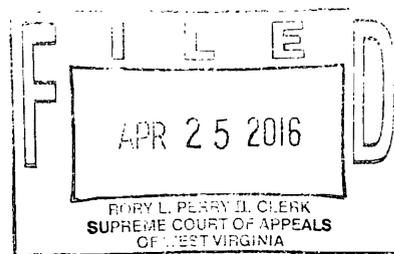


No. 15-1121



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 REPLY BRIEF

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SUMMARY OF ARGUMENT

The Respondent, Robert S. Perry ("Perry"), does not and cannot rebut the arguments of Petitioner, Citibank, N.A. ("Citibank"), which clearly establish that the Circuit Court was required to compel arbitration and committed error when it failed to grant Citibank's motion. Perry cannot dispute that arbitration agreements are binding contracts and this Court is constitutionally bound to liberally apply such agreements and resolve doubts in favor of arbitration.¹ Nor can he contest that United States Supreme Court precedent, as well as recent authority from this Court, consistently recognize that state law contract principles are to be used to apply, not construe, clear contract terms to enforce arbitration. Despite this clear guidance, Perry urges this Court to ignore a clear contract term which permits any party to invoke arbitration at any time prior to trial or judgment. This invitation must be rejected as it would place this Court in the untenable position of running afoul of firmly established principles governing the law of arbitration.²

ARGUMENT

I. THIS COURT HAS RECENTLY ENDORSED CITIBANK'S ARGUMENT THAT WAIVER OF ARBITRATION REQUIRES INTENTIONAL ACTS THAT ARE INCONSISTENT WITH THE TERMS OF THE CONTRACT

Perry spends several pages arguing a point that is not disputed: arbitration can be waived. Citibank agrees with this basic proposition. However, the more pressing question is what constitutes a waiver? As recently as April 11, 2016, this Court applied traditional contract law principles to analyze whether waiver within an arbitration context had occurred. *Parsons v. Halliburton Energy Services, Inc.*, --- W. Va. ---, --- S.E.2d --- (No. 14-1288, April 11, 2016).

While *Parsons* announced a new syllabus point holding that waiver does not require a showing of prejudice or detrimental reliance, it reaffirmed the standard that traditional state law

¹ The recent summary reversal by the United States Supreme Court in *Schumacher Homes of Circleville, Inc. v Spencer*, ___ U. S. ___, 136 S.Ct. 1157 (2016), again demonstrates the constraints under which this Court operates in considering arbitration issues.

² Citibank files this reply pursuant to this Court's Scheduling Order requiring the reply to be filed within twenty days of receipt of response. The response brief was received by Citibank on April 4, 2016. Because twenty days from April 4 falls on a Sunday, the reply is timely filed.

contract principles control when analyzing waiver in the context of arbitration. Specifically, this Court reiterated that waiver of arbitration requires an intentional relinquishment of a known right, and that waiver “may be inferred from actions or conduct, but all the attendant facts, taken together, must amount to an intentional relinquishment of a known right” Syl. Pt. 2, *Id.* This Court ultimately affirmed the lower court’s ruling compelling arbitration and stated that “[t]he delay³ alone is meaningless, it is the circumstances surrounding the defendant’s acts and language that determine whether the defendant implicitly intended to waive the right to arbitrate.”

Parsons completely supports Citibank’s position on waiver given that the focus is on the application of contract principles and whether the acts of the party are at odds with the contractual right. “Waiver may be established by express conduct or impliedly, through **inconsistent actions**.” *Id.* at p. 9. (emphasis added). Here, the Arbitration 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

