relief it sought. Furthermore, Perry asserted counterclaims challenging Citibank's right to recover the outstanding balance owed on the Account by alleging that the collection action was improperly filed in violation of state law and that it violated the West Virginia Consumer Credit Protection Act as well as common law. The claims were asserted on both an individual and class basis. Citibank denies any wrongdoing as set forth in the Counterclaim and further maintains that Perry expressly agreed to arbitrate any dispute arising out of, or related to the Account, upon election by either party.

IV. The Motion to Compel Arbitration

On June 22, 2015, Citibank filed the Motion of Plaintiff/Counter-Claim Defendant Citibank, N.A. to Compel Arbitration and Stay Action ["Motion to Compel Arbitration"], citing the plain language of the Arbitration Agreement. (A.R. 38). In response, Perry offered no evidence to rebut either the existence or terms of the Arbitration Agreement as established by affidavit. (A.R. 170). Nor did Perry contend that the Arbitration Agreement was procedurally or substantively unconscionable or that the claims set forth in the Counterclaim fell outside of its scope. Instead, Perry's sole argument was that Citibank had waived the right to compel arbitration by initiating suit in circuit court and not invoking arbitration until the Counterclaim was filed on May 1, 2015. (A.R. 170)

Following a hearing, the circuit court embraced Perry's waiver argument and denied Citibank's motion, stating:

> Citibank effectively waived any purported arbitration rights once held because Citibank, inter alla, voluntarily selected Boone County Circuit Court as its preferred forum, litigated its disputes with Mr. Perry in this Court, agreed to an amended scheduling order allowing for counterclaims, issued fact witness

[1] Perry did not seek leave of court to either amend the Answer to the Complaint, or file a counterclaim, as required by W.V. R. Civ. P. 15.

> disclosures, requested judgment on the pleadings, and waited nearly five years to invoke its purported contractual rights to arbitrate.

(A.R. 549)

With this ruling, the trial court concluded its order by stating "Mr. Perry has won this wrestling match with the arbitration bear." (A.R. 550). It is from this order, which displays open hostility to arbitration, that Citibank now appeals.

SUMMARY OF ARGUMENT

Arbitration agreements are binding contracts that must be enforced pursuant to the Federal Arbitration Act ("FAA"). As binding contracts, courts are not permitted to disregard their terms or rewrite the provisions to change their meaning. Instead, courts are permitted to only determine the threshold issues of whether the agreement is valid and whether the dispute falls within its scope.

Here, the circuit court erred in denying the Motion to Compel Arbitration on the ground that Citibank waived its right to arbitrate by initiating filing the lawsuit in circuit court. In addressing the question, the circuit court ignored the clear language of the Arbitration Agreement which specifically provides:

> [at] any time you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such claims are part of a lawsuit, unless a trial has begun or a final judgment has been entered. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims.

Notably, the Arbitration Agreement also provides that "[a] party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party." This specifically includes "Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions or any other sources of law. . . [and] Claims made as counterclaims. . . ." Under these clear and unambiguous provisions, Citibank had a contractual right to initiate a collection action and later

seek arbitration when Perry filed the Counterclaim. Indeed, the Arbitration Agreement further contains a non-waiver provision that provides that Citibank "can delay in enforcing or fail to enforce any of our rights under this agreement without losing them."

The circuit court was required, under the FAA, to apply ordinary state law principles that govern the formation of contracts. Consequently, the court was also required to treat the Arbitration Agreement like any other contract. When contract terms are clear and unambiguous, they are to be applied and not ignored. The circuit court failed to follow these basic contract principles and as a result, violated Section 2 of the FAA, which mandates that binding Arbitration Agreements and contracts "evidencing a transaction involving interstate commerce. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The circuit court's order was also contrary to well established federal authority which does not lightly infer waiver given the strong federal policy favoring arbitration. A party asserting waiver is required to shoulder a heavy burden and must demonstrate that the party invoking arbitration so substantially utilized the litigation process that to permit arbitration would prejudice the opposing party, including a showing of actual prejudice. Here, such a showing was not and could not be made. Little was done with the collection action despite its pendency for over four years. More significantly, arbitration was immediately sought as soon as the Counterclaim was filed. It is the Counterclaim which is the essence of the action and the invocation of arbitration will not impede Perry's ability to timely resolve his claims.

