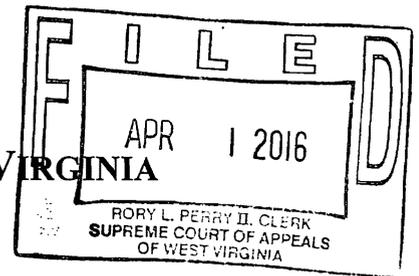


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-1121



**CITIBANK, N.A.,
SUCCESSOR TO CITIBANK
(SOUTH DAKOTA), N.A.,
PLAINTIFF BELOW,**

Appeal from an Order of the Circuit
Court of Boone County,
Civil Action No. 10-C-218

PETITIONER,

v.

**ROBERT S. PERRY,
DEFENDANT BELOW,**

RESPONDENT.

**Brief on Behalf of the
Respondent**

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I. STATEMENT OF THE CASE

This appeal presents a straightforward case of a litigant repeatedly waiving its right to enforce a contract provision. On September 20th, 2010, Petitioner Citibank¹ sued Robert Perry in Boone County Circuit Court. App. 3.² It is undisputed that Citibank selected Boone County West Virginia for its debt collection lawsuit, litigated the dispute for nearly five years, and actively attempted to extract an alleged debt from the consumer Respondent. App. 1-604. This activity all occurred in Citibank's chosen forum: Boone County Circuit Court. Approximately two months after Respondent mounted a challenge to Citibank's illegal debt collection conduct, Citibank curiously determined that Boone County Circuit Court was no longer a suitable jurisdiction and filed its Motion to Compel Arbitration. App. 38. Petitioner Citibank's message is clear: West Virginia Courts are perfectly acceptable forums to sue pro se litigants, but unacceptable forums to handle claims against Citibank.

Citibank repeatedly and undeniably conducted itself in a manner inconsistent with its purported right to arbitrate. Citibank's summons specifically allowed for counterclaims and states "you are hereby summoned and required to serve...an answer including any related counterclaim..." App.1, line 4. The litigation progressed, and on April 20th, 2011, Petitioner Citibank requested judgment on the pleadings against the consumer Respondent. App. 7. Then, for roughly three years, Citibank was dilatory in pursuing the lawsuit it initiated in West Virginia. Finally, on December 12th, 2014,

¹ Citibank N.A., Successor to Citibank (South Dakota) N.A.

² All references to the Petitioner's Appendix shall be set forth as "App. ___."

Citibank hired a new law firm to pursue its debt collection allegations and issued discovery to the Respondent. App.1, lines 11-13. The Respondent, in good faith, actively participated in Citibank's chosen forum and answered Citibank's discovery requests including requests for production, interrogatories, and requests for admission. App. 1, line 17.

On February 24, 2015, the Respondent and the Petitioner entered into an Agreed Scheduling Order that specifically permitted "...amended pleadings to be filed and served on or before May 1, 2015." App. 12. At this time, The Giatras Law Firm became involved in the matter. In one of many instances reflecting conduct inconsistent with that of a party intending to arbitrate, Petitioner Citibank filed the February 24, 2015 Agreed Scheduling Order and was undeniably aware of its provisions allowing for amended counterclaims. *Id.* Citibank aggressively attempted to extract funds from the consumer Respondent during this phase of its lawsuit.

The Respondent ultimately filed an Amended Answer and Counterclaim, in complete compliance with the Agreed Scheduling Order between the parties, which specially allowed for such claims. App. 12, 13. In response to this counterclaim, Citibank hired new counsel, its third law firm on this case, and requested an extension to respond to the Defendant's Amended Answer and Counterclaim. The Respondent agreed to an extension to provide a responsive pleading and a stipulation was filed. App. 34. On June 22, 2015, approximately two months after the Respondent filed his counterclaim,

Citibank filed its Motion to Compel Arbitration and sought to abandon the forum it had chosen to originally file its dispute. App. 38.

Even after filing its Motion to Compel, Citibank continued to act inconsistent with the purported right to arbitrate and issued fact witness disclosures as instructed by the February 24, 2015 Agreed Scheduling Order. App. 120. On October 15, 2015, the Circuit Court of Boone County properly denied Petitioner's Motion to Compel Arbitration. App. 543. Citibank now Appeals this Order.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this matter because "the facts and legal arguments are adequately presented" in the appellate briefing pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure.

III. SUMMARY OF ARGUMENT

There is not a single legal authority supporting the proposition that a litigant may pursue its contractual dispute in the court system for five years and then suddenly thrust that same case into arbitration in an obvious attempt to forum shop. Citibank's Appeal should not only be rejected because it lacks a legal or factual basis supporting reversal, but also because Citibank is attempting to deprive Mr. Perry of the very right that it utilized against him for five years: Exercising his Seventh Amendment right to litigate in the courts of West Virginia.

