IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0395

FRONTLINE ASSEST STRATEGIES, LLC,
Defendant Below,
Petitioner,

vs.

ROBERT RUTLEDGE and CAROL BARCLAY, on behalf of themselves and others similarly situated,
Plaintiffs Below,
Respondents.

Interlocutory Appeal as of Right from a Final Order of the Circuit Court of Raleigh County (Civil Action No. 18-C-364-D)

PETITIONER FRONTLINE ASSET STRATEGIES, LLC'S REPLY BRIEF

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I. INTRODUCTION[1]

It was error for the Circuit Court to deny Frontline's motion to compel arbitration without permitting it an opportunity to conduct third-party discovery to obtain documentation sufficient to demonstrate Frontline's standing to enforce the broad contractual arbitration provisions to which Respondents bound themselves with their original creditors. In its opening Brief, Frontline demonstrated that the trial court gave short shrift to its motion to compel arbitration. That court applied an erroneous legal standard and failed to make the findings and conclusions needed to facilitate appellate review. Most importantly, and central to this appeal, the trial court erred in summarily denying Frontline's motion rather than allowing the discovery *both parties requested*, and that Frontline said was needed to obtain the documentary trail that Respondents insist is required to show that Frontline may enforce their arbitration agreements with their original creditors.

Respondents spend much of their brief attempting to obfuscate the central issue in this appeal by disparaging Petitioner Frontline and denigrating the debt collection industry in general. There is no real dispute, however, that each Respondent agreed to valid arbitration provisions and class action waivers in their contracts with their original creditors. Thus, an agreement to arbitrate exists, and if this dispute were between Respondents and their original creditors, Respondents plainly would be bound to arbitrate their disputes on an individual basis. Respondents dispute, however, whether Frontline may invoke these valid arbitration provisions on the basis that Frontline failed to adequately document the assignment of the debt from the original creditor to the current creditor that engaged Frontline, and Frontline's derivative standing to invoke the arbitration agreement.

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[1] For brevity and consistency, Frontline continues to use terms defined in its opening Brief.

Frontline should have been given the opportunity to obtain through discovery documentation of its standing to invoke the Respondents' agreements to arbitrate prior to a merits ruling on that motion – and in no event should that motion have been denied based on the inapplicable Rule 12(b)(6) legal standard for evaluating the threshold legal viability of a complaint. At the very least, the trial court's denial of Frontline's motion should have been without prejudice to renewing this motion once such discovery had been completed. Moreover, Respondents should be permitted an opportunity on remand to develop the grounds for arguing, alternatively, that Respondents are equitably estopped from resisting arbitration with Frontline under their arbitration agreements with their original creditors.

Finally, this Court should direct the Circuit Court on remand to consider and rule upon the merits of Frontline's separate motion for judgment on the pleadings, which that court overlooked completely in purporting to deny both motions while its ruling only actually addressed Frontline's motion to compel arbitration. Frontline's motion for judgment on the pleadings presents purely legal issues and if the Circuit Court were to follow the weight of federal judicial authority interpreting analogous provisions of the FDCPA, it would grant Frontline's motion, thereby obviating any need for further proceedings on the motion to compel arbitration.

II. ARGUMENT

A. The Court Should Direct the Circuit Court to Permit Discovery on the Motion to Compel Arbitration and Thereafter Resolve the Disputed Fact Issues

1. There Is No True Dispute that Respondents Entered into Agreements to Arbitrate

Respondents' attempts to imply (at 1) that Frontline might be trying to collect the wrong debts from the wrong persons are belied by the factual allegations and legal contentions of their

own Complaint. These assertions make clear not only that the credit agreements exist, but Respondents' entire case proceeds from the premise that Frontline in fact is attempting to collect on behalf of assignees of the original creditors. Respondents' Complaint thus admits that their consumer debts exist, and that Frontline is attempting to collect them. (AR 0003).