The circuit court's ruling also violated well established state law principles with respect to implied waiver. For implied waiver to occur, a party must intentionally relinquish a known right. Here, Citibank did not relinquish any rights under the Arbitration Agreement because the agreement clearly permitted either party, including Citibank, to invoke arbitration at any time prior to trial or judgment. Thus, when the original action was initiated in 2010 and even when

the Counterclaim was filed, there was an existent right for Citibank to invoke arbitration which had never been relinquished.

Citibank requests that this Court reverse this circuit court's order denying the Motion to Compel Arbitration, and remand the matter with instructions to permit the action to proceed to arbitration with a corresponding stay of proceedings pending the outcome of arbitration.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Citibank requests oral argument pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Specifically, Citibank requests that this case be set for Rule 20 oral argument since this waiver issue is a matter of first impression before the Supreme Court of Appeals.

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT THE ARBITRATION AGREEMENT IS VALID AND MUST BE ENFORCED

The law of arbitration has been extensively litigated in West Virginia. No less than twenty one (21) decisions of this Court have considered the issue in varying contexts in the last five (5) years.[2] Thus, this Court is well aware of the principles governing the application of the

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[2] *Geological Assessment & Leasing v. O'Hara*, No. 14-1210, No. 14-1211, No. 14-1286, 2015 W. Va. LEXIS 1113 (W. Va. November 18, 2015); *Chesapeake Appalachia, L.L.C. v. Hickman*, No. 14-0921, No. 14-0922, No. 14-0923, 2015 W. Va. LEXIS 1119 (W. Va. November 18, 2015); *Navient Solutions, Inc. v. Robinette*, No. 14-1215 (W.Va. Supreme Court, November 4, 2015) (memorandum decision); *Schumacher Homes of Circleville, Inc. v. Spencer*, __W.Va.__, 774 S.E.2d 1 (W. Va. 2015) *petition for cert. filed* (Sept. 14, 2015); *Toney v. EQT Corp.*, No. 13-1101 (W.Va. Supreme Court, June 13, 2014) (memorandum decision); *Kirby v. Lion Enters.*, 233 W. Va. 159, 756 S.E.2d 493 (W. Va. 2014); *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (W. Va. 2013) (Workman, J. concurring) *cert. denied*, *West Virginia ex rel. U-Haul*, 2014 U.S. LEXIS 5425 (Oct. 6, 2014); *Bd. of Trs. of the Weirton Policemen's Pension & Relief Fund v. Jones Fin. Cos., LLP*, No. 12-0959 (W.Va. Supreme Court, November 21, 2013) (memorandum decision); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (W. Va. 2013); *New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (W. Va. 2013); *Price v. Morgan Fin. Group*, No. 12-1026 (W.Va. Supreme Court, June 24, 2013) (memorandum decision); *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (W. Va. 2013); *Shorts v. AT&T Mobility*, No. 11-1649 (W.Va. Supreme Court, June 17, 2013) (memorandum decision); *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 740 S.E.2d 66 (W. Va. 2013); *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91; 736 S.E.2d 91 (W. Va. 2012); *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (W. Va. 2012); *State ex rel. Johnson Controls,*

FAA and the recognition that it applies broadly to any transaction directly or indirectly affecting interstate commerce. *See*, e.g., *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995). Indeed, this Court has recognized that "the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *See State ex rel. City Holding Co., v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004).