³ In *Parsons*, an employee of Halliburton Energy Services, Inc. filed a West Virginia Wage Payment and Collection Act claim against his employer. Pursuant to Halliburton’s Dispute Resolution Program, binding arbitration was the exclusive remedy for any employment related disputes arising between the company and an employee. (See *Parsons* Appendix App. 065). In response to Parsons’ complaint, Halliburton’s counsel requested several discovery extensions in lieu of answering the complaint. Ultimately, approximately seven (7) months later, Halliburton’s new attorney filed a motion to compel arbitration. The court granted the motion, and Parsons appealed. On appeal, Parsons argued that Halliburton had waived its right to arbitration by not invoking the arbitration provision until seven months after the complaint was filed. The *Parsons* arbitration clause provided that arbitration was an exclusive remedy and included a provision stating that a party who fails to object in writing when a portion of the dispute program is not followed is deemed to have waived that right. (See *Parsons* Appendix App. 065, 074). By contrast, the Citibank arbitration provision is much different and contains specific language which sets forth the period of time during which arbitration can be invoked as well as express non-waiver language.

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 plain and unequivocal contractual right to initiate the collection action in the Circuit Court of Boone County, and then seek arbitration when Perry filed the Counterclaim. Likewise, Perry could have invoked arbitration at any point in the litigation short of trial or a judgment.

Given that Citibank acted in accordance with a clear contractual provision, a finding of waiver, which requires relinquishment of a known right, was completely erroneous. Certainly, if there was nothing within the Arbitration Agreement which defined when arbitration was available or when it had to be invoked, one could argue that a significant delay or the undertaking of substantial action could operate as a waiver. Here, however, the express terms of the Arbitration Agreement, conferred a right to invoke arbitration which was continuing in nature and which could be exercised at any point short of a trial or judgment. Simply stated, there can be no waiver of a right that had not expired.

Additionally, the Arbitration Agreement 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 further operate to eliminate any waiver argument based on Citibank’s conduct in this case.

In its opening brief, Citibank cited to out-of-jurisdiction cases which impose a prejudice requirement when asserting waiver. Citibank recognizes that *Parsons* addresses the confusion between waiver and estoppel, clarifies that prejudice is not required to prove waiver, and reverses prior decisions that are inconsistent. Accordingly, Citibank acknowledges that its

prejudice argument may be abrogated assuming West Virginia and not South Dakota law applies.⁴ Nonetheless, *Parsons* affirms Citibank's argument that contract principles are applicable and that waiver cannot be found when Citibank's invocation is consistent with plain and unambiguous contract language.

II. THIS COURT CANNOT ANALYZE THE ISSUE OF WAIVER FOR PERRY'S CONSUMER COUNTERCLAIM DIFFERENTLY THAN ANY OTHER CATEGORY OF ARBITRATION AGREEMENT

Perry's request for this Court to single out the state law claims asserted against Citibank for unique treatment under the Arbitration Agreement under the pretext of waiver is clearly prohibited by the Federal Arbitration Act ("FAA"). The FAA preempts any state law impediments to enforcing arbitration agreements according to their terms, even under the guise of generally applicable contract principles. "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.*, with respect to all arbitration agreements covered by that statute. See *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, ___, 132 S. Ct. 1201, 1202 (2012); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1752-53 (2011)(states may not superimpose judicial procedures on arbitration); *Id.* at ___, 131 S. Ct. at 1752, 179 L. Ed. 2d at 758 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.") (citing *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 983 (2008)); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758, 1774 (2010)("[P]arties are 'generally free to structure their arbitration agreements as they see fit.'"); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 612, 2004 U.S. Dist. LEXIS 6173, *19

⁴ As stated in the opening brief, South Dakota law and not West Virginia law applies to this case based on the choice of law provision in the Card Agreement. In light of the recent *Parsons* decision, West Virginia and South Dakota law are now in conflict. *Rossi Fine Jewelers, Inc. v. Gunderson*, 2002 SD 82, P9, 648 N.W.2d 812, 815 (S.D. 2002)(holding that second step of two part analysis requires a showing of prejudice to the party claiming waiver).

