IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0434

KRISTIN L. HUNNICUTT,

Defendant Below, Petitioner,

v.

SUSAN H. HUNNICUTT,

Plaintiff Below, Respondent.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Circuit Court of Randolph County erred in its denial of Petitioner, Kristin L. Hunnicutt's ("Petitioner" or "Ms. Kristin Hunnicutt") motion to dismiss and in its refusal to refer the parties' dispute to arbitration as required by their binding arbitration agreement. The arbitration agreement is valid, enforceable, and applicable to all known and unknown claims accruing at any time prior to the agreement's effective date. Not only did the claims at issue accrue prior to the arbitration agreement's effective date, but also the agreement expressly delegates the arbitrability of claims to an arbitrator. For these reasons, and under the law strongly favoring arbitration agreements, Ms. Kristin Hunnicutt seeks an order reversing the ruling of the circuit court and referring the claim to arbitration.

STATEMENT OF THE CASE

This appeal relates to a February 4, 2022 lawsuit initiated by Respondent, Susan H. Hunnicutt, against her sister, Ms. Kristin Hunnicutt, as well as two parties who are non-participants in this appeal—Larry S. Barger and Inter-State Hardwoods, Inc. [J.A. 5-10.] The underlying lawsuit is based upon a single cause of action for trespass to timber. [J.A. 9-10.] The trespass to timber claim arises from a September 10, 2010 Timber Sale Agreement and subsequent timbering activities performed between 2010 and approximately November 2012. [J.A. 12-17.]

More than two years later, on December 10, 2014, Respondent initiated a separate and unrelated civil suit against Petitioner in connection with the sisters' dispute over the inheritance of their father's estate ("the Estate Action"). [J.A. 35.] The Estate Action was resolved by way of a May 5, 2015 *Release and Settlement Agreement*. [J.A. 35-39.] Per the parties' settlement agreement, Petitioner paid Respondent the sum of $475,000.00 in exchange for a "global release" of any and all claims, whether known or unknown, that accrued on or before the date of receipt of

the settlement proceeds. [J.A. 35-36, 40.] Specifically, the parties' *Release and Settlement Agreement* provides:

> **Global Release.** Upon receipt of the Settlement Payment pursuant to Section 4 of this Agreement, and without more, SUSAN for herself (and for her agents, heirs, personal representatives, successors and assigns) **forever releases, remises, indemnifies, and fully discharges** KRIS, individually (and KRIS's agents, heirs, personal representatives, successors, and assigns), **from any and all claims**, controversies, suits, demands, obligations, allegations (express and implied), rights, responsibilities, duties, obligations, remedies (including for any past or future accounting, fiduciary removal, or any other equitable entitlement or expectancy whatever), **causes of action** (and any and all related damages, payment, **property**, **property interest**, liabilities, losses, fees, attorney's fees, interest, costs, and expenses**), including, but not limited to**, the CONTROVERSIES (as defined in this Agreement), **of any kind or character, whether now known or unknown**, asserted or unasserted, liquidated or unliquidated, secured or unsecured, whether sounding at law or in equity, whether arising by statute or under the common law, and whether provided for by state or federal law, which SUSAN has or may have, directly or indirectly, legally or beneficially, **from the beginning of the world through the date of SUSAN's receipt of the Settlement Payment**[.]

[J.A. 36.] (Emphasis added). The parties' settlement was perfected when Respondent endorsed and deposited the settlement check on or about May 18, 2015. [J.A. 36, 40.] At that time, in accordance with the parties' agreement, Respondent released any and all claims against Petitioner, irrespective of kind or character, whether known or unknown, which had accrued "from the beginning of the world" through her May 18, 2015 receipt of the settlement payment. [J.A. 36.]