Moreover, as the U.S. Supreme Court repeatedly has emphasized, "[u]nderscoring the consensual nature of private dispute resolution . . . parties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758 (2010) (citations omitted). Thus, "parties may agree to limit the issues subject to arbitration [citation], to arbitrate according to specific rules [citation], and to limit with whom a party will arbitrate its disputes [citation]." *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (citations omitted). Indeed, the "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 1749. Ultimately, "[i]t falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

Inc. v. Tucker, 229 W. Va. 486; 729 S.E.2d 808 (W. Va. 2012); *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 729 S.E.2d 217 (W. Va. 2012); *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909 (W. Va. 2011); *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (W. Va. 2011), *motion granted by*, *Clarksburg Nursing Home & Rehab. Ctr., LLC v. Marchio*, 132 S. Ct. 1619, 182 L. Ed. 2d 158 (2012), *vacated by*, *remanded by*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), *aff'd*, in part, *vacated*, in part, *Brown v. Genesis Healthcare Corp.*, __ W. Va. __, 729 S.E.2d 217 (W. Va. 2012); *State ex rel. Galloway Group v. McGraw*, 227 W. Va. 435, 711 S.E.2d 257 (W. Va. 2011).

Nonetheless, Citibank recognizes this Court's recent trepidation regarding federal case law enforcing arbitration provisions pursuant to the FAA. As stated by Justice Ketchum:

> In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as 'a tad oversubtle for a sensible application.' The Supreme Court sees its arbitration decisions as a series of 'clear instruction[s],' *Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d 42 (2012).* But experience suggests that the rules derived from these decisions are difficult for lawyers and judges - and nearly impossible for people of ordinary knowledge - to comprehend. *Still, no matter how confounding the Supreme Court's arbitration decisions may seem, we are constitutionally bound to apply them to arbitration clauses that involve interstate transactions.*

(emphasis supplied). *Schumacher Homes of Circleville, Inc., v. Spencer*, ____ W.Va. ____, 774 S.E.2d 1, 5 (W.Va. 2015).

It is within this framework that Citibank's Motion to Compel Arbitration must be analyzed and applied. Significantly, the issue presented is a limited one - was it appropriate for the circuit court to find that Citibank waived its right to compel arbitration despite clear contractual language permitting invocation of arbitration at any point prior to trial or judgment, particularly when arbitration was immediately sought once the class counterclaim was filed? There was no finding or challenge to the existence of the Arbitration Agreement and its terms. Nor was there any finding of unconscionability or that the Counterclaim fell beyond the scope of the Arbitration Agreement. Therefore, the issue is a straightforward question of basic contract application principles. Application of those contract principles yields the inescapable conclusion that the circuit court's finding of waiver was plainly wrong. *See, Buckeye Check Cashing, Inc., v. Cardegna,* 546 U.S. 440 (2006) (recognizing that the FAA places arbitration agreements on equal footing with all other contracts). And, that failure by the circuit court has resulted in a decision which runs afoul of the FAA.

A. Per the Cardholder Agreement's choice of law provision, South Dakota law controls the issue of waiver

Initially, it should be noted that the circuit court's waiver analysis was flawed because it failed to recognize that South Dakota law was applicable. In fact, the court made no finding of the applicable law though the issue was raised by Citibank. However, the 2006 Agreement, which contains the Arbitration Agreement, has a choice of law provision that states: "[t]he terms and enforcement of this agreement shall be governed by federal law and the law of South Dakota, where [Citibank] is located." (A.R. 107) Under West Virginia law, a choice of law provision is presumptively valid "(1) unless the provision bears no substantial relationship to the chosen jurisdiction or (2) the applicable laws of the chosen jurisdiction would offend the public policy of this State." *See, Manville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 637, 644, 749 S.E.2d 329, 336 (2013)(citing Syl. Pt. 1 of *General Electric Co. v. Keyser*, 166 W.Va. 456, 275 S.E.2d 289 (1981)).

The Arbitration Agreement bears a substantial relationship to the State of South Dakota because that is where Citibank is located. Additionally, because the consumer protection provisions of the West Virginia Consumer Credit and Protection Act still apply, there is no risk that the laws of South Dakota would offend the consumer credit protection laws of West Virginia. See e.g. W. Va. Code § 46A-2-103(c) ("An agreement may not limit or waive the claims and defenses of a borrower under this section").