(S.D.W. Va. 2004) (holding that FAA preempts “West Virginia law to the extent that West Virginia law would impose [] heightened requirements on the enforcement of agreements to arbitrate.”); see e.g., *Marmet*, 565 U.S. at ___, 132 S. Ct. at 1203, 182 L. Ed. 2d at 45 (2012) (“The FAA provides that a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2. The statute's text includes no exception for personal-injury or wrongful-death claims. It requires courts to enforce the bargain of the parties to arbitrate.) (internal citations omitted).

Here, Perry attempts to argue that Citibank is merely trying to avoid liability on his state law consumer protection claims by relying on the Arbitration Agreement. That is simply not accurate. Perry can press his claims in the arbitration context and recover any and all damages he seeks on an individual basis. Procedurally, Perry had no claims against Citibank at the time Citibank initiated the collection action. Citibank had no ability to “waive” its right to compel arbitration on those claims until the counterclaim was filed on May 1, 2015. (A.R. 13). On June 22, 2015, Citibank filed its motion to compel arbitration. (A.R. 38). Singling out any particular state law claims for unique treatment under an arbitration agreement is prohibited by the FAA. Thus, the same “waiver” rules would have to apply to both Citibank’s claims, and Plaintiff’s separate counterclaims. Perry has no factual or legal argument whatsoever that Citibank waived its right to compel arbitration of his counterclaims, particularly when those claims are purportedly brought on a class action basis.

III. RESPONDENT’S CONTINUED RELIANCE ON THE WISCONSIN INTERMEDIATE APPELLATE COURT DECISION IN *KIRK V. CREDIT ACCEPTANCE* IS MISPLACED

Perry relies heavily on the Wisconsin intermediate appellate court case of *Kirk v. Credit Acceptance Corp.*, 346 Wis. 2d 635; 829 N.W.2d 522 (Wis. Ct. App. 2013) to support his waiver argument. Specifically, he states that Credit Acceptance waived arbitration “by initiating the

lawsuit.” Resp. Br. p. 6. Likewise, on page 7, Perry asserts that Credit Acceptance waived its right to arbitration “by pursuing judicial remedies and delaying for nine months . . .” These contentions oversimplify the facts and legal analysis in that case. To the contrary, the court in *Kirk* stated that “[i]t is true that simply filing a lawsuit, or simply conducting discovery, before asking for arbitration do not constitute waiver.” *Id.* at 658, 533 (internal citations omitted). Rather, that court found against Credit Acceptance for two reasons. First, the court determined that violations of Wisconsin’s consumer protection laws were not included in the definition of the term “dispute” in the arbitration provision. *Id.* at 655, 531-532. Second, in examining the “overall evaluation of the applicant’s conduct up to the time of the request for arbitration”, the court took issue with Credit Acceptance waiting until “the final moments of the action” to invoke arbitration. *Id.* at 658, 533. The fact that Credit Acceptance initiated a lawsuit had no bearing on that court’s decision. Instead, Credit Acceptance responded to a complaint by filing a motion to dismiss without requesting arbitration. It was only after the lower court denied the motion to dismiss did Credit Acceptance move to compel arbitration. Here, unlike *Kirk*, the Arbitration Agreement broadly covers the claims asserted by Perry and the invocation of arbitration by Citibank was not at the final moments of the action. Instead, Citibank timely moved to compel arbitration right after Perry filed his amended answer and class counterclaim. Finally, it is noteworthy that *Kirk* was a two to one (2-1) decision by Wisconsin’s intermediate appellate court. Citibank submits that the decision is of little value, particularly in the face of plain arbitration language and recent precedent that recognizes that state law contract principles are to be followed.

IV. RESPONDENT NEVER CONTESTED THE EXISTENCE AND VALIDITY OF THE ARBITRATION AGREEMENT BELOW

Perry’s challenge to the existence or validity of the Arbitration Agreement fails for several reasons. First, Perry never sufficiently raised the issue below. The only challenge to the Citibank’s motion to compel arbitration was that the right had been waived. Perry offered no

evidence to rebut Citibank's detailed affidavit which traced the history and terms of the Cardholder Agreement, including the arbitration language. Nor did Perry ever claim that the Arbitration Agreement was unconscionable or that his claims fell beyond the reach of arbitration. Because the challenge mounted by Perry was limited, the Circuit Court's ruling was also limited to a finding of waiver. Perry cannot now raise an issue which he did not adequately address below.