Instead, Respondents allege that Frontline's dunning letters to them represent the nature and amount of these conceded debts in a manner that has the potential to mislead an "unsophisticated consumer" in two specific ways. First, Respondents argue that the letters are actionably misleading because the figure the letters refer to as being the "principal" amount of the debt inaccurately implies that the debt collector is not attempting to collect interest and fees accrued by the original creditor when "based upon the last statement sent by the original creditor to [Respondents]," the "principal" included interest and late fees that assessed by the original creditors. Second, Respondents assert that the letters' references to the amount of interest and fees being $0 "as of the date of this letter" misleadingly implies that the current owner of the debt might in the future add additional interest and fees if the debt if not paid when the debts, in fact, are static and will not be assessed additional interest or additional fees going forward. For these reasons, Respondents assert that Frontline's letters violate the provisions of the WVCCPA, West Virginia's counterpart to the FDCPA. (AR 0004-0007).

As one of its few factual findings, the trial court found that Respondent Rutledge had entered into an arbitration agreement with his original creditor. Even though Respondent Barclay never raised the issue, however, the trial court found that Frontline had not proven that she had assented to the arbitration provision in her agreement with her original creditor. But, as demonstrated in Frontline's opening Brief (at 16, n.2), *use* of a credit card, when identified as a form of acceptance, suffices to bind the cardholder to the creditor's contractual terms. *See*

Bluestem Brands, Inc. v. Shade, 239 W.Va. 694, 699, 805 S.E.2d 805, 810 (2017). And given that Ms. Barclay is suing Frontline for attempting to collect on her credit card debt, it is obvious – in addition to being uncontested – that she did, in fact, make use of her credit card, thereby binding herself to the arbitration provision.[2]

2. Since Arbitration Agreements Undeniably Exist Here, the "Emphatic" Public Policy Favoring Arbitration Informs the Nature and Scope of Further Proceedings – Including Needed Discovery to Resolve the Disputed Factual Issues as to Whether Frontline May Enforce Respondents' Agreements to Arbitrate

Because the answer to the threshold question of "whether a valid arbitration agreement exists" is uncontestably "yes," the inquiry moves on to "whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *Golden Eagle Resources, II, v. Willow Run Energy,* 836 S.E. 2d 23 (W.Va. 2019). And with respect to that inquiry, the deferential standards of the FAA and the RUAA apply, with all doubts being resolved in favor of arbitrability. And since enforcement of arbitration agreements is favored, requests for discovery to demonstrate a party's standing to enforce another party's agreement to arbitrate should be liberally indulged.

As Frontline demonstrated in its opening Brief (at 16-18), presumptively resolving factual disputes against the party seeking to enforce an agreement to arbitrate based on incorrect legal presumptions against the moving party is the *opposite* of what the FAA requires. Instead, the FAA requires a prompt trial of the disputed or unsettled facts, as the 10th Circuit explained in

[2] To the extent that Respondent Barclay actually seeks to contest whether she entered into an arbitration agreement with her original creditor, the only fact issue is whether she used her credit card since, as explained in the opening Brief, assent to the arbitration agreement was manifested by such use. Again, this is something that is relatively obvious given that her claims here are based upon allegedly misleading representations regarding the debt that she incurred by making charges with her card. And again, it is something that Frontline should be permitted to prove through discovery.

Howard v. Ferrellgas Partners, L.P., 748 F.3d 975 (10th Cir. 2014) (Gorsuch, J.): "One thing the district court may never do is find a material dispute of fact *does* exist and then proceed to *deny* any trial to resolve that dispute of fact." *Id.* at 978 (original emphasis). Likewise, this Court's ruling in *Certegy Check Servs. v. Fuller*, 241 W. Va. 701, 705, 828 S.E.2d 89, 93 (2019), confirms that trial courts must not simply identify fact issues and then deny a motion to compel arbitration, but instead, "to facilitate review, the circuit court necessarily [must] resolve the disputed facts relevant to resolution of the motion at hand. *Id.* (Citation omitted).