In this case, South Dakota law governs whether a valid agreement to arbitrate exists, and like most states, South Dakota strongly endorses arbitration:

> The Federal Arbitration Act reflects an emphatic federal policy in favor of arbitral dispute resolution. South Dakota has also consistently favored the resolution of disputes by arbitration. It is an overriding policy that arbitration will be favored, when provided for in a contract provision, as a means to the resolution of disputes. For those reasons, questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. And under the Federal Arbitration Act, as a matter of federal law, any doubts concerning the scope of arbitratable issues should 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.

Wright v. GGNSC Holdings LLC, 2011 SD 95, P16, 808 N.W.2d 114,119 (S.D. 2011)(internal citations omitted). Just like the FAA, South Dakota applies its state contract law principles when analyzing whether the parties entered into a valid agreement to arbitrate. *Dinsmore v. Piper Jaffray, Inc.,* 1999 S.D. 56, P11, 593 N.W.2d 41, 44 (1999)

Nonetheless, even if this Court determines that West Virginia law applies, the result is the same. Like South Dakota, West Virginia recognizes that "[t]he purpose of [the FAA] is for courts to treat Arbitration Agreements like any other contract. The Act does not favor or elevate Arbitration Agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms." Syl. Pt. 7, *Brown v. Genesis Healthcare Corp.("Brown I"),* 228 W.Va. 646, 724 S.E.2d 250 (2011), *reversed on other grounds by Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 182 L. Ed. 2d 42 (2012).

B. The trial court's finding of waiver was in error and must be reversed.

1. Under traditional rules of contract application, Citibank's clear contractual right to seek arbitration at any time prior to judgment or trial must be recognized.

As discussed above, the FAA "places Arbitration Agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1207 (2006). For this reason, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitratibility), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995). South Dakota and West Virginia recognize these rules and, when followed, they require that the clear provisions of the Arbitration Agreement be given full effect.

When it comes to interpreting contract language, under both South Dakota and West Virginia law, "[t]he court is to enforce and give effect to the unambiguous language and terms of the contract." *JAS Enters., Inc. v. BBS Enters., Inc.,* 2013 SD 54, P24, 835 N.W.2d 117,125 (S.D. 2013); Syl. Pt. 2, *Citynet, LLC v. Toney*, __ W. Va.___, 772 S.E.2d 36 (2015)("Where the

terms of a contract are clear and unambiguous, they must be applied and not construed."). "Unless the language is ambiguous or a different intention is manifested, the language in a contract is to be given its plain and ordinary meaning." *American State Bank v. Adkins*, 458 N.W.2d 807, 809 (S.D. 1990). In applying unambiguous contract language, "the Court must avoid rewriting the contract; rather, it will be [the Court's] endeavor to establish the intention of the parties at the time the agreement was made." *FMB BankShares, Inc. v. Hajek*, 2003 SD 103, p.10, 668 N.W.2d 715, 717 (S.D. 2003); Syl. Pt. 3, *Citynet, LLC*, ("It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."). To this end, "[a]ll of the contract provisions must be given meaning if that can be consistently and reasonably done." *Hajek*, Id.; Syl. Pt. 6, *Columbia Gas Transmission Corp. v. E. I. Du Pont de Nemours & Co.*, 159 W. Va. 1, 217 S.E.2d 919 (1975)(same).

Within the arbitration clause, the Agreement specifically provides: "At **any time** you or we may ask an appropriate court to compel arbitration of Claims, or to stay the litigation of Claims pending arbitration, even if such Claims are part of a lawsuit, **unless a trial has begun or a final judgment has been entered**. Even if a party fails to exercise these rights at any particular time, or in connection with any particular Claims, that party can still require arbitration at a later time or in connection with any other Claims." (emphasis added). Likewise, the Agreement also states that "[a] party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party." This specifically includes "Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law . . . [and] Claims made as counterclaims . . . ." Under these provisions, Citibank had the contractual right to initiate the collection action in the Circuit Court of Boone County, and then seek arbitration when Perry filed the Counterclaim.