Rejecting Citibank's Appeal requires nothing more than the basic application of universally well-established contract law. When a party repeatedly conducts itself

inconsistently with a contractual right, the right is waived. In the five years between the filing of Citibank's lawsuit and its motion to compel arbitration, Citibank's every act was inconsistent with the right to arbitrate. The circuit court did not commit reversible error in determining that Citibank's right to arbitrate was waived, and this Court should deny Citibank's strategic attempt to forum shop.

Importantly, Mr. Perry's original contract did not contain an arbitration provision. According to Citibank, arbitration clauses were mailed to the consumer on various separate occasions from 2001-2006. These alleged mailings, consisting of sideways, upside-down, and barely legible scanned exhibits, only prove how Citibank attempted to obtain Mr. Perry's unknowing assent to onerous arbitration provisions. How Mr. Perry purportedly became obligated to surrender his constitutional right to trial is almost as troubling as how Citibank is strategically abandoning the West Virginia court system.

The time has come for Citibank to face the litigation that it started. The Appeal should be denied.

IV. ARGUMENT

A. Strategic Invocation of Arbitration Rights is Highly Disfavored and Arbitration Should not be Used to Avoid Liability

Arbitration is sold under the banner of efficiency, speed, and convenience. If ever a case revealed the true purpose of arbitration in the commercial versus consumer context, it is this one. Almost amazingly, after waiting five years to invoke its alleged contractual right, Citibank still touts the splendors of arbitration and how it allows for "efficient streamlined procedures," and effectively works at "reducing the costs and

increasing the speed of dispute resolution.” *Petitioner’s Brief*, page 10, paragraph 2.

Where was this love affair with arbitration five years ago?

Citibank’s half-decade delay in this case is completely contrary to the entire point of arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22 (1983) (Holding that “Congress’ clear intent, in the [FAA], [was] to move the parties in an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”). Citibank’s position in this case – that a party can affirmatively indicate its desire to litigate in state court, engage in dilatory tactics, request summary judgment, participate in discovery, aggressively negotiate its own claims, and then strategically invoke arbitration without explaining its own five year delay, flies in the face of efficiency and fairness.

Of course, Citibank provides no explanation for its long-delayed decision to compel arbitration. The record, however, reveals the truth: Citibank finds the West Virginia court system perfectly suitable to sue pro se consumers, but Citibank strategically prefers arbitration for any potential consumer claims. Courts have rejected late-filed motions to compel arbitration when it is clear that the option is being strategically exercised “...as a backup plan.” *See, e.g., MC Asset Recovery, LLC v. Castex Energy, Inc.*, 613 F.3d 584, 590 (5th Cir. 2010).

The goal of efficiency described noted by Congress in *Moses* emphasizes the need to enforce established waiver rules, which are perfectly consistent with the Federal Arbitration Act. Citibank’s extreme delay, nearly five years, and its strategic invocation of arbitration rights, are both highly disfavored and provide additional support for the

circuit court's decision to deny Citibank's Motion to Compel Arbitration. Perhaps most importantly, Citibank's timing of its Motion to Compel Arbitration reveals the true intent behind its arbitration policies: Not speed or efficiency, but instead to defeat the claims of consumers and escape liability.

B. The Circuit Court did not Commit Reversible Error in Ruling that Citibank Waived any Right It may Have had to Arbitrate

This case likely contains one of the most dramatic circumstances of waiver ever before a court. Citibank may have delayed invoking its purported arbitration rights longer than any litigant ever. Still, Citibank is not the first creditor to attempt the maneuver of jettisoning the litigation that it initiated. Credit Acceptance tried a similar tactic and the Court of Appeals of Wisconsin ruled that by initiating the lawsuit, Credit Acceptance waived arbitration. *Kirk v. Credit Acceptance Corp.*, 829 N.W.2d 522, 533 (Wis. Ct. App. 2013) (“Applying those facts to the law, we agree with the circuit court that Credit Acceptance waived its right to arbitrate the claims raised by Kirk. Credit Acceptance chose the judiciary as the forum in which to attempt to obtain the deficiency...”).

