IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-49

SCA EFiled: Jul 25 2023
02:40PM EDT
Transaction ID 70480254

AMPLER BURGERS OHIO LLC, d/b/a BURGER KING, LESLEY McLAUGHLIN, SHEILA SPAULDING, AND TERESA STEPHENS, *Petitioners,*

v.

KENNA BISHOP, *Respondent.*

Honorable Tera Salango, Judge
Circuit Court of Kanawha County
Case No. 21-C-820

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Standard of Review 2

B. The Arbitration Agreement Applies to the Ampler Defendants 5

1. The Arbitration Agreement Applies to Claims Against the Ampler Defendants 5

2. The Ampler Defendants Can Enforce the Arbitration Agreement 7

C. Bishop's Claims Fall Within the Scope of the Agreement 11

D. The Arbitration Agreement Is Supported by Mutual Consideration 11

E. The Arbitration Agreement Is Not an Unconscionable Adhesion Contract 13

1. The Arbitration Agreement is Not Procedurally Unconscionable 13

2. The Agreement Is Not Substantively Unconscionable 14

F. The Ampler Defendants Did Not Waive Their Right to Arbitrate 16

1. The Ampler Defendants' Participation Did Not Waive Their Right to Arbitrate 16

III. CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Allen v. Chevron U.S.A. Inc.,
No. 5:22-CV-18, 2023 WL 2603941 (N.D. W. Va. Mar. 22, 2023) 3

Antero Res. Corp. v. Directional One Servs. Inc. USA,
246 W. Va. 301, 873 S.E.2d 832 (2022)..... 7

Bluestem Brands, Inc. v. Shade,
239 W. Va. 694, 805 S.E.2d 805 (2017)..... 8, 9

Burkhamer v. City of Montgomery,
No. 13-0930, 2014 WL 2404321 (W. Va. May 30, 2014)..... 15

Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.,
No. 16-0904, 2017 WL 5192490 (W. Va. Nov. 9, 2017) 17

Chamber of Com. of the United States of Am. v. Bonta,
62 F.4th 473 (9th Cir. 2023) 4

Citibank, N.A. v. Perry,
238 W. Va. 662, 797 S.E.2d 803 (2016)..... 17

Coleman-Reed v. Ocwen Loan Servicing LLC,
No. CV 2:15-13687, 2016 WL 6469329 (S.D. W. Va. Oct. 28, 2016) 17

Firewater Restoration, Inc. v. Maroni,
No. 21-0912, 2023 WL 3719859 (W. Va. May 30, 2023)..... 15

Frazier v. Hussing,
No. 19-0056, 2020 WL 533965 (W. Va. Feb. 3, 2020)..... 14

Hampden Coal, LLC v. Varney,
240 W. Va. 284, 810 S.E.2d 286 (2018)..... 11, 12, 13

Hoffman v. Wheeling Sav. & Loan Ass'n,
133 W. Va. 694, 57 S.E.2d 725 (1950)..... 18

Holloman v. Consumer Portfolio Servs., Inc.,
No. CV RDB-23-134, 2023 WL 4027036 (D. Md. June 15, 2023) 4

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,
863 F.2d 315 (4th Cir. 1988) 10

Long v. Silver,
248 F.3d 309 (4th Cir. 2001) 10

McCumbee v. M Pizza, Inc.,
No. 3:22-CV-128, 2023 WL 2725991 (N.D. W. Va. Mar. 30, 2023) 3

Morgan v. Sundance, Inc.,
142 S. Ct. 1708 (2022)..... 1, 2, 3, 4

Nat'l Nurses Org. Comm., Missouri & Kansas/Nat'l Nurses United v. Midwest Div. MMC, LLC,
70 F.4th 1315 (10th Cir. 2023) 4

New v. GameStop, Inc.,
232 W. Va. 564, 753 S.E.2d 62 (2013) 13

Palmer v. Johns Island Post Acute, LLC,
No. 2:22-CV-3432-RMG, 2023 WL 4117366 (D.S.C. June 22, 2023) 4

Parsons v. Halliburton Energy Servs., Inc.,
237 W. Va. 138, 785 S.E.2d 844 (2016) 4, 18

Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.,
380 F.3d 200 (4th Cir. 2004) 17