The only way to affirm the findings and conclusions of the circuit court is to patently rewrite the Arbitration Agreement by deleting the words "at any time" and "unless a trial has begun or a final judgment has been entered." This language is clear and unambiguous and must be applied. Despite the clear precedent requiring the lower court to apply this language, it was neither analyzed, nor was it even cited or referenced anywhere in the circuit court's order denying arbitration. The court simply failed to give these contract clauses any force, and rendered the express language of an enforceable agreement meaningless. The result is clear error that this Court must reverse and correct.

2. The Arbitration Agreement's non-waiver clause allows Citibank to delay enforcing a term without waiving its rights under the agreement.

There is another, separate contractual basis for finding that Citibank did not waive its right to compel arbitration. Specifically, the arbitration clause contains the following non-waiver language: "[n]o portion of this arbitration provision may be amended, severed or waived absent a written agreement between you and us." Also, under a provision titled "Enforcing this Agreement", Citibank "can delay in enforcing or fail to enforce any of our rights under this Agreement without losing them." These two sections specifically operate to exclude a waiver argument based on Citibank's conduct in this case.

There is only one West Virginia authority[3] on the subject of so called "non-wavier" or "anti-waiver" contract provisions. In *Lowe's Home Ctrs., Inc. v. THF Clarksburg Dev. Two, LLC*, 2014 U.S. Dist. LEXIS 35234 (N.D. W. Va. Mar. 18, 2014), Judge Keeley analyzed whether these provisions would be valid under West Virginia law, and concluded that "the Court has no choice other than to predict that West Virginia courts would follow the majority of states and hold that no waiver clauses are themselves subject to waiver upon a showing that the party asserting

[3] Likewise, South Dakota has limited case law on the issue as well. See *Moe v. John Deere Co.*, 516 N.W.2d 332, 1994 S.D. LEXIS 74 (1994)(holding that a creditor's acceptance of late payments imposes a duty on the creditor to notify the debtor that strict compliance is necessary before repossession of collateral even if the contract has non-waiver language).

the clause has waived its rights under another provision of the contract." Id. at *18; See e.g. *Hovnanian Land Investment Group, LLC, et al. v. Annapolis Towne Center at Parole, LLC*, 421 Md. 94, 125, 25 A.3d 967,985 (2011)("[t]he waiver of the non-waiver clause need not be explicit and independent from the underlying waiver; rather, waiver of that clause may be implied from the very actions which imply waiver of [a] condition precedent.") Id. at 125, 985.

The facts of *THF* provide an effective illustration of the "waiver of non-waiver" conundrum, but still demonstrate why Citibank's non-waiver provision supports the invocation of arbitration. Lowe's Home Centers, Inc. entered in a Site Development Agreement with THF Clarksburg Dev. Two, LLC. That agreement included a formal notice provision. Sometime after the development was complete, Lowe's began to notice soil stability issues and sent an email to *THF* to raise concerns. That email prompted significant action by both parties, including the retention of several engineering firms to determine the likely cause and best remedy. Several years later, Lowe's filed suit against *THF*. One of *THF's* defenses was that it never received formal notice from Lowe's regarding the issues. Judge Keeley found otherwise and concluded that "THF's conduct following the receipt of the actual notice . . . amounted to a waiver of its contractual right to formal notice." Id. at *14-15. Specifically, "[u]pon receipt of Lowe's email, *THF* could have demanded formal notice [under the agreement], or simply remained silent and rested upon its rights." Id. at 16. To the contrary, "[t]he efforts it undertook and the expenses it incurred manifested it relinquishment of its right to formal notice, thus constituting waiver." Id.

The underlying point relevant to this case is that where non-waiver clauses are not strictly applied, there has to be an affirmative finding that a party acted inconsistent with some other condition precedent within the contract. Here, Citibank did not act inconsistent with any terms of the agreement considering the agreement expressly conferred the right to invoke arbitration at any time prior to the start of trial or a final judgment. Therefore, the non-wavier language in the Cardholder Agreement is valid, and operates to further support Citibank's arguments against waiver.