Despite Citibank's attempts to distinguish *Kirk*, the reality is that the instant case presents a much more compelling argument supporting waiver of the right to arbitrate. In *Kirk*, the parties' arbitration clause included a non-waiver provision and permitted either party to invoke the arbitration clause “...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. Citibank's purported arbitration clause includes similar provisions of non-waiver and

permits either party to invoke the clause "...at any time." App. 43. The creditor in *Kirk* attempted to enforce arbitration and cited the non-waiver provision as Citibank has in this Appeal, yet the Court in *Kirk* still ruled that the creditor's conduct in pursuing judicial remedies and delaying for nine months resulted in waiver of its right to arbitrate. *Id.* at 533. In this case, Citibank repeatedly sought judicial remedies and delayed invoking arbitration for nearly five years. There is little doubt that Citibank's conduct in this case presents a more extreme example of waiving one's right to arbitrate than in *Kirk*.

If Plaintiff Citibank genuinely desired to use arbitration and wanted to invoke an alternative dispute process, Citibank could have, and should have, filed this case directly in arbitration six years ago. Certainly Citibank could have made the decision to thrust this case into arbitration prior to requesting judgment on the pleadings, receiving an answer to its complaint, reviewing the Respondent's discovery responses, making demands on its pending lawsuit, or requesting attorney's fees in its collection lawsuit. App. 1, 4, 7, 32. Interestingly, Petitioner Citibank made the decision to abandon its initially chosen forum only after the consumer Respondent attempted to challenge Citibank's illegal collection conduct. App. 13, 38. By this time, the circuit court ruled that Citibank had already waived any right it may have had to arbitrate as a result of, *inter alia*, the following:

- a. Citibank chose Boone County Circuit Court to resolve its dispute with Mr. Perry;
- b. Citibank significantly advanced its lawsuit to the extent of requesting judgment on the pleadings;

- c. Citibank issued discovery and Mr. Perry provided responses;
- d. Citibank prejudiced Mr. Perry by refusing to participate in discovery but receiving meaningful responses from him, damaging his credit for five years as Citibank's lawsuit languished, exposing Mr. Perry to the expense of prolonged litigation, and, Mr. Perry argues the inherent unfairness in a party taking advantage of the litigation process and then shifting to the arbitration process for its own advantage;
- e. Citibank actively negotiated its debt claims for years;
- f. Citibank agreed to a scheduling order, which provided for a deadline to file any counterclaims;
- g. Citibank waited nearly five years to request transfer of this case to arbitration; and
- h. Citibank never provided the actual agreement it is attempting to enforce and has only provided a "Card Agreement Exemplar."

App. 547, 548.

In previously ruling on the issue waiver of arbitration rights, this Court noted that the enforcement of an arbitration clause is purely a matter of contract and "...may be waived through the conduct of the parties." *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 111 (W. Va. 2000) (citing *Earl T. Browder, Inc. v. Cnty. Court of Webster Cnty.*, 102 S.E.2d 425, 430 (W. Va. 1958) (finding that "[a]rbitration agreements are as much enforceable as other contracts, but not more so.)) The circuit court, in its October 15, 2015 Order denying Petitioner's Motion to Compel Arbitration, determined that Citibank's conduct constituted "implied waiver" as Citibank repeatedly conducted itself inconsistent with the right to arbitrate. App. 549. Here, the circuit court simply followed this Court's guidance in *Potesta* describing how waiver by conduct of a party is recognized as implied waiver. *Potesta v. U.S. Fidelity & Guar. Co.*, 504 S.E.2d 135,

142-43 (W. Va. 1998). Citibank always had knowledge of its right to arbitrate, yet still engaged in activities completely inconsistent with that right. It was not a stretch for the circuit court to “infer[] from actions or conduct” of Citibank that it had intentionally relinquished its right to arbitrate.” *Hoffman v. Wheeling Sav. & Loan Ass'n*, 57 S.E.2d 725, 735 (W. Va. 1950). Citibank voluntarily chose Boone County circuit court as its preferred forum, issued discovery to the Respondent consumer, agreed to amended scheduling orders, demanded attorney’s fees from the Respondent in a collection action, issued witness disclosures, actively negotiated its alleged debt claims in attempts to extract monies from the Respondent, and even requested summary judgment. The repeated and voluntarily actions of Citibank unequivocally constitute waiver because, according to this Court, “[v]oluntary choice is of the very essence of waiver.” *See Hoffman*, 57 S.E.2d at 735.

Aside from Petitioner Citibank’s inconsistent conduct, its extreme delay in attempting to enforce the alleged arbitration agreement also constitutes waiver. To preserve one’s right to arbitration, a party must “do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration.” *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995). There is not a single legal authority supporting the notion that a party may wait five years into litigation until it invokes its purported right to arbitrate. This Court held in *Barden* that after only two months of failing to invoke an arbitration clause the defendant had waived its right to arbitrate. Citibank’s extreme five

year delay and consequent prejudice against the Respondent constitutes a clear waiver of any purported right to arbitrate.