Given the comprehensive nature of this "global release," the parties also negotiated and agreed to a mandatory alternative dispute resolution provision ("the Arbitration Provision"). [J.A. 37-38.] The Arbitration Provision applies to any and all claims, causes of action, disputes, and controversies between the parties (with the limited exception of the proceedings dismissing and/or enforcing the settlement of the Estate Action). [J.A. 37.] The Arbitration Provision is as follows:

12. Mandatory, Binding, and Final Alternative Dispute Resolution; Wavier of Jury Trial; Venue. Except as set forth in Section 11 of this Agreement, the Parties to this Agreement agree that **any and all claims, causes of action, disputes, and/or controversies** (the "Dispute" or "Disputes"), whether based on federal or state law, statute or common law, and whether sounding at law or in equity, arising from, related to, or in connection with this Agreement, including any modification and/or amendment thereto, any breach or alleged breach thereof, and/or the construction or interpretation of the terms and conditions thereof shall be resolved **exclusively** as follows.

Any Dispute shall be subject, first, to mandatory participatory or in-person mediation in Fairfax County, Virginia. The mediation shall be limited to two (2) days' participatory or in-person mediation, with each participant receiving equal time before the mediator. No pre-mediation discovery shall be requested or permitted. If the mediation does not fully resolve the Parties' Dispute or Disputes, the remaining Dispute or Disputes shall be **required to be submitted to mandatory, binding, and final arbitration** in accordance with the then current arbitration rules of Juridical Solutions, PLC or the McCammon Group.

This Agreement's arbitrability shall be governed by the Federal Arbitration Act. **No Party hereto shall be entitled to a trial by judge or jury in any court. A trial by jury is hereby expressly waived by the Parties hereto.** Any arbitration shall be held before a single arbitrator, unless otherwise agreed to in writing by all of the Parties to the arbitration. Administrative costs; if any, of mediation or arbitration shall be paid by the Party initiating arbitration; any and all fees of the arbitrator first shall be paid by the Party initiating arbitration, provided, however, that the substantially prevailing party as to any Dispute or as to any defendant to a Dispute shall be entitled, in addition to any other rights or remedies available to an award of reasonable attorney's fees and costs in the prosecution or defense of such Dispute. **The exclusive venue for any arbitration shall be Fairfax County, Virginia**, which shall be deemed to be a neutral and convenient forum.

[J.A. 37-38.] (Emphasis added).[1]

Stated simply, the Arbitration Provision reflects the parties' agreement to relinquish the right to bring before a judge or jury any claims, causes of action, disputes, or controversies related to the *Release and Settlement Agreement*. [J.A. 37.] Rather, the parties chose to resolve any and all such claims, as well as claims relating to "the construction and interpretation of the terms and conditions" of the *Release and Settlement Agreement*, "exclusively" through mediation followed by binding arbitration. [J.A. 37.] The parties further agreed that Fairfax County, Virginia would be the "exclusive venue" for any such claims. [J.A. 38.]

The underlying trespass to timber claim accrued prior to the execution of the *Release and Settlement Agreement* and, thus, was released (as were all other claims, causes of action, disputes, and controversies which accrued prior to Respondent's receipt of the settlement proceeds). In exchange for the release of these claims, Respondent received $475,000.00. [J.A. 36, 40.]

Respondent now seeks to claw back her prior release of the claims and seeks to avoid her agreement to the Arbitration Provision in order to prosecute the trespass to timber claim in the Randolph County Circuit Court. [J.A. 5-10.] The Circuit Court of Randolph County, however, is not the appropriate forum because the parties previously agreed that such claims would be "resolved exclusively" through the Arbitration Provision with Fairfax County, Virginia being the

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[1] The Arbitration Provision references Section 11 of the *Release and Settlement Agreement*. That section provides:

> Jurisdiction; Venue; ADR. A motion to enforce the final dismissal with prejudice of the [Estate Action], and a motion to enforce the Settlement Payment . . . shall be made in the U.S. District Court, Eastern District of Virginia, Alexandria Division. After the Settlement Payment is received and clears and the final dismissal with prejudice of the [Estate Action] is entered by the court . . . any and all other claims, causes of action, disputes, and controversies shall be governed by the mandatory, binding, and final alternative dispute resolution provisions of Section 12 of this Agreement.

[J.A. 37.]

"exclusive venue." [J.A. 37-38.] Therefore, Petitioner moved to dismiss for "lack of jurisdiction and improper venue," and, further, asked that the matter be "compelled to alternative dispute resolution in Fairfax County, Virginia" in accordance with the parties' binding contractual obligation. [J.A. 24-31.]