3. Federal cases interpreting arbitration agreements with similar language favor arbitration.

"Because of the strong federal policy favoring arbitration, . . . [courts] will not lightly infer the circumstances constituting waiver." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95, 1996 U.S. App. LEXIS, at *8 (4th Cir. 1996). Moreover, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, [including] whether the problem at hand is . . . an allegation of waiver . . . ." *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249, 2001 U.S. App. LEXIS 21068, at *12 (4th Cir. 2001) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 103 S. Ct. 927 (1983).

To prove that a waiver of arbitration exists under federal law, the party opposing arbitration faces a "heavy burden", *Am. Recovery Corp.*, 96 F.3d at 95, 1996 U.S. App. LEXIS 23166 at 21, and must demonstrate that: (1) the party seeking arbitration "so substantially utiliz[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay;" and (2) that the "party objecting to arbitration has suffered actual prejudice." *MicroStrategy, Inc.,* 268 F. 3d at 249, 2001 U.S. App. LEXIS at *12 (citations omitted). Critically, "[n]either delay nor the filing of pleadings by the party seeking [arbitration] will suffice, *without more*, to establish waiver of arbitration." Id. (citing *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252, 1987 U.S. App. LEXIS 5446, at *4 (4th Cir. 1987)) (emphasis added); see also *In re Mercury Constr. Co.*, 656 F.2d 933, 939, 1981 U.S. App. LEXIS 18569, at *17 (4th Cir. 1981) ("[I]t is only when . . . delay results in actual prejudice that it may amount to 'default' within the [FAA].").

Instead, the dispositive inquiry is whether the party objecting to arbitration has suffered *actual* prejudice. Id. (citing *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (emphasis added)). Proof of such prejudice must be "concrete, not merely speculative." *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 252 (4th Cir. 2001) (discussing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000)). In this

action, Perry cannot demonstrate actual prejudice. Citibank's litigation of its claims was not "remarkably aggressive," as was the case in *MicroStrategy, Inc. v. Lauricia*, wherein the party seeking arbitration had filed three separate actions against the Plaintiff, deposed her, successfully sought the seizure of certain documents relevant to the action, received responses to interrogatories and requests to produce, and obtained employment records from the Plaintiff's former employers. 268 F.3d 244, 249, 254 (4th Cir. 2001). Citibank's litigation here was largely inactive for a period of time. Filing suit, seeking discovery, agreeing to a scheduling order, and filing a motion for summary judgment over the course of almost *five (5) years* is not the type of "active participation" to constitute waiver as Perry would have it characterized. Though litigation between the parties has been pending for several years, Perry cannot demonstrate actual prejudice simply by virtue of his participation in the legal system for a period of time.

Moreover, Perry only filed the Counterclaim on May 1, 2015, and Citibank immediately sought arbitration. It is the Counterclaim which is truly the heart of the action and what Perry wants to litigate. There was no real dispute on the collection claim as Perry admitted from the beginning that the debt was owed. Thus, this is not a circumstance where a party litigated a particular claim for a substantial period of time, only to be deprived of timely resolution by a belated assertion of arbitration rights. Instead, the Counterclaim, and the putative class claims therein, had not been the subject of any litigation development when Citibank moved to compel arbitration. Simply stated, nothing has occurred which has prejudiced Perry or impeded his ability to prosecute the Counterclaim in a timely manner.

Below, Perry cited to a list of out-of-state cases purportedly standing for the proposition that commencing litigation constitutes a waiver of the right to arbitrate. None of them, save perhaps three, even involve an Arbitration Agreement such as the one here, which distinctly speaks to non-waiver in the context of litigation. The cases that *did* involve non-waiver clauses were *Barbagallo v. Niagra Credit Solutions, Inc.*, 2012 WL 6478956, at *1 (D. Md. Dec. 4, 2012),

Kirk v. Credit Acceptance Corp., 829 N.W.2d 522 (Wis. Ct. App. 2013), and *Green Tree Servicing, LLC v. Hill*, 307 P.3d 347 (Okla. Civ. App. 2013).