Potesta v. U.S. Fid. & Guar. Co.,
202 W. Va. 308, 504 S.E.2d 135 (1998) 4

Ribadeneira v. New Balance Athletics, Inc.,
65 F.4th 1 (1st Cir. 2023) 4

Roberts v. Wells Fargo Clearing Servs., LLC,
No. 22-11049, 2022 WL 16826715 (11th Cir. Nov. 9, 2022) 4

Simmons v. TA Operating, LLC,
No. CV 3:22-0494, 2023 WL 2759771 (S.D. W. Va. Mar. 31, 2023) 3

Soucie v. Virginia Util. Prot. Serv., Inc.,
No. 7:22-CV-00552, 2023 WL 2991487 (W.D. Va. Apr. 18, 2023) 4

State ex rel. Troy Grp., Inc. v. Sims,
244 W. Va. 203, 852 S.E.2d 270 (2020) 11

Stover v. Fluent Home, LLC,
No. 5:21-CV-00191, 2023 WL 3081284 (S.D. W. Va. Apr. 25, 2023) 4

U.S. ex rel. TBI Invs., Inc. v. BrooAlexa, LLC,
119 F. Supp. 3d 512 (S.D. W. Va. 2015) 11

West Virginia Dept. of Health and Human Resources v. Denise,
245 W. Va. 241, 858 S.E.2d 866 (2021) 9

Rules

W. Va. R. App. P. 10(d) 13, 14

W. Va. R. Civ. P. 38(b) 18

I. INTRODUCTION

For the reasons set forth below and in the initial brief of Petitioners, Ampler Burgers Ohio LLC d/b/a Burger King ("Ampler Burgers Ohio"), Lesley McLaughlin, Sheila Spaulding, and Teresa Stephens (collectively, the "Ampler Defendants") ("Brief"), the *[Proposed] Order Denying Defendants' Motion to Dismiss and Stay and Compel Arbitration* (the "Order") must be reversed and Respondent, Kenna Bishop ("Bishop") should be ordered to arbitrate her employment claims against the Ampler Defendants.

In her response brief ("Response"), Bishop, asks this Court to disregard the Federal Arbitration Act's ("FAA's") strong presumption in favor of arbitration based upon the ruling by the Supreme Court of the United States in *Morgan v. Sundance*, Inc., 142 S. Ct. 1708 (2022). Contrary to Bishop's claim, however, *Morgan* does not abolish the long-established presumption; it simply holds that courts cannot weigh prejudice when analyzing waiver, a principle that applied in West Virginia before *Morgan*. The strong presumption in favor of arbitration survives.

As to the five assignments of error, Bishop cannot overcome the plain language of the Arbitration Agreement that it applies to "Ampler Burgers" and "any affiliated entities, and each of their employees" and all claims "arising out of [Bishop's] employment with the Company or the termination of [her] employment." (Appx. at 72-76.) Bishop concedes that Ampler Burgers Ohio is an affiliate of Ampler Burgers LLC; that Bishop's sole employer was Ampler Burgers Ohio; and that Bishop's claims arise out of her employment. That is all that is needed for the Arbitration Agreement to apply to her claims. Further, Bishop fails to counter the plethora of case law confirming that the estoppel theory permits the Ampler Defendants to enforce the Arbitration Agreement because the employment relationship between she and Ampler Burgers Ohio serves as the basis for her claims in this case.

Bishop's other arguments quickly fail. Bishop can hardly contend that her claims are not within the scope of the Agreement when it applies broadly to all claims related to her employment, including claims of harassment. (Appx. at 71, 73-74.) Mutual consideration exists because the terms of the Agreement apply equally to the Ampler Defendants and Bishop. Similarly, there is no unconscionability where a dozen West Virginia and Fourth Circuit cases confirm that an adult signing an arbitration agreement that includes standard confidentiality, discovery, and injunctive relief provisions is perfectly appropriate. And finally, when it comes to alleged waiver, Bishop fails to counter the Ampler Defendants' position that simply responding to her discovery and her attempts to progress the case do not amount to waiver, particularly when the Ampler Defendants asserted the affirmative defense of mandatory arbitration in their initial pleading and then moved to compel arbitration just two months after Ampler Burgers Ohio became a defendant in the case.

II. ARGUMENT

A. Standard of Review

Contrary to Bishop's argument on appeal, the FAA continues to carry a strong presumption in favor of arbitration. The U.S. Supreme Court's decision in *Morgan v. Sundance,* Inc., 142 S. Ct. 1708 (2022), did not abolish decades of precedent establishing that presumption.