Tellingly, in the response to Petitioner's dismissal motion, Respondent did not challenge the validity of the Arbitration Provision and made no effort to address the jurisdictional and venue arguments. [J.A. 43-52.] The circuit court nevertheless denied the motion. In so doing, the court stated from the bench "if there is a valid arbitration agreement the Hunnicutt sisters will have to go to arbitration but I don't know whether that valid – that arbitration agreement in the release relating to dad's estate is applicable and can be enforced in dealing with mom's estate." [J.A. 82.] The circuit court entered a four-paragraph order reflecting its ruling. [J.A. 92-93.] The order failed to set forth findings of fact and conclusions of law; rather, it stated only that the denial was based "upon the record this day." [J.A. 92.] That order forms the basis of the instant appeal.

SUMMARY OF ARGUMENT

Arbitration agreements are binding contracts that must be enforced pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq. See e.g., Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2018); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 2777-78, 177 L. Ed. 2d 403 (2010). As binding contracts, courts are not permitted to disregard their terms or rewrite the provisions to change their meaning. *See e.g., Geological Assessment & Leasing v. O'Hara*, 236 W. Va. 381, 780 S.E.2d 647 (2015). Instead, courts are only permitted to determine if the agreement is valid and whether the dispute falls within its scope. If the court answers these two questions in the affirmative, it must enforce the arbitration agreement. *See* Syl. pt. 1, *Baker Mine Serv. v. Nutter*, 171 W. Va. 770, 301 S.E.2d 860 (1983).

In this case, it is not disputed that the Arbitration Provision is valid; thus, the primary issue to be decided on appeal is whether the underlying trespass to timber dispute falls within the scope of the *Release and Settlement Agreement* such that it must be resolved exclusively through the Arbitration Provision. Because the trespass to timber claim accrued before Respondent discharged all known and unknown causes of action against Petitioner, the claim is encompassed by the *Release and Settlement Agreement* and, in turn, is subject to that agreement's Arbitration Provision.

The plain terms of the Arbitration Provision provide that any issues related to the *Release and Settlement Agreement*—including "the construction or interpretation of" the *Release and Settlement Agreement*—are to be "resolved exclusively" through mediation and binding arbitration. [J.A. 37-38.] A claim that was released as part of Respondent's global release is certainly related to the *Release and Settlement Agreement* and comes within the scope of the Arbitration Provision. What is more, this "gateway" question regarding the scope of the Arbitration Provision and its application to the trespass to timber claim is delegated to the arbitrator because the parties agreed that matters of "construction or interpretation" of their agreement are also to be resolved exclusively through alternative dispute resolution. [J.A. 37.] Consequently, the circuit court is not the appropriate forum for the trespass to timber claim or questions surrounding its arbitrability. The circuit court's decision therefore should be reversed and the matter should be remanded for the entry of an order dismissing the case and enforcing the Arbitration Provision.

STATEMENT REGARDING ORAL ARGUMENT

This matter involves an assignment of error in the application of settled law. Petitioner requests oral argument in accordance with Rule 19(a) of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

The underlying order is an interlocutory ruling subject to immediate appeal and *de novo* review by this Court. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013); *see also* Syl. pt. 4, *Ewing v. Board of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998); *accord* Syl. pt. 1, *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy*, 238 W. Va. 465, 796 S.E.2d 547 (2017) ("When an appeal from an order denying and motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*.")

ARGUMENT

The law of arbitration has been extensively litigated in West Virginia. Thus, the Court is well aware of the principles governing the application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. and the recognition that it applies broadly. The central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 176 L. Ed. 605 (2010) (quotations omitted). The FAA reflects an "emphatic federal policy in favor of arbitration." *KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 23, 181 L. Ed. 323 (2011). It leaves "no place for the exercise of discretion" but instead commands both state and federal courts to "rigorously enforce" arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 158 (1985); *see also Perry v. Thomas*, 482 U.S. 483, 489-90, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987), *Southland Corp. v. Keating*, 465 U.S. 1, 12, 103 S. Ct. 2199, 76 L. Ed. 372 (1984).