There are a plethora of cases, cited in footnote 3, *infra*, which illustrate the basic principle that once a Plaintiff elects to forgo an arbitration clause and file its own lawsuit and litigates in a court, the party has effectively waived any right it may have had to arbitrate. This basic idea is so well litigated that even CitiFinancial, an affiliate of the Plaintiff in this case, has been subject to this rule before and thus, it should come as no surprise to Citibank. *Blackburn v. Citifinancial, Inc.*, 2007 WL 927222 (Ohio Ct. App. Mar. 12, 2007) (“by actively pursuing litigation in lieu of arbitration by filing a complaint to enforce its contractual rights under the note, Citifinancial has waived its own arbitration clause.”).

Given the ruling in *Blackburn v. Citifinancial*, Citibank was clearly on notice that if it continued to refuse to utilize its alleged arbitration clauses, those clauses would be deemed waived and enforceable. *Id.* In the case at bar, Citibank filed its lawsuit against the Respondent in the circuit court of Boone County West Virginia with full knowledge that it was waiving the arbitration clause. Nonetheless, Citibank still elected to file its lawsuit in the West Virginia court system. Even ignoring the fact that Citibank knew it was waiving its arbitration clause when it filed this debt collection action in circuit court, this Court should note the logic employed by sister states in footnote 3, *infra*, who have examined this very issue. The Ohio Court of Appeals, in the *Finish Line, Inc. v. Patrone* decision, reasoned as follows:

There is a long line of precedent in Ohio holding that a party waives an arbitration clause in a contract by filing a complaint that fails to raise the arbitration clause.

A party to a contract to arbitrate waives its right when it files a lawsuit rather than requesting arbitration. When the other contracting party files an answer and does not demand arbitration, it, in effect, agrees to the waiver and a referral to arbitration...is inappropriate. *Mills v. Jaguar-Cleveland Motors, Inc.*, 430 N.E.2d 965, (Ohio App. 8th Dist. 1980), syllabus.

The main reason why this has been considered a waiver of arbitration is that filing a lawsuit **evidences an intent to rely on the judicial process rather than arbitration.** Thus, it is incompatible with an intent to assert a right to arbitration...

Finish Line, Inc., No. 2013-Ohio-5527 at p. 4 (emphasis added).

The *KenAmerican* decision from Kentucky federal court similarly determined that:

There can be no question that KenAmerican's decision to file suit against Potter in Fayette Circuit Court flies in the face of the arbitration agreement provision. KenAmerican chose the forum for its dispute. Only when Potter removed the case to federal court and filed a dispositive motion did KenAmerican choose to reverse course and try to enforce the arbitration provision. **KenAmerican's timing smacks of forum shopping.** Nonetheless, filing this action in the Fayette Circuit Court was a clear and irrefutable renouncement of the arbitration provision.

Id at 801 (emphasis supplied). Maryland Courts have made analogous findings as well.

See Barbagallo, 2012 WL 6478956 at *3-4. This Appeal presents a much more egregious history as Citibank litigated its collection lawsuit against the Respondent for nearly five years. During this timeframe Citibank issued discovery, motioned for summary judgment, agreed to amended orders allowing for counterclaims, and actively attempted to extract payment of the alleged debt from the consumer. Like in

KenAmerican, Citibank’s forum shopping motive is clear in this case: West Virginia Courts are perfectly acceptable forums to sue and collect debts from pro se litigants, but unacceptable forums to challenge Citibank.

More than thirty (30) opinions from West Virginia Courts and jurisdictions all over the nation directly address the matter at issue in this Appeal, and these courts have all resolved this logical conundrum the same way: If a corporation elects to forgo their arbitration clause and file a case in this nation’s court system and litigate that case, then that corporation is choosing to resolve that case in the court it selected, including any defenses and counterclaims a defendant may have. The primary legal question presented is as follows: Did Citibank waive any contractual right it may have had to arbitrate by invoking the Boone County circuit court system first? A multitude of courts throughout the country have already reviewed this question and it is clear that Citibank’s litigation conduct waived any right it ever held to invoke arbitration. *See Erdman Co. V. Phoenix Land & Acquisition, L.L.C.*, 650 F. 3d 1115 (8th Cir. 2011) (waiver when party initiated lawsuit); *Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Piece, Fenner & Smith, Inc.*, 626 F.3d 156, 160 (2nd Cir. 2010) (“[B]y filing its lawsuit and litigating it at length, LSED acted inconsistently with its contractual right to arbitration.”); *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009) (“[T]he decision to file suit typically indicates a ‘disinclination’ to arbitrate... [T]he act of plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process...”);...³