In *Morgan,* the plaintiff signed an employment-based arbitration agreement, the defendant moved to compel arbitration, and the plaintiff argued that the defendant waived that right by participating in the case. *Id.* at 1709. The trial court denied the motion, but the Eighth Circuit reversed and ordered arbitration, finding an absence of prejudice to the plaintiff. *Id.* The Supreme Court "granted certiorari to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice." *Id.* The Court held that prejudice is not an element of the waiver analysis, and the Eighth Circuit erroneously added that element to the analysis. *Id.* ("The Court's sole holding today is that it may not make up a new procedural rule

based on the FAA's 'policy favoring arbitration.'") In short, *Morgan* stands for the unremarkable proposition that courts cannot create "variants of federal procedural rules" when analyzing arbitration agreements. *Id.* at 1712. The Supreme Court did not abolish the FAA's strong presumption of arbitrability. Indeed, the Court referenced the "policy favoring arbitration" throughout the opinion, confirming the policy's continued validity.

This is how courts across the country have understood and applied *Morgan*, including in the Fourth Circuit and cases applying West Virginia law. *See, e.g.*, *McCumbee v. M Pizza, Inc.*, No. 3:22-CV-128, 2023 WL 2725991, at *12 (N.D. W. Va. Mar. 30, 2023) (applying West Virginia contract law and writing "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. . . . The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.") (quotations and citations omitted); *Simmons v. TA Operating, LLC*, No. CV 3:22-0494, 2023 WL 2759771, at *2 (S.D. W. Va. Mar. 31, 2023) (applying in part West Virginia contract law to determine enforceability of arbitration agreement, and stating "[t]he Supreme Court has repeatedly held that the FAA establishes a liberal federal policy favoring arbitration agreements.") (quotations omitted); *Allen v. Chevron U.S.A. Inc.*, No. 5:22-CV-18, 2023 WL 2603941, at *3 (N.D. W. Va. Mar. 22, 2023) (analyzing "precedent set by the West Virginia Supreme Court of Appeals" under the standard that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.") (quotation omitted); *Palmer v. Johns Island Post Acute,*

LLC, No. 2:22-CV-3432-RMG, 2023 WL 4117366, at *1 (D.S.C. June 22, 2023) ("The Supreme Court has consistently encouraged a healthy regard for the federal policy favoring arbitration.").[1]

Notably, *Morgan* simply confirmed the rule that this Court already applied – namely that prejudice is not an element of the waiver analysis in cases interpreting the enforceability of arbitration clauses. *See Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844, 854 (2016) ("[U]nder West Virginia's long-established law of contracts, courts do not require a showing of prejudice to establish a waiver of contract rights."); *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 316, 504 S.E.2d 135, 143 (1998) (same). In other words, the strong presumption in favor of arbitration continues after *Morgan*, and Respondent's contention that "no such presumption exists" (Resp. at 10) is mistaken.

[1] *See also Stover v. Fluent Home, LLC*, No. 5:21-CV-00191, 2023 WL 3081284, at *1 (S.D. W. Va. Apr. 25, 2023) ("Congress's purpose in creating appellate jurisdiction . . . was to effectuate a strong policy favoring arbitration . . . , whereby an order that favors litigation over arbitration . . . is immediately appealable, even if interlocutory in nature.") (quotations omitted); *Roberts v. Wells Fargo Clearing Servs., LLC*, No. 22-11049, 2022 WL 16826715, at *3 (11th Cir. Nov. 9, 2022) ("Because the [FAA] embodies a liberal federal policy favoring arbitration agreements, [t]he role of the courts is to rigorously enforce agreements to arbitrate applicable to the parties and their dispute.") (quotations omitted); *Holloman v. Consumer Portfolio Servs., Inc.*, No. CV RDB-23-134, 2023 WL 4027036, at *9 (D. Md. June 15, 2023) (citing *Morgan* for the proposition that arbitration agreements should be on equal footings as all contracts, but that "the FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]") (quotation omitted); *Nat'l Nurses Org. Comm., Missouri & Kansas/Nat'l Nurses United v. Midwest Div. MMC, LLC*, 70 F.4th 1315, 1316 (10th Cir. 2023) ("The Supreme Court regularly reminds us of the federal policy favoring arbitration . . . [that] results in a presumption of arbitrability."); *Ribadeneira v. New Balance Athletics, Inc.*, 65 F.4th 1, 15 (1st Cir. 2023) ("[C]ourts encourage participation in arbitration" which "flows from the liberal federal policy favoring arbitration agreements established by the FAA itself.") (quotations omitted); *Chamber of Com. of the United States of Am. v. Bonta*, 62 F.4th 473, 478 (9th Cir. 2023) ("The FAA embodies a national policy favoring arbitration, and the Supreme Court has interpreted its scope broadly.") (quotations and citations omitted); *Soucie v. Virginia Util. Prot. Serv., Inc.*, No. 7:22-CV-00552, 2023 WL 2991487, at *3 (W.D. Va. Apr. 18, 2023) ("Section 2 of the FAA reflects a liberal federal policy favoring arbitration.") (quotation omitted).