Barbagallo's arbitration clause was as follows: "Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial . . . . You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction . . . . Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit." 2012 WL 6478956, at *1 (D. Md. Dec. 4, 2012). However, that case found waiver on the grounds of the existence of *actual prejudice*, which is decidedly absent in the case at bar. Id. at *12.

The parties' arbitration clause in *Kirk* permitted any party to elect to have an arbitrator decide a given dispute. 829 N.W.2d 522, 531 (Wis. Ct. App. 2013). "Dispute" was defined as follows: "any dispute, controversy or claim between You or us arising out of or in any way related to this Contract, or any default under this Contract, or the collection of amounts due under this Contract, or the purchase, sale, delivery, set-up, quality of the Vehicle, or any product or service included in this Contract. 'Dispute' includes contract claims, and claims based on tort or any other legal theories. Either You or we may require any Dispute to be arbitrated and may do so *before or after a lawsuit has been started* over the Dispute or with respect to other Disputes brought later in the lawsuit." Id. at 532 (emphasis added). Though the Court in *Kirk* found waiver due to the nature of the litigation undertaken prior to arbitration being sought, that case is factually distinguishable from this matter. There, the Court found that the party seeking arbitration had waived its right to arbitrate due to "its conduct in pursuing judicial remedies, dismissing them, and then doing nothing for over nine more months and only seeking arbitration when [the Plaintiff] filed his separate . . . claims." Id. at 532. No such separate action exists in this case nor has there been any dismissal of any claims.

The arbitration clause in *Green Tree Servicing, LLC v. Hill* provided, in part:

> The parties understand that they have a right to litigate in district court, but that they prefer to resolve their disputes through arbitration, except as provided herein. . . . The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract. . . .
>
> Notwithstanding anything hereunto the contrary, [Green Tree] retain[s] an option to use judicial (filing a lawsuit) or non- judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. The institution and maintenance of a lawsuit to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement *shall not constitute a waiver* of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by you pursuant to this provision.
>
> 307 P.3d 347, 349 (Okla. Civ. App. 2013) (emphasis added).

However, in that case, the Plaintiff had filed two suits against the Defendant concerning payment of a note, arguing for arbitration in the second suit. Id. at 348. The Court found the right to arbitration had been waived because the Plaintiff had already obtained a final judgment on the original loan agreement in the first suit. Id. at 350.

The circumstances in this matter are decidedly different. Here, little was done on the collection action after it was filed. No judgment was entered. In fact, the action was still pending after four years when counsel appeared on behalf of Perry. After the appearance of counsel, a Scheduling Order was entered and the Counterclaim was filed pursuant to the deadline established in the order. Citibank immediately acted to invoke arbitration once the Counterclaim was filed and before any substantive prosecution of the Counterclaim occurred. Perry's right to pursue relief in a timely manner has not been affected. Thus, nothing has occurred which would suggest any waiver of the right to pursue arbitration since the matter is still essentially undeveloped.

4. Under state law implied waiver doctrine, Citibank did not waive its right to seek arbitration because it did not intentionally relinquish its right to seek arbitration at any time prior to trial or judgment.

Instead of applying the Cardholder Agreement's express terms regarding waiver, the court chose to rely on implied waiver. As this Court has noted before, "[a]n implied contract and an express one covering the identical subject matter cannot exist at the same time." *Evans v. United Bank, Inc.,* ___ W. Va. ___, 775 S.E.2d 500, 509 (2015)(citing Syl. Pt. 3, in part, *Rosenbaum v. Price Construction Company*, 117 W. Va. 160, 184 S.E. 261 (1936)).

In addition to the express contractual terms allowing Citibank to seek arbitration at any time prior to trial, or to delay enforcing its rights without waiving them, the trial court's application of general waiver law was wholly inconsistent with both West Virginia and South Dakota precedent. Under South Dakota law, "[w]aiver is when 'one in possession of any right, whether confirmed by law or contract, and with full knowledge of the material facts, does or forbears something inconsistent with the existence of the right or of his intention to rely on it." *Boxa v. Vaughn,* 2003 SD 154, P11, 674 N.W.2d 306, 310 (S.D. 2003).