³ *Nokia Corp. v. Interdigital Inc.*, 2008 WL 2951912, at *3 (2nd Cir. July 31, 2008) (“Nokia has waived its right to arbitrate through its repeated, intentional invocation of the judicial process to

resolve questions about the scope of the patents at issue and the applicability of the license established by the Agreement to these patents”); *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756 (9th Cir. 2002) (filing a state court complaint was inconsistent with right to arbitrate); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co.*, 956 F.2d 473, 477 (6th Cir. 1991) (Ill. Law) (finding a waiver of right to arbitrate based on moving party’s filing of a state court action seeking preliminary and permanent injunctions and compensatory and punitive damages); *Kenyon Int’l Emergency Services, Inc. v. Malcom*, 2010 WL 2303328 (S.D. Tex. June 7, 2010) (waiver when party filed suit twice, opposed then equivocated about arbitration, then withdrew from arbitration when compelled); *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 790 (Ariz. 1970) (party had waived by its conduct the right to arbitrate by filing a lawsuit in which it requested the same kind of relief if could have gained from arbitration); *Multicare Physicians & Rehab. Group, Prof’l Corp. v. Wong*, 2006 WL 2556584 (Con. Super. Ct. Aug. 15, 2006)(party waived right to compel arbitration by filing complaint in a court asserting number of arbitable claims); *Ill. Concrete-I.C.I., Inc. v. Storefitters, Inc.*, 922 N.E.2d 542 (Ill. App. Ct. 2010) (waiver when party used procedure demanding that the other side file a lawsuit); *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) (“There is no question that Getz acted inconsistently with its right to arbitrate, give that it first initiated suit for breach of contract replevin, etc. in Jackson County.”); *Framan Mech., Inc. v. Lakeland Reg’l High Sch. Bd. of Educ.*, 2005 WL 2877923, at *1 (N.J. Super. Ct. App. Div. Nov. 3 2005) (filing of complaint seeking “substantive resolution” of party’s claims waived right to demand arbitration); *Blackburn v. Citifinancial, Inc.*, 2007 WL 927222 (Ohio Ct. App. Mar. 12, 2007)(“by actively pursuing litigation in lieu of arbitration by filing a complaint to enforce its contractual rights under the note, Citifinancial has waived its own arbitration clause”); *Elite Home Remodeling, Inc. v. Lewis*, 2007 WL 730072 (Ohio Ct. App. Mar. 12, 2007) (“Elite filed the complaint against Lewis, thereby waiving the right to arbitrate”); *Checksmart v. Morgan*, 2003 WL 125130, at *4 (Ohio Ct. App. Jan 16 2003) (“We are guided by *Mills [v. Jaguar-Cleveland Motors, Inc.]*, wherein the institution of a lawsuit was an action inconsistent with the party’s right to arbitrate”); *Otis Hous. Ass’n, Inc. v. Ha*, 201 P.3d 309, 312 (Wash. 2009); *Grant & Associates v. Gonzales*, 135 Wash App. 1019 (2006) (“There is no clearer manifestation of an intent to use the judicial process than filing a lawsuit.”); *Kenyon Int’l Emergency Medical Service, Inc. v. Malcom* citation; aff’d, 421 Fed. Appx 413 (5th Cir. 2011); *KenAmerican Res., Inc. v. Potter Grandchildren L.L.C.*, 916 F. Supp 2d 799 (E.D. Ky. 2013) (“There can be no question that KenAmerican’s decision to file suit...files in the face of the arbitration agreement provision...”); *Barbagallo v. Niagra Credit Solutions, Inc.*, 2012 WL 6478956, at *3 (D. Md. Dec. 4, 2012) (creditor’s filing of collection suit contributed to conclusion that creditor waived arbitration of debtor’s subsequent unfair debt collections suit); *Pearson v. People’s Nat’l Bank*, 116 So. 3d 1283, 1284-1285 (Fla. Dist. Ct. App. 2013) (“Initiating a lawsuit... constitutes an affirmative selection of a course of action which runs counter to the purpose of arbitration...” (internal quotations omitted)); *Levonas v. Regency Heritage Nursing & Rehab. Ctr., L.L.C.*, 2013 WL 4554509 (N.J. Super. Ct. Appt. Div. Aug. 29, 2013) (nursing home’s filing of suit on its arbitable collection claims contributed to conclusion that nursing home waived arbitration of wrongful death suit subsequently filed against it); *Am. Gen. Fin. v. Griffin*, 2013 WL 3422900, at *7 (Ohio Ct. App. July 3, 2014) (lender’s filing of suit on its arbitable collection claims contributed to the conclusion that lender waived arbitration of class counterclaims); *Liberty Credit Services Assignee v. Yonker*, 2013 WL 5221219, at *5 (Ohio Ct. App. Sept. 16, 2013) (fact that party seeking arbitration initially filed suit supported waiver ruling); *Finish Line, Inc. v. Patrone*, No. 2013-Ohio-5527 (Ohio Ct. App. Dec. 13, 2013) (finding waiver when Plaintiff filed suit in court and only moved to compel arbitration after responding to Defendant’s counterclaim); *EMCC Inv. Ventures v. Rowe*, 2012 WL 4481332, at *6 (Ohio Ct. App. Sept. 28, 2012) (fact that