B. The Arbitration Agreement Applies to the Ampler Defendants

1. The Arbitration Agreement Applies to Claims Against the Ampler Defendants[2]

Bishop argues extensively that the Arbitration Agreement does not apply to the Ampler Defendants because it uses the terms "Ampler Burgers," "QSR Burgers," and "Company" interchangeably, but the Agreement does not expressly refer to "Ampler Burgers Ohio," her legal employer. This argument effectively disregards the reality of her employment relationship, which she concedes. (Resp. at 2.) There is no dispute that Bishop was employed by Ampler Burgers Ohio and never had an employment relationship with any other Ampler-affiliated entity. (Burns Decl., ¶ 4, Appx. at 70.) There also is no dispute that Bishop signed the Arbitration Agreement, along with the Ampler Burgers Employee Handbook, at the inception of her employment (Appx. at 74, 404) and that the Ampler Burgers entities (both Ampler Burgers LLC and Ampler Burgers Ohio LLC) use the same Arbitration Agreement and Employee Handbook for their employees. (Bruns. Decl., ¶ 3, Appx. at 70.) As such, Bishop signed the Arbitration Agreement in connection with and as a condition of her employment with Ampler Burgers Ohio.

The relevant terms of the Arbitration Agreement state:

> I have reviewed Ampler Burgers Dispute Resolution and Arbitration Policy and Agreement and agree to submit to final and binding arbitration ***any and all claims and disputes that are related in any way to my employment or the termination of my employment with Ampler Burgers***. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against QSR Burgers ***or any affiliated entities, and each of their employees, officers, directors or agents*** . . . .
>
> * * *
>
> The DRAP applies to all employees, regardless of length of service or status, and covers all disputes relating to or ***arising out of an employee's employment with the Company or the termination of employment***. . . . Your decision to accept

[2] Bishop covers many of these arguments in the "scope" section of her brief (Resp. at 11-16), but the Ampler Defendants believe they are more appropriately argued under the application and enforcement section.

> employment or to continue ***employment with the Company*** constitutes your agreement to be bound by this policy.
>
> * * *
>
> Nothing in this policy shall be construed to create a contract of employment, express or implied, nor does this policy in any way alter the at-will nature of the employment relationship ***between you and the Company***.

(Bruns Decl., ¶ 8, Ex. 1, Appx. at 72-76) (emphasis added).

By its express terms, the Arbitration Agreement encompasses claims against "Ampler Burgers," "QSR Burgers," or the "Company" ***and*** "any affiliated entities, and each of their employees, officers, directors or agents." (*Id*.) Ampler Burgers Ohio and Ampler Burgers are sister companies under common ownership, using the same Employee Handbook and the same Arbitration Agreement. (Bruns. Decl., ¶ 3, Appx. at 70.) As such, Ampler Burgers Ohio is an "affiliated entit[y]," subject to the Arbitration Agreement, and McLaughlin, Spaulding, and Stephens are "employees" thereof. (Bruns Decl., Ex. 1, Appx. at 73.) Bishop does not dispute these facts.

Instead, Bishop clings to the statement that the Agreement to arbitrate applies to claims "arising out of an employee's employment with the Company or the termination of employment." (Appx. at 74; Resp. at 13.) Bishop then goes so far as to argue that while the Ampler Defendants "have the right to bring certain claims [under the Arbitration Agreement], those claims are limited to . . . disputes relating to or arising out of [Petitioner's] employment with [Ampler Burgers, LLC]." (Resp. at 16) (quotation omitted) (brackets original). Bishop's argument fails on its face.