Under the FAA, arbitration is proper when there is a valid written agreement covering the asserted claims. 9 U.S.C. § 2. That is, the FAA limits the court's consideration when evaluating the enforceability of an arbitration agreement:

> When a party to an arbitration agreement makes a motion to dismiss a complaint and to compel arbitration, the power of the trial court to proceed in the case is constrained. "In the context of cases affected by the Federal Arbitration Act, we have found that courts are limited to weighing only two questions: does a valid arbitration agreement exist? And do the claims at issue in the case fall within the scope of the arbitration agreement?"

Bayles v. Evans, 842 S.E.2d 235, 2020 W. Va. LEXIS 258, 2020 WL 1982894 (quoting *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 836 S.E.2d 23, 29 (W. Va. 2019); *accord* Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

In analyzing these questions, this Court has recognized that it is required to "construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004). Moreover, where parties to a contract bargained for and agreed to an arbitration provision, the "provision is binding and specifically enforceable." Syl. pt. 1, *Baker Mine Serv.*, 171 W. Va. 770, 301 S.E.2d 860 (in part) (internal citation omitted). It is within this framework that the subject Arbitration Provision must be evaluated and applied. *See Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 339, 774 S.E.2d 1, 5 (2015).

I. A Valid Arbitration Agreement Exists Between the Parties and Must Be Enforced.

This Court has made clear that the burden of establishing *prima facie* evidence of an agreement to arbitrate is a light one. "A party 'me[ets] the prima facie burden by providing copies of [a] written and signed agreement[ ] to arbitrate.'" *State ex rel. Troy Grp., Inc. v. Sims*, 244 W. Va. 203, 210, 852 S.E.2d 270, 277 (2020) (citing *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (Ky. 2013)) (internal citation omitted). "This does not require the movant to show the 'agreement would be enforceable, merely that one existed.'" *Sims*, 244 W.

Va. at 210, 852 S.E.2d at 277 (internal citations omitted). There is no dispute that an arbitration agreement exists between Petitioner and Respondent.

Furthermore, there can be no dispute that the arbitration agreement is valid. Section 2 of the FAA recognizes that an agreement to arbitrate is a contract and, thus, controlled by the state law governing contracts. Under West Virginia law, "[t]he fundamentals of a legal 'contract' are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syl. pt. 9, *Ways v. Imation Enters. Corp.*, 214 W. Va. 305, 308, 589 S.E.2d 36, 39 (2003). In order for there to be mutual assent, "there must be an offer by one party and an acceptance on another." *Id.* at 313, 44. "Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement[.]" *Id.* (quoting *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993).

All four of the "fundamentals" or "essential elements" of a legal contract are present with respect to the Arbitration Provision. First, there is no evidence of incompetence. In fact, both Petitioner and Respondent were represented by separate counsel in reaching their agreement. [J.A. 38.] Second, an agreement to arbitrate is unquestionably legal subject matter. *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013). Third, valuable consideration was exchanged insofar as the parties entered into a reciprocal arbitration agreement. [J.A. 37.] This fact alone is sufficient consideration. *See Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 287, 737 S.E.2d 550, 556 (2012). Additionally, the agreement was supported by payment of $475,000.00 to Respondent. [J.A. 36, 40.] Lastly, mutual assent to the Arbitration Provision is evidenced by the parties' endorsement of the *Release and Settlement Agreement*. [J.A. 39.] Respondent's intent to

be bound by the terms of the *Release and Settlement Agreement*, including its Arbitration Provision, was manifested when she executed the document. Indeed, Respondent's signature demonstrates that she assented to the Arbitration Provision and "intended to enforce the contract as drafted." *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013).