Regardless, South Dakota law governs the determination of whether a valid agreement to arbitrate exists. *Dinsmore v. Piper Jaffray, Inc.*, 1999 S.D. 56, P11, 593 N.W.2d 41, 44 (1999) (noting that, "the question of whether the parties entered into a valid agreement to arbitrate is a question for the court to determine applying state contract law principles"); accord *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Gay v. CreditInform*, 511 F.3d 369, 389 (3rd Cir. 2007) (citing numerous cases applying choice-of-law provisions to determine applicable law in evaluating enforceability of arbitration agreements); *McCormick v. Citibank, N.A.*, No. 15-CV-46-JTC, 2016 WL 107911, at *6, 2016 U.S. Dist. LEXIS 11811 (W.D.N.Y. Jan. 8, 2016) (enforcing Citibank's Arbitration Agreement and holding that use of the account constitutes acceptance of the terms of the account, including the arbitration agreement); *Clookey v. Citibank, N.A.*, No. 8:14-cv-1318, 2015 WL 8484514, at *3, 2015 U.S. Dist. LEXIS 164802 (N.D.N.Y. Dec. 9, 2015) (same); *Cayanan v. Citibank Holdings, Inc.*, 928 F. Supp. 2d 1182, 1199 (S.D. Cal. 2013) (same).

Here, Perry agreed to the terms of the Card Agreement that were sent to him, including the Arbitration Agreement, when he used the Account. (See A.R. 59-67). South Dakota law provides that the "use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer"

S.D. Codified Laws § 54-11-9. This statute is consistent with the Card Agreement, which unequivocally states: "This 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 card." (A.R. 613) There is no dispute that Perry used the Account after the Card Agreement was received; accordingly, there can be no dispute that a valid Arbitration Agreement exists between the parties.

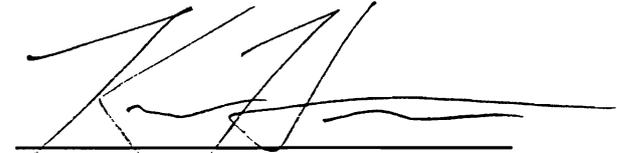
Additionally, Respondent's arguments based on *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013) have no relevancy to the issues in this matter. *Zakaib* dealt with the issue of "incorporation by reference." Specifically, in that case, U-Haul would have customers sign an electronic rental agreement that referenced other applicable documents that were provided at a later time. At no point in the motions or arguments below, or on appeal, has there ever been an allegation that the Arbitration Agreement at issue in this case was "incorporated by reference." To the contrary, the arbitration clause relevant to this matter was printed in boldface font and included within the Card Agreement itself, not just referenced or incorporated. (A.R. 616). Thus, Perry's argument, even if considered by this Court, should be rejected

CONCLUSION

The 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
CITIBANK, SOUTH DAKOTA, N.A.**



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v.

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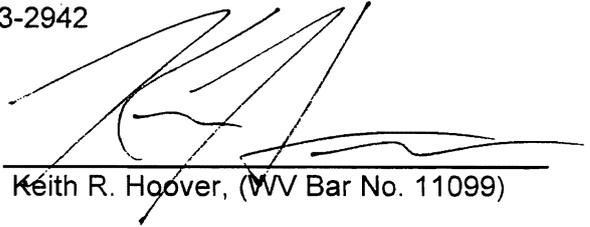
Robert S. Perry,

Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, Keith R. Hoover, do hereby certify that on the 25th day of April, 2016, I served the foregoing **"Petitioner's Reply Brief"** upon the parties hereto 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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