How can the Ampler Defendants be subject to the Arbitration Agreement, yet any claims against them not be subject to that same Agreement? That would render the provision meaningless. Bishop's argument is belied by her concession that Ampler Burgers Ohio was her sole employer. (Resp. at 2 ("Ampler Burgers Ohio was Ms. Bishop's employer . . . .").) As such, any claim "arising

out of [Bishop's] employment" *per se* has to mean her employment with *Ampler Burgers Ohio*, the only Ampler affiliate by whom she was employed.

"[T]he primary goal of a court construing a contract is to ascertain and give effect to the parties' intent." *Antero Res. Corp. v. Directional One Servs. Inc. USA*, 246 W. Va. 301, 873 S.E.2d 832, 842 (2022). Here, the intent of the parties was to document the terms of Bishop's employment with Ampler Burgers Ohio. The Agreement is expressly premised upon "[Bishop's] decision to accept employment or to continue employment with the Company," and if her only employment was with Ampler Burgers Ohio, then "the Company" certainly includes Ampler Burgers Ohio. (Appx. at 74-76) Logically, it could not mean anything else in this context.

Although the Arbitration Agreement could have been drafted differently, Bishop unequivocally agreed to arbitrate "any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Ampler Burgers" and all affiliated entities and their respective employees. When viewed through the lens of the strong presumption in favor of arbitrability and the requirement that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration, the overreach in Bishop's arguments is apparent. (*See Infra*, Section II(A).) The Circuit Court erred in holding that because Bishop was an employee of Ampler Burgers Ohio LLC rather than Ampler Burgers LLC, the Arbitration Agreement "does not apply or limit Ms. Bishop's rights in any way." (Order, ¶ 66, Appx. at 462.)

2. The Ampler Defendants Can Enforce the Arbitration Agreement[3]

Having established that the Arbitration Agreement applies to the Ampler Defendants and to Bishop's claims against them, the only remaining question is whether the Ampler Defendants can enforce the Agreement even though it was signed by their affiliate Ampler Burgers LLC, rather than each of them individually. The common sense answer to that question, supported by

[3] Bishop addresses this argument in the enforcement section of her Response. (Resp. at 17-21.)

substantial case law, is yes. The Ampler Defendants' initial Brief cited numerous (within and outside of West Virginia and/or the Fourth Circuit) confirming that in similar situations, courts apply the estoppel theory to permit third-party beneficiaries to enforce the agreement even if they did not sign it – especially when the signatory is an affiliate. (Brief at 7-10.)

Bishop acknowledges the validity of the estoppel theory, but she argues that it should not apply here because she is not attempting to enforce the Arbitration Agreement. Bishop cites to *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 805 S.E.2d 805, 814, Syl. pt. 4 (2017), arguing that courts apply the estoppel theory only when the claim brought by the plaintiff arises out of "the very same" arbitration agreement the defendant is attempting to enforce. (Resp. at 19) (emphasis omitted). In other words, she claims that the estoppel theory would apply only if she were attempting to enforce the Arbitration Agreement *against* the Ampler Defendants. (Resp. at 19 ("Bishop is not attempting to rely upon, enforce, or benefit from the terms of the Arbitration Agreement[.]").) That is not an accurate representation of *Bluestem* or West Virginia law.

In *Bluestem*, a retailer collaborated with a bank to offer customers the ability to finance purchases, and the plaintiff entered into an agreement with the bank to finance such a purchase, which included an arbitration provision for credit payment disputes. *Id*. at 697. The plaintiff's account became delinquent, collections were initiated, and the plaintiff customer filed a lawsuit against the *retailer* (not the bank) related to consumer protection violations. *Id*. at 698. This Court permitted the non-signatory retailer to enforce the arbitration agreement entered into between the bank and the customer under the estoppel theory.

This Court pointed to precedent explaining that "***courts have widely held parties [are] estopped from avoiding arbitration [where] they ha[ve] entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves***." *Id*. at 702 (quotation omitted) (emphasis added). This Court confirmed that,

"although [plaintiff] may not be trying to 'prove' any of the credit agreement's terms, the existence of her credit purportedly extended under the agreement is necessary" to serve as the basis of her allegations. *Id*. at 703. As such, it held that the non-signatory retailer (in a separate industry and not a signatory to the arbitration agreement) could still compel arbitration, overruling the trial court's holding to the contrary. *Id*. This Court explained that the plaintiff's direct reliance on the agreement was not necessary because the agreement set the stage for the "***relationships*** and 'scheme'" that serve as the basis for her claims. *Id*. at 703 (quotation omitted) (emphasis added).