Because a valid arbitration agreement exists between the parties, the circuit court erred in its failure to enforce the contract as drafted. It is well-settled in West Virginia that "[w]here parties to a contract agreed to arbitrate . . . all disputes . . . arising under the contract, and where the parties bargained for the provision, ***such provision is binding and specifically enforceable.***" Syl. pt. 1, *Baker Mine Serv.*, 171 W. Va. 770, 301 S.E.2d 860 (in part) (quoting *Board of Education v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977) (emphasis added); *accord State ex rel. Ranger Fuel Corp. v. Lilly*, 165 W. Va. 98, 267 S.E.2d 435 (1980); *Smithson v. United States Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991); *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997). A valid arbitration agreement exists between the parties and, therefore, the first question considered by the lower court regarding the existence of an arbitration agreement should have been answered in the affirmative.[2] Because the Arbitration Provision is valid, it is binding and specifically enforceable. *See* Syl. pt. 1, *Baker Mine Serv.*, 171 W. Va. 770, 301 S.E.2d 860. In accordance with the binding and enforceable Arbitration Provision, the Randolph County Circuit Court was not the appropriate forum for this matter and Petitioner's motion to dismiss and compel arbitration should have been granted. [J.A. 37-38.]

II. Respondent's Claim Falls Within the Scope of the Arbitration Agreement.

The second question of whether the parties' dispute falls within the scope of the arbitration agreement "must be weighed in view of the FAA being a 'congressional declaration of a liberal

[2] The circuit court did not articulate its findings with respect to the question of whether a valid arbitration agreement exists between the parties. [J.A. 92-93.]

federal policy favoring arbitration agreements,' and establishing that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]'" *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 436, 781 S.E.2d 198, 213 (2015) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983)). Significantly, a court may not deny a party's request to arbitrate an issue "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *accord Chapple v. Fairmont Gen. Hosp.*, 181 W. Va. 755, 760, 384 S.E.2d 366, 371 (1989).

Here, the circuit court did not find with "positive assurance" that the Arbitration Provision was too narrow to cover the dispute. To the contrary, the court expressed doubt about it on the record, stating: "if there is a valid arbitration agreement the Hunnicutt sisters will have to go to arbitration but I don't know whether that valid – that arbitration agreement in the release relating to dad's estate is applicable and can be enforced in dealing with mom's estate." [J.A. 82.] In failing to resolve this pronounced doubt with positive assurance "in favor of arbitration," the circuit court disregarded the "congressional declaration of a liberal federal policy favoring arbitration agreements." *See Chesapeake Appalachia*, 236 W. Va. at 436, 781 S.E.2d at 213.

Applying the liberal federal policy favoring arbitration agreements, it is readily apparent that the Arbitration Provision in this case covers the Respondent's trespass to timber claim. In fact, to reach this conclusion, this Court need not look beyond the terms of the *Release and Settlement Agreement* and the timeline of relevant events.

With respect to the former, Respondent agreed to a "global release" of any and all claims, of any kind or character, whether known or unknown, from "the beginning of the world" through

Respondent's "receipt of settlement payment." [J.A. 36.] Stated succinctly, all known and unknown claims accruing prior to Respondent's receipt of the settlement payment were encompassed by the global release and, thus, were relinquished in exchange for payment of $475,000.00. [J.A. 36.]

With respect to the latter, the following timeline of events demonstrates that the trespass to timber claim was necessarily encompassed by the global release:

- **September 10, 2010** – Execution of Timber Sale Agreement. [J.A. 12-17.]
- **2010 – 2012** – Timbering work performed pursuant to Timber Sale Agreement. [J.A. 12-17.]
- **December 10, 2014** – The Estate Action filed by Respondent against Petitioner. [J.A. 35.]
- **May 5, 2015** – *Release and Settlement Agreement* reached between Respondent and Petitioner. [J.A. 35-39.]
- **May 18, 2015** – Settlement proceeds deposited by Respondent. [J.A. 40.]
- **May 18, 2015** – *Release and Settlement Agreement* and attendant Arbitration Provision becomes enforceable as to any and all claims accruing on or before this date. [J.A. 36-39.]
- **January 31, 2022 –** Respondent files suit for trespass to timber. [J.A. 1, 5-10.]

The *Release and Settlement Agreement* applies to ***all*** claims, ***known or unknown***, that accrued prior to May 18, 2015. [J.A. 36.] Inasmuch as the trespass to timber claim at issue accrued (at the very latest) when the timbering services were completed in 2012, it is within the purview of the *Release and Settlement Agreement.*[3] The trespass to timber claim was therefore discharged by Respondent, irrespective of whether she was aware of its accrual.