West Virginia law is identical:

> [T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right. This intentional relinquishment, or waiver, may be expressed or implied. However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. Furthermore, the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.

Potesta v. U.S.F. & G., Co., 202 W. Va. 308, 504 S.E.2d 135, 142 (1998)(internal citations and quotations omitted)

Waiver requires an act inconsistent with a known right. Here, Citibank was operating completely consistent with its contractual rights. There was no finding by the circuit court that this conduct was "inconsistent" with a known contractual right. To the contrary, Citibank operated entirely consistent with the express terms of the arbitration provision. The lower court's order found that Citibank waived its right, even though under the express terms of the

Cardholder Agreement, Citibank had no set timeframe to enforce a contractual right before the right was waived. Citibank had the right to invoke arbitration after it filed the collection action. Citibank had the option to invoke its right up until the start of trial or final judgment. That right had not expired.

In support of his argument regarding implied waiver, Perry cited a West Virginia case, *State ex rel. Barden & Robeson Corp. v. Hill*, for the principle that a party can waive its right to arbitrate by acting inconsistently with that right. 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (citing *Earl T. Browder, Inc. v. Cnty. Court of Webster Cnty.,* 143 W. Va. 406, 412, 102 S.E.2d 425, 430 (1958)). However, the facts of that case are clearly distinguishable. There, the party seeking arbitration was trying to set aside a motion for default judgment that had been entered against it, asserting that the circuit court lacked subject matter jurisdiction over the action due to an existing agreement for the parties to arbitrate. The Court found that unless the party was able to show good cause for its default, it waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court. "As 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)." 208 W. Va. 163, 169, 539 S.E.2d 106, 111 (2000). That case concerned procedural forfeiture, not the substantive question before this Court. Here, Citibank timely elected to pursue arbitration as permitted under the terms of the Arbitration Agreement.

CONCLUSION

This Arbitration Agreement is a binding contract that must be enforced. Under the FAA, this Court must interpret the agreement within the framework of traditional contract rules, including the requirement to enforce clear and unambiguous contract terms. The agreement gave Citibank the right to file its collection action, and then later seek arbitration as soon as a class counterclaim was filed. To deny Citibank that right requires the Court to effectively rewrite the contract between Citibank and Perry and, more importantly, it would be at odds with this

Court's constitutional duty to apply arbitration clauses which involve interstate transactions. Citibank requests that this Court reverse the circuit court's order denying the Motion to Compel Arbitration, and remand the matter with instructions to permit the action to proceed to arbitration with a corresponding stay of proceedings pending its outcome.

CITIBANK, N.A. SUCCESSOR TO
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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

CITIBANK, N.A. SUCCESSOR TO
CITIBANK, SOUTH DAKOTA, N.A.

Plaintiff/Counter-Claim Defendant

v. **CIVIL ACTION NO. 10-C-218**
(Judge Thompson)

ROBERT S. PERRY,

Defendant/Counter-Claim Plaintiff

CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, do hereby certify that on the 16th day of February, 2016, I served the foregoing **"Petitioner's Brief"** upon the parties hereto via facsimile, and by depositing a true copy thereof in the United States mail, postage pre-paid, addressed to the following counsel of record:

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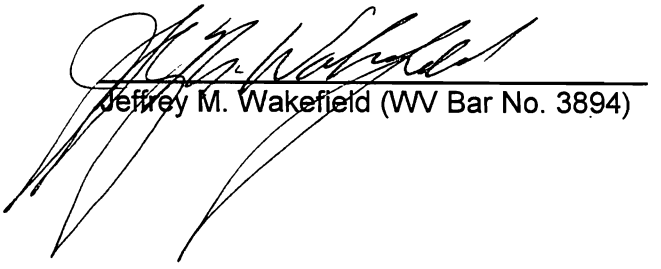

Jeffrey M. Wakefield (WV Bar No. 3894)