The principle articulated in *Bluestem* applies seamlessly here, where there are not different industries separating the signatory and non-signatory entities. Ampler Burgers Ohio is an undisputed affiliate of the signatory, and the Ampler Defendants are directly referenced in the Arbitration Agreement by way of the language extending its terms to "affiliated entities, and each of their employees[.]" (Appx. at 72.) Further, as in *Bluestem*, "the existence of [Bishop's employment] extended under the agreement" serves as the basis of her claims arising out of that employment relationship. *Id*. at 703.[4] But for Bishop's execution of the Arbitration Agreement, she never would have been employed by Ampler Burgers Ohio. As such, the employment relationship out of which Bishop's claims arise provides the "essential context" of and "presume[s] the existence of" the Arbitration Agreement. Contrary to Bishop's contention, the holding in *Bluestem* only helps the Ampler Defendants' position.[5]

[4] *See* Appx. at 74 (The Arbitration Agreement is based upon "[Bishop's] decision to accept employment or to continue employment with the Company."); *see also* Appx. at 76 ("Nothing in this policy shall . . . in any way alter the at-will nature of the employment relationship between you and the Company.").

[5] Bishop also cites to *West Virginia Dept. of Health and Human Resources v. Denise*, 245 W. Va. 241, 858 S.E.2d 866 (2021) in support of her position, but the Ampler Defendants already distinguished this case. (Brief at 9.) *Denise* is unpersuasive and inapplicable.

The principle that the estoppel theory focuses on the relationship between the signatory and non-signatory and applies outside of the rare occasion when the plaintiff attempts to enforce the arbitration agreement itself (as Bishop claims), is supported by a plethora of case law. In *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–21 (4th Cir. 1988), for example, the Fourth Circuit allowed a non-signatory affiliate company to compel the plaintiff to arbitrate its claims even though the arbitration agreement was signed by the parent company. The Fourth Circuit based its decision on the fact that the affiliate and parent company were "inherently inseparable" under the arbitration agreement, and that "[i]f the parent corporation was forced to try the case, the [subsidiary's right to have the case resolved in] arbitration . . . would be rendered meaningless, and the federal policy in favor of arbitration effectively thwarted." *Id.* (quotation omitted); *see also Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (shareholders could compel arbitration because they were "so closely intertwined" with the signatory company, noting "we see little difference between a parent and its subsidiary" or a "corporation and its shareholders")

The Ampler Defendants cited more than a dozen cases in which courts permitted affiliated companies to enforce arbitration agreements signed by the parent companies. (Brief at 7-9.) Bishop attempts to distinguish just two of them. (Resp. at 20-21.) The fact that the Ampler Defendants did not sign the Arbitration Agreement is immaterial. The Agreement applies to them, it covers claims against them, and they are beneficiaries who may enforce the Agreement. If the Ampler Defendants were precluded from enforcing the Agreement in this case, then "the federal policy in favor of arbitration [would be] effectively thwarted." *J.J. Ryan & Sons, Inc.*, 863 F.2d at 321. The Circuit Court erred when it held that the Ampler Defendants cannot enforce the Arbitration Agreement because they are not signatories. (Order, ¶ 62, Appx. at 461.)

C. Bishop's Claims Fall Within the Scope of the Agreement

Given that the Arbitration Agreement is enforceable by the Ampler Defendants, whether the scope of the Agreement includes Bishop's claims becomes an easy determination. The Arbitration Agreement requires Bishop "to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment[,]" specifically including "claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under . . . any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations." (Bruns Decl., ¶ 10, Ex. 1, Appx. at 71, 73-74.) These broad categories encompass Bishop's West Virginia Human Rights Act hostile work environment/sexual harassment, retaliation, and constructive discharge claims. (*See* Complaint, Appx. 1-23.)

There is a strong presumption of arbitrability pursuant to federal policy, and any doubts or ambiguities as to the scope of an arbitration clause must be resolved in favor of arbitration. *U.S. ex rel. TBI Invs., Inc. v. BrooAlexa, LLC*, 119 F. Supp. 3d 512, 526 (S.D. W. Va. 2015) *see also supra* Section II(A). The Circuit Court erred in finding that Bishop's "claims do not fall with[in] the scope of claims subject to the Arbitration Agreement." (Order at ¶ 72, Appx. at 463.) As such, the Order must be reversed.