[3] Respondent's counsel has argued that the timbering services were not completed until 2014. [J.A. 56, 66, 77.] Whether timbering activities were completed in 2012 or 2014 is immaterial to Petitioner's position. Either way, the claim was released when Respondent entered into the *Release and Settlement Agreement* in May 2015.

Because the trespass to timber claim was discharged by way of the *Release and Settlement Agreement*, it falls within the scope of the Arbitration Provision. The Arbitration Provision applies to any claims, causes of action, or controversies relating to the *Release and Settlement Agreement*. [J.A. 37-38.] There can be no credible argument that a claim released pursuant to the *Release and Settlement Agreement* is unrelated to the *Release and Settlement Agreement*. Therefore, the trespass to timber claim relates to the *Release and Settlement Agreement* and, as a result, is subject to the Arbitration Provision. The circuit court erred when it held otherwise.

The circuit court's error becomes especially apparent in view of the "heavy presumption of arbitrability." *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989). "[W]hen the scope of the arbitration clause is open to question, a court ***must*** decide the question in favor of arbitration." *Id.* (Emphasis added). *See also Kaufman*, 216 W. Va. at 598, 609 S.E.2d at 859 (doubts as to the scope of arbitration clause should be resolved in favor of arbitration). The heavy presumption of arbitrability, when coupled with the directive to resolve all open questions in favor of arbitration, should lead this Court to reverse the decision of the circuit court.

III. Questions of Arbitrability Have Been Delegated to the Arbitrator.

The appropriateness of reversal of the lower court's decision is further evidenced by the fact that the parties agreed to delegate questions relating to validity, enforceability, and scope of the Arbitration Provision to the arbitrator, not the court. The Arbitration Provision states, in relevant part:

> [T]he Parties to this Agreement agree that any and all claims, causes of action, disputes, and/or controversies . . . in connection with this Agreement, including . . . ***the construction or interpretation of the terms and conditions*** thereof ***shall be resolved exclusively*** . . . ***by mandatory, binding, and final arbitration*** in accordance with the then current arbitration rules of Juridical Solutions, PLC or the

> McCammon Group. ***This Agreement's arbitrability shall be governed by the Federal Arbitration Act.*** No Party hereto shall be entitled to a trial by judge or jury in any court. A trial by jury is hereby expressly waived by the Parties hereto.

[J.A. 37.] (Emphasis added).

This Court has expressly held that parties have the power to delegate questions of the scope of an arbitration agreement to the arbitrator, as the parties have done in the instant Arbitration Provision.

> The United States Supreme Court has recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration ask the federal court to enforce and the FAA operates on this additional arbitration agreement just as it does on any other *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-70, 130 S. Ct. 2772, 2777-78, 177 L. Ed. 2d 403 (2010).

W. Va. CVS Pharmacy, 238 W. Va. at 472, 796 S.E.2d at 581.

Petitioner and Respondent agreed to arbitrate "gateway" questions of arbitrability, such as whether the agreement covers a particular controversy. Any claims regarding the "construction or interpretation of the terms and conditions" of the Arbitration Provision "shall be resolved exclusively" through alternative dispute resolution. [J.A. 37.] In other words, even if Respondent were to challenge whether the scope of the Arbitration Provision is broad enough to bar her trespass to timber claim, that would be a question for the arbitrator and not the circuit court.

Because open questions regarding the scope of the arbitration clause should be resolved in favor of arbitration, this Court should conclude that the parties agreed to arbitrate all questions of arbitrability, including the scope of the agreement. *See Peoples Sec. Life Ins.*, 867 F.2d at 812.[4]

[4] The circuit court openly questioned the scope of the Arbitration Provision at the hearing but clearly did not resolve the question in favor of arbitration despite this explicit authority. [J.A. 82.]

The Court should further conclude that, in light of the parties' agreement, the denial of Petitioner's motion to dismiss was erroneous and contrary to controlling law. Consequently, the ruling of the circuit court should be reversed and this matter referred to arbitration.