Tellingly, rather than address *Howard*, Respondents brief avoids any discussion of this case and its holding. Instead, they cite cases (at 12) that reference a summary-judgment-like standard for *granting* motions to compel arbitration when there is no material issue of fact as to the existence of an arbitration agreement and an arbitral dispute. Not one those cases, however, stands for the proposition that when the initial submissions of a party seeking to compel arbitration fail to meet that summary-judgment-like burden, that party's motion is summarily denied, without leave to conduct discovery (that both sides requested in their papers), and without leave to renew its motion once it has obtained the documentation the court found wanting from its initial submission. Thus, *Gibbs v. Stinson*, 421 F.Supp.3d 267 (E.D. Va. 2019), cited by Respondents, *id.*, involved a situation where the party opposing arbitration failed to come up with any evidence to rebut the moving party's affidavit evidence establishing the existence and scope of the parties' arbitration agreement and did not request any discovery. Here, by contrast, in the face of Respondents assertion that Frontline needed more than what it had in its own possession in order to prove the "chain" of its claimed authority to enforce arbitration agreements, the existence of which is not the subject of legitimate dispute, the Circuit

Court erred in denying Frontline's Motion rather than giving leave for discovery and then adjudicating the disputed fact issues.

Where, as here, only the derivative standing of Frontline to enforce otherwise-applicable arbitration provisions is genuinely contested, the public policy of enforcing agreements to arbitrate militates in favor of permitting needed discovery when requested by the parties prior to adjudicating the disputed factual issues. If this Court were to endorse the Circuit Court's inappropriate grafting of a motion to dismiss standard onto the arbitrability inquiry it would do substantial violence to the FAA's and the RUAA's "emphatic" public policy favoring arbitral resolution of disputes.

B. In Addition, the Court Should Instruct the Circuit Court on Remand to Consider and Rule on the Actual Merits of Frontline's Motion for Judgment on the Pleadings, Which Is Founded Upon Pursuasive FDCPA Jurisprudence Rejecting Respondents' Legal Theories

Respondents' underlying claims themselves are bereft of legal merit. The claims that they are trying to bring under West Virginia's consumer protection statute already have been rejected by the weight of federal authority under substantively-identical provisions of the FDCPA.

First, Respondents contend that it is misleading to refer to the amount of the debt purchased from the original creditor as "principal" if that amount includes interest and late charges imposed by the original creditor prior to charging off the debt. As support, they cite *Mushinsky v. Nelson, Watson Assocs., LLC*, 672 F. Supp.2d 470 (E.D. Pa. 2009). But *Mushinsky* is an outlier that has not been followed by any other court. In fact, the overwhelming weight of federal authority, including the Seventh Circuit, has ruled that the "principal" amount is the amount of the debt as of the time it is sold to the current creditor, even if it includes interest and fees charged by the original creditor. *See*, e.g., *Wahl v. Midland Credit Mgmt.*, 556 F.3d 643 (7th

Cir. 2009) ("we see no way this language would confuse the reasonable consumer, unsophisticated though she may be...The unsophisticated consumer, with a reasonable knowledge of her account's history, would have little trouble concluding that the 'principal balance' included interest charged by [the original creditor]."); *Smith v. First Nat'l Collection Bureau, Inc.*, No. 06 C 4742, 2007 U.S. Dist. LEXIS 92241, *8 (N.D. Ill. Dec. 10, 2007) (statements in the collection letter should be interpreted as relating to the relationship between the debtor and the collection agency); *Humes v. Blatt, Hasenmiller, Liebsker & Moore, LLC*, No. 1:06-CV-985, 2007 U.S. Dist. LEXIS 72344, *8 (S.D. Ind. Sept. 26, 2007) ("[T]he amount of the debt that must be correctly stated and itemized...is not the entire underlying debt but the debt owed to, and sought by, the debt collector"); *Gissendaner v. Enhanced Recovery Co., LLC*, 2018 U.S. Dist. LEXIS 206321, at *8 (W.D.N.Y. Dec. 6, 2018) (same). Thus, the clear weight of federal court jurisprudence rejects plaintiffs' argument that setting forth the entire amount that was owed to the original creditor, inclusive of fees and interest, as "principal" in a debt collector's validation letter is actionably misleading.