D. The Arbitration Agreement Is Supported by Mutual Consideration

Bishop does not dispute that "the burden of establishing prima facie evidence of an agreement to arbitrate is a light one," and a party can meet its burden by simply providing copies of a written and signed agreement. *State ex rel. Troy Grp., Inc. v. Sims*, 244 W. Va. 203, 852 S.E.2d 270, 277 (2020). Nor does she dispute that, "[u]nder West Virginia law, a mutual agreement between an employer and an employee to arbitrate their claims establishes adequate consideration." *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286, 294 (2018)

(quotations omitted). Instead, Bishop recycles her prior argument to claim that because the Arbitration Agreement does not reference the Ampler Defendants by name, the Agreement "created illusory consideration because Ms. Bishop was not employed by Ampler Burgers, LLC." (Resp. at 32.) As the lack of citation in support of her illusory argument suggests, however, it is not supported by law. In fact, Bishop's argument is rejected by the numerous cases cited by the Ampler Defendants in which affiliates were permitted to enforce the parent company's arbitration agreement even though the affiliate was not a signatory.

Bishop's absence of consideration argument has no merit. Her entire argument is an attempt to distinguish *Hampden Coal*, where an employee plaintiff and Hampden Coal entered into an arbitration agreement that incorrectly referenced the employer as "Blue Diamond" rather than "Hampden Coal." 810 S.E.2d at 294. As such, the agreement appeared to be between the employee and an entity that was not his employer. *Id*. Bishop claims that "[t]he Court found that under these circumstances mutual consideration existed because, among other things, the single reference to 'Blue Diamond' was a typographical error." (Resp. at 32.) But that is an overly narrow interpretation of the Court's well-reasoned holding.

In reality, the plaintiff in *Hampden Coal* made the ***same*** argument that Bishop makes here: "Mr. Varney counters that the stated consideration in the Agreement is his 'employment and continued employment' with 'Blue Diamond' and, because he has never been employed by Blue Diamond, the Agreement is invalid for lack of consideration." *Id*. at 293. This Court rejected that argument outright: "We agree with the petitioners that a mutual agreement to arbitrate is sufficient consideration to support an arbitration agreement." *Id*. In other words, the fact that the incorrect employer was listed was immaterial because the agreement to arbitrate was mutual, and the "parties were clearly aware at the time the Agreement was signed that Hampden Coal was the employer—not Blue Diamond . . . ." *Id*. at 294.

Hampden Coal is on point, and this Court already has rejected the same argument propounded by Bishop here and confirmed that mutual obligation to arbitrate is all that is needed. In this action as well the provisions of the Arbitration Agreement at issue are mutual. (Bruns Decl., ¶ 8, Ex. 1, Appx at 71, 73-76). The Circuit Court erred in concluding that because the Ampler Defendants are not mentioned by name in, or identified as signatories to, the Agreement, and because Bishop accepted employment with Ampler Burgers Ohio LLC (rather than with its affiliate, Ampler Burgers LLC), there was no consideration for her agreement to arbitrate. (Order, ¶¶ 80, 82-86, Appx. 464-465.)

E. The Arbitration Agreement Is Not an Unconscionable Adhesion Contract

Under West Virginia law, a contract is unconscionable only if it is both procedurally and substantively unconscionable. *New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62, 75 (2013). In this case, the Arbitration Agreement is neither.

1. The Arbitration Agreement is Not Procedurally Unconscionable

Procedural unconscionability weighs alleged inequities or unfairness in the bargaining of a contract. *Id*. The Ampler Defendants explained in their initial brief that the Circuit Court's holding of procedural unconscionability based upon the fact that Bishop "had just reached the age of majority" was in error because this Court repeatedly has rejected that argument where, as here, the plaintiff was an adult with a high school education at the time of signing the Agreement. (Brief at 13-14.) Bishop does not respond to this argument, leaving it unchallenged. (*See* W. Va. R. App. P. 10(d) (if the respondent fails to address an argument, the Court assumes the respondent agrees with the petitioner on that issue).)

Instead, Bishop again argues that because the Arbitration Agreement supposedly does not apply to Ampler Burgers Ohio, Bishop had no meaningful opportunity to understand the Agreement. (Resp. at 29.) Bishop goes so far as to claim that this "is a textbook example of

procedural unconscionability." (*Id.*) If that were true, Bishop would have been able to find at least one case to support her argument, but she cites none. Bishop cannot, and does not, try to counter the Ampler Defendants' arguments that she understood the circumstances surrounding the Agreement because when she signed these documents, she acknowledged she was working for an "Ampler Owned Burger King Restaurant[.]" (Appx. at 358.) She also agreed that the Agreement applied to Ampler Burgers and its affiliates and their employees. (Resp. in Opp. To Mot. to Comp., Ex. 39, Appx. at 71, 73-76.) Bishop's claims of confusion or misunderstanding are unsupported, and the Circuit Court's finding of procedural unconscionability was erroneous. (Order, 92-93, Appx. 466-467.)