IV. The Circuit Court's Vague Order is Indicative of the Error in its Ruling.

The circuit court's error is compounded by the absence of findings of fact and conclusions of law evidencing the grounds for its ruling. This Court has expressly held: "[w]hen a circuit court denies a motion to compel arbitration, the circuit court's order must contain the requisite findings of fact and conclusions of law that form the basis of its decision." *See* Syl. pt. 2, *Certegy Check Servs. v. Fuller*, 241 W. Va. 701, 828 S.E.2d 89 (2019). "A circuit court speaks through its written orders, which, as a rule, must contain the requisite findings of fact and conclusions of law to permit meaningful appellate review." *Id.* at 705, 93. (citing *State v. Allman*, 234 W. Va. 435, 438, 765 S.E.2d 591, 594 (2014)).

In *Certegy Check*, the Mercer County Circuit Court was admonished for its failure to identify facts and apply the facts to the law in denying a motion to compel arbitration. *Id.* This Court likened its consideration of the appeal regarding the motion to compel arbitration to being "greatly at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong." *Id.* (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 673, 724 S.E.2d 250, 277 (2011), *overruled on other grounds by Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012)). The *Certegy Check* Court cautioned that the absence of specific findings of fact and conclusions of law in an order denying a motion to compel arbitration is fundamentally unfair to the parties. 241 W. Va. at 706, 828 S.E.2d at 94. Accordingly, the circuit court's ruling denying the motion to compel arbitration was vacated and the matter remanded. *Id.*

Although the Randolph County Circuit Court denied Petitioner's request to compel arbitration, the order reflecting this ruling lacked any findings of fact or conclusions of law. The order instead states that it is "based upon the record this day." [J.A. 92.] The record, however, evidences the circuit court's doubt regarding the scope of the arbitration provision. [J.A. 82.] ("I don't know whether that valid – that arbitration agreement in the release relating to dad's estate is applicable and can be enforced in dealing with mom's estate"). Notwithstanding law instructing courts to resolve such doubts in favor of arbitration, the circuit court here decided against arbitration. The circuit court then entered an order void of facts and the application of facts to the law. The incomplete order, when taken together with the court's failure to resolve open questions in favor of arbitration, illustrates an inattention to controlling law on arbitration matters. As a result, reversal of the circuit court's ruling is appropriate.

CONCLUSION AND REQUEST FOR RELIEF

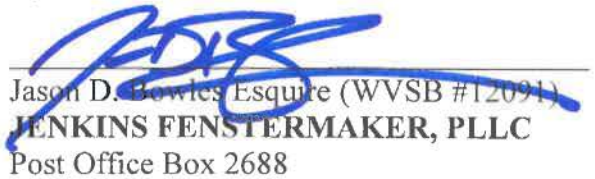
The *Release and Settlement Agreement*, including its attendant Arbitration Provision, is a binding contract that must be enforced. The FAA leaves no room for the exercise of discretion by the court, but instead commands courts to "rigorously enforce" all agreements to arbitrate where the dispute is reasonably contemplated by the language in the arbitration clause. For the reasons set forth above, the underlying trespass to timber claim is contemplated by the language in the Arbitration Provision. This issue crystallizes when consideration is given to the strong presumption favoring arbitration.

The Randolph County Circuit Court is not the appropriate forum for the underlying claim because it is to be resolved exclusively through the Arbitration Provision bargained for and agreed to by the parties. Accordingly, Petitioner respectfully requests that this Court reverse the circuit

court's order denying the motion to dismiss and remand the matter with instructions to refer this action to arbitration.

KRISTIN L. HUNNICUTT

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0434

KRISTIN L. HUNNICUTT,

Defendant Below, Petitioner,

v.

SUSAN H. HUNNICUTT,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Jason D. Bowles, counsel for Petitioner, hereby certify that on September 2, 2022, service of the ***Petitioner's Brief*** and ***Joint Appendix*** was made upon the following counsel of record by mailing a true and exact copy thereof via First Class United States Mail, postage prepaid to:

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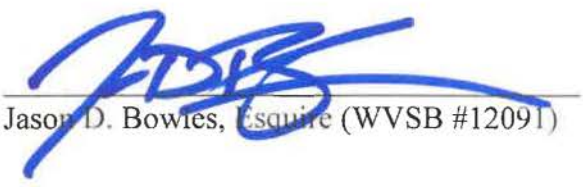

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