Second, Respondents allege that it is misleading for a debt collector to write that the debtor owes the "principal" amount "as of the date of this letter" because it suggests that fees and interest may be added in the future, where the debt in fact will never increase with the addition of future fees or interest – i.e., is a "static" debt. Again, this position has been largely rejected by the federal courts in the FDCPA context, including by each of the three courts of appeals, the Second, Third, and Seventh Circuits, that have considered the theory. *See Dotson v. Nationwide Credit, Inc.*, No. 19-3695, 2020 WL 5757994, at *1–2 (3d Cir. Sept. 28, 2020) ("[I]f a collection notice correctly states a consumer's balance without mentioning interest or fees, and no such interest or fees are accruing, then the notice will ... [not] fail to state accurately the amount of the

debt under Section 1692g."); *Taylor v. Fin. Recovery Servs.*, 886 F.3d 212, 214-15 (2d Cir. 2018) ("requiring debt collectors to draw attention to the fact that a previously dynamic debt is now static might even create a perverse incentive for them to continue accruing interest or fees on debts when they might not otherwise do so"); *Koehn v. Delta Outsource Grp., Inc.*, 939 F.3d 863 (7th Cir. 2019) ("It takes an ingenious misreading of this letter to find it misleading. And that same ingenuity would call into question the even simpler phrase that 'the balance is $__.' After all, the simple present-tense verb 'is' also implies 'current,' doesn't it?").

Indeed, this issue has been directly decided in Frontline's favor by the Second Circuit with regard to a letter that is largely identical to the letters challenged here, in *Dow v. Frontline Asset Strategies, LLC*, 783 F. App'x 75, 76 (2d Cir. 2019) ("a collection notice that fails to disclose that interest and fees are not currently accruing on a debt is not misleading within the meaning of Section 1692e.").

Frontline appreciates that the Circuit Court's denial of its Motion for Judgment on the Pleadings is not subject to interlocutory appeal as of right, but the truth of the matter is that the Circuit Court did not even consider the motion on its merits. Given the general rejection of plaintiffs' theories – including by the Third and Seventh Circuits while this case has been pending – this Court, for the sake of judicial economy and due administration of justice, should exercise its supervisory authority over the Circuit Court. This Court should instruct the Circuit Court, on remand, to consider and make a ruling on the actual merits of Frontline's Motion for Judgment on the Pleadings, giving full consideration to the federal court authority cited therein, and to certifying the issues for appeal to this Court, pursuant to West Virginia Code § 58-5-2, should that decline to dismiss Respondents' claims on Frontline's Motion.

III. CONCLUSION

The Respondents are parties to arbitration agreements with their original creditors. Material factual disputes exist as to whether Frontline, as the debt collector for the assignees of the original creditors, has standing to enforce these arbitration provisions and both Frontline and the Respondents requested discovery. In these circumstances, it was reversible legal error for the Circuit Court to simply deny Frontline's Motion to Compel Arbitration on the basis of adverse presumptions instead of permitting Frontline to adduce additional evidence from non-parties and thereafter resolving any remaining disputed factual issues, if necessary by an evidentiary hearing.

This Court should vacate the Circuit Court's March 30, 2020 Order, and remand this case to the Circuit Court with instructions to permit discovery on the disputed factual issues, and only then proceed to adjudicate the factual disputes and resolve the arbitration motion. In addition, this Court should exercise its supervisory powers and instruct the Circuit Court, on remand, to consider and rule upon the merits of Frontline's Motion for Judgment on the Pleadings, which called to that Court's attention the many federal court decisions rejecting Respondents' legal theories of liability against Frontline.

Dated: November 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2020, a true and correct copy of the foregoing **Petitioner's Reply Brief** was served via email to the following:

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