Citibank actively, willfully, and aggressively participated in the underlying litigation. The record is clear that Citibank never informed Mr. Perry that it intended to invoke arbitration, or that arbitration was even an option. The bottom line is this: A contract to arbitrate, once waived, cannot be unfairly and untimely invoked. This matter should proceed in Citibank's initial and first choice forum: Boone County Circuit Court.

C. Citibank's Conduct in this Case Resulted in Prejudice to the Respondent

The Respondent consumer articulated more than sufficient prejudice to support a finding of waiver. Although many courts have required merely a "modicum of prejudice," particularly when a party engages in dilatory tactics, the Respondent in this case suffered from significant prejudice. *In Re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005). In support of this point, the circuit court also made a specific finding regarding just some of the prejudice suffered by the Respondent by ruling:

Citibank prejudiced Mr. Perry by refusing to participate in discovery but receiving meaningful responses from him, damaging his credit for five years as Citibank's lawsuit languished, exposing Mr. Perry to the expense of prolonged litigation, and, Mr. Perry argues the inherent unfairness in a party taking advantage of the litigation process and then shifting to the arbitration process for its own advantage;

App. 547, ¶ 19.

In evaluating Citibank's prejudice of the consumer Respondent, it is important to recognize that Citibank obtained Respondent Perry's answers to requests for production,

party seeking arbitration initially filed lawsuit supported waiver ruling); *Green Tree Servicing, L.L.C., v. Hill*, 307 P.3d 347 (Okla. Civ. App. 2013) (by suing and obtaining judgment on note, creditor waiver arbitration of later-filed claims and counterclaims relating to the note); *House Dev., Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289 (Wash. Ct. App. 2012) (finding waiver when plaintiff file suit in superior court instead of filing for arbitration and parties engaged in discovery); *Kirk*, 829 at 533.

interrogatories, and requests for admission. Despite this fact, Citibank refused satisfy its own discovery obligations and answer the Respondent's requests, which still remain unanswered. In the same tone, while the Respondent filed an answer to the claims in Citibank's lawsuit, Citibank never provided an answer to Respondent's claims. The very moment that the Respondent attempted to level the playing field, Citibank hired a new law firm, its third on the case, and fought desperately to enforce an alleged, yet never produced, 1998 credit card agreement.

If Citibank's arbitration wish is granted, it will begin arbitration with valuable information from the Respondent including an answer to Citibank's pleading and responses to Citibank's discovery. The Respondent, on the other hand, will start the arbitration exactly where Citibank wants him: With no responses or information from Citibank and no ability to make Citibank follow the West Virginia Rules of Civil Procedure regarding Respondent's claims. In addition, Respondent Perry was sued and embarrassed by Citibank for the prolonged period of more than five years in his local community in this debt lawsuit. Citibank's claim that "nothing has occurred that has prejudiced Perry" is both insensitive and factually inaccurate.

D. Citibank's Argument in Favor of Applying South Dakota Law Would not Change the Outcome of this Matter and is Incorrect

Citibank's Petition misstates applicable law in its argument that the Federal Arbitration Act ("FAA") prevents state courts from applying state law contract principles to determine whether an agreement to arbitrate is valid and enforceable. This argument

by the Petitioner is simply untrue and is not even supported by the cases or rules cited by Citibank. In fact, the FAA provides that:

A written provision in any maritime transaction or 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. This provision specifically provides that “grounds as exist at law or in equity for the revocation of any contract” still apply under the FAA. Indeed, the United States Supreme Court has repeatedly recognized the “fundamental principle that arbitration is a matter of contract.” See e.g. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. —, —, 130 S. Ct. 2772, 2776, (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, (2011). In line with these principles, it is clear that courts must place arbitration agreements on an equal footing with other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

In both West Virginia and South Dakota,⁴ parties to contracts can waive certain contractual provisions. *Action Mechanical, Inc. v. Deadwood Historical Preservation Com’n*, 652 N.W.2d 742, 749 (S.D. 2002) (Finding that “parties to contracts can waive certain contractual provisions.”); *Norwest Bank South Dakota v. Venners*, 440 N.W.2d 774, 775 (S.D. 1989) (“The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the