2. The Agreement Is Not Substantively Unconscionable

The Circuit Court found the Arbitration Agreement to be substantively unconscionable because: (1) it "requires complete confidentiality;" (2) it has "limitations on discovery that would undoubtedly favor Defendants;" and (3) it "carved out 'claims by the Company for injunctive relief and/or other equitable relief for unfair competition.'" (Order, ¶¶ 95-97, Appx. at 497-98.) The Ampler Defendants countered each of these findings in their initial Brief, citing numerous cases confirming that under West Virginia and Fourth Circuit law, confidentiality provisions,[6] discovery limitations, and carve outs for emergency injunctive relief are legal, common, and even preferred. (Brief at 14-18.) Bishop did not respond to any of these arguments, effectively conceding them. *Frazier v. Hussing*, No. 19-0056, 2020 WL 533965, at *3 (W. Va. Feb. 3, 2020) ("If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.") (citing W. Va. R. App. P. 10(d).)

[6] Bishop briefly mentions the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. (Resp. at 30.) As Bishop concedes, however, this federal statute does not apply to the Arbitration Agreement here. (*Id.*)

Instead, Bishop argues – for the first time – that the Arbitration Agreement is substantively unconscionable because it binds Ampler Burgers LLC and Bishop to its provisions, but not Ampler Burgers Ohio, so that *none* of its terms is reciprocal. (Resp. at 29-30.) Bishop did not make this argument to the Circuit Court. (*See* Resp. to Mot. to Compel Arbitration at 19-20, Appx. 95-96.) As such, Bishop waived this argument. *Burkhamer v. City of Montgomery*, No. 13-0930, 2014 WL 2404321, at *2, fn. 4 (W. Va. May 30, 2014) ("Given that petitioner raises this argument for the first time on appeal—and does so half-heartedly at best—it will not be considered herein."); *Firewater Restoration, Inc. v. Maroni*, No. 21-0912, 2023 WL 3719859, at *3 (W. Va. May 30, 2023) ("We have long held that theories raised for the first time on appeal are not considered.").

Even if Bishop had not waived this argument, the argument fails for the same reason her previous arguments fail. Bishop cannot ignore the plain language of the Arbitration Agreement confirming that the obligation to resolve disputes in an arbitral forum is bilateral.

> Ampler Burgers sincerely hopes that you will never have a dispute relating to your employment with the Company. However, QSR Burgers recognizes that disputes sometimes arise between an employer and its employees relating to the employment relationship. Ampler Burgers believes that it is in the best interests of both its employees and the Company to resolve those disputes in a forum that provides the fastest, least expensive and fairest method for resolving them. Therefore, if disputes cannot be resolved through the open door process, ***Ampler Burgers and its employees are required to resolve disputes through final and binding arbitration*** as discussed in this Dispute Resolution and Arbitration Policy . . . .

(Bruns Decl., ¶ 8, Ex. 1, Appx. at 74) (emphasis added). This unambiguous language encompasses the Ampler Defendants and subjects them to the terms of the Arbitration Agreement, just like it subjects Bishop to them. Bishop's speculative fears about the Ampler Defendants not having to abide by the Agreement are not based in fact or law.

F. The Ampler Defendants Did Not Waive Their Right to Arbitrate

1. The Ampler Defendants' Participation Did Not Waive Their Right to Arbitrate

Throughout her Response, Bishop asserts that the Ampler Defendants' "active litigation of the case for more than 300 days before they elected to file their Motion to Compel Arbitration" amounts to waiver. (Resp. at 22, 24, 25.) Bishop's (and the Circuit Court's) reliance on this alleged 300 days of "active" participation is not supported by the record, and it does not amount to waiver under West Virginia law.

The Ampler Defendants thoroughly explained in their initial Brief that the "active litigation" relied upon by the Circuit Court was actually *Bishop's* attempt to further this case or the Ampler Defendants simply complying with Court deadlines. (Brief at 19-31.) For example, after the Ampler Defendants filed