⁴ Citibank maintains that, pursuant to the alleged contract between the parties, South Dakota law is the law applicable to this action. Fortunately, this Court need not decide that issue as South Dakota law and West Virginia law are in agreement on the issue of waiver of contractual provisions and Citibank’s argument is moot.

material facts, does or forbears the doing of something inconsistent with the exercise of the right.”); Syl. pt. 7, *Schumacher Homes of Circleville, Inc. v. Spencer*, 774 S.E.2d 1 (W. Va. 2015) (“[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides the normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement.”) (quoting Syl. pt. 9, *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201 (2012)); *Ara v. Erie Ins. Co.*, 387 S.E.2d 320, 323 (W. Va. 1989) (“an insurance company may waive a contractual policy provision”).

Fortunately, the circuit court’s ability to rule on Citibank’s waiver is clear and has already been addressed in the courts of West Virginia and of South Dakota. The South Dakota case of *Flandreau Public School Dist. No. 50-3 v. G.A. Johnson Construction, Inc.*, 701 N.W.2d 430 (N.D. 2005) is directly on point. It states that the “question of *who* initially determines whether a dispute should be arbitrated is . . . governed by contract principles. . . Who determines whether the agreement creates a duty to arbitrate **the particular grievance is a question for judicial determination.**” *See Flandreau*, 701 N.W.2d at 435-36 (emphasis added); *see also Azcon Construction Co. v. Golden Hills Resort, Inc.*, 498 N.W.2d 630, 633 (N.D. 1993) (“The question of whether a contract to arbitrate exists is a question for the court.”).

Indeed, while Citibank incorrectly states that federal law applies to this principle,⁵ even the Fourth Circuit Court of Appeals and the Supreme Court of the United States are in agreement on this issue. In the case of *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013), the Fourth Circuit Court of Appeals expressly stated that “a challenge specific to an arbitration clause is considered by the court in a motion to compel.” See *Muriithi*, 712 F.3d at 184. In the United States Supreme Court case of *Oxford Health Plans, LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064 (2013), the Court held that questions of arbitrability, “which ‘include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy’ – are presumptively for courts to decide.” See *Oxford*, 133 S. Ct. at 2068 (quoting *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)).

Here, Petitioner Citibank has litigated its dispute with the Respondent and waited five years to trigger the purported arbitration provision. Thus, while the arbitration clause may be invoked by either party, clearly Citibank did not choose to invoke the clause in this matter for the first five years. The circuit court properly applied West Virginia law but even if Citibank was correct, in both South Dakota and in West Virginia, equity and the rule of law demand that Citibank cannot now assert a right it has so clearly waived.

⁵ “We apply ordinary state law principles governing the formation of contracts.” *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 179 (4th Cir. 2013).

E. Citibank Never Produced a Valid, Enforceable Arbitration Contract

Citibank has never produced the parties' original agreement that it is now attempting to enforce. This is likely because the Respondent's relationship with Citibank began decades ago in 1998. Either way, the actual original agreement has never been provided. Importantly, even according to Citibank, the Respondent's first credit card agreement did not include an arbitration clause. Then, "in or about October 2001" Citibank allegedly mailed an arbitration clause to the Respondent. *Petitioner's Brief*, page 2, Lines 1, 2. Obviously, the time of this mailing is unknown to Citibank. Whether the Respondent actually received this mailing, or any of the alleged mailings from Citibank, is a mystery.

Citibank's production of sideways, upside-down, and barely legible scanned exhibits attached to its Motion to Compel Arbitration do little to add clarity to the history of mailing multiple iterations of arbitration clauses to the Respondent. App. 72, 74. In any event, Citibank's representation to the Court that "there was no finding or challenge to the existence of the Arbitration Agreement and its terms" is baseless. *Petitioner's Brief*, page 11, lines 23, 24. During the proceedings below, counsel for Respondent specifically and unequivocally maintained that no valid arbitration agreement exists:

An important thing to remember in this case is that the arbitration provision that [Citibank is] attempting to impose, which is nearly ten years old, was not part of [Respondent's] regular agreement. We don't even have his agreement with this company your Honor. Which is an important thing to remember, that [Citibank is] trying to impose a contract. We don't have the contract. We have a template of the contract. So this is a purported agreement where [Petitioner is] trying to impose something that [Citibank] attest was mailed in 2006. We don't even have the original agreement in

this case. I don't know how they can say mutual assent has occurred...[Respondent] does not remember being mailed anything...

App. 571-572, Lines 16-24, Lines 1-8.

Again, despite Citibank's misleading argument that it is seeking to enforce a valid and enforceable arbitration contract, the circuit court Order denying the Motion to Compel Arbitration did in fact address the alleged arbitration agreement and states:

During the September 10, 2015 hearing, **the enforceability of this arbitration clause along with the enforceability of the provided template agreement was disputed by Mr. Perry.** It was also noted that the actual agreement between the parties had never been produced and that only a "Card Agreement Exemplar" had been provide to the Court. *See* Walters Affidavit ¶ 8.

App. 547, ¶ 17 (emphasis added).

This Court has ruled that "arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 752 S.E.2d 586 (W. Va. 2013). Even if Citibank's self-serving affidavit regarding the history of Respondent Perry's credit card account is accepted as true, it is clear that the Respondent never agreed or understood the barrage of contract provisions Citibank allegedly sent to his home. Frankly, few individuals would. This Court predicted the potential abuses of incorporation by reference and reasoned:

One scholar has suggested that incorporation by reference in drafting contracts can be problematic and "can create inconsistency or ambiguity that one would expect would not arise were the pertinent provisions more expressly detailed in a single writing[.]" Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 Baylor L.Rev. 651, 661 (2012). "[T]he cavalier drafting style, simply incorporating another

document by reference, allows parties to elide the process of detailing precisely what they intended, creating ambiguity that may, or may not, be properly resolved in subsequent litigation.” *Id.* at 663 (footnote omitted). **Furthermore, attempts at incorporation by reference are sometimes used to “create contract forms in a way designed to mislead” and “may be used by a party to obtain the other’s unknowing assent to onerous provisions.”** *Id.* at 665.

U-Haul, 752 S.E.2d at 597. The danger of a party using incorporation by reference “to obtain the other’s unknowing assent to onerous provisions” is exactly what has occurred in this case. *Id.* While the original agreement has never been produced, Citibank’s maneuvering to gain unknowing assent to oppressive provisions is clear from its flurry of mailings in 2001, February 2005, July 2005, and then September 2006. Like *U-Haul*, the arbitration provision here is the product of “an oblique reference to an addendum...” that is “insufficient to incorporate the addendum and its terms, including its inclusion of an arbitration agreement, into the contracts by reference.” *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 752 S.E.2d 586 (2013).

U-Haul held, in Syllabus Point 2, that

To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

Syl. pt. 2, *U-Haul*, 752 S.E.2d 586. Citibank has not met the requirements set by *U-Haul*.

Looking at the first factor, the only reference Citibank has referred to is found at App. 107-110. This document is an upside-down, illegible piece of paper full of legalese

written in print so small and blurry it is unreadable. This does not constitute an unmistakable reference. The second factor also mandates against arbitration. Citibank has alleged, but failed to prove that it sent the illegible piece of legalese attached as App. 107-110 to Respondent. There is absolutely no evidence that this happened, or evidence that Respondent received the alleged document. Further, the original "writing" describing the alleged arbitration agreement has not been produced, and likely does not exist. Citibank did not send a clear, 12-point font letter that it was adding arbitration to Respondent's contract and explain what that means. Citibank offers only the upside-down illegible piece of paper full of legalese it has presented in the Appendix. Finally and crucially, there is **no** proof that Respondent had knowledge of and assented to the incorporation of an arbitration agreement into his contract with Citibank.

The three factor test set forth in *U-haul* is nowhere near satisfied by Citibank in this matter. Citibank's alleged mailings of contract provisions make unclear references that are barely legible, these writings do not described the "other document in such terms that its identity may be ascertained beyond doubt," and, it is far from certain "that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship." *U-Haul*, 752 S.E.2d at 598. How Citibank unilaterally, cavalierly, and repeatedly attempted to alter its agreement with the Respondent is yet another reason to reject Citibank's Appeal.

V. CONCLUSION

Based on the foregoing recitations of fact and arguments of law, the Respondent respectfully requests that this Honorable Court affirm the order denying Citibank's Motion to Compel Arbitration dated October 15, 2016.

Citibank never acknowledges the reason it suddenly chose, after five years of suing a pro se litigant, to abandon its initially chosen forum. If a case ever exposed the true nature and intent of arbitration this is it: Arbitration in the consumer context is not enforced to ensure the "speedy," "streamlined," or "efficient" resolution of disputes, it is used to defeat the claims of individuals and deprive them of their seventh amendment rights. Citibank's Appeal should be denied and the circuit court's order should be affirmed.

Signed: 

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CERTIFICATE OF SERVICE

I, Matthew W. Stonestreet, Esquire, do hereby certify that on this 1st day of April, 2016, true and accurate copies of the foregoing "***Brief on Behalf of the Respondent***" has been forwarded via United States Mail, postage prepaid, in an envelope addressed to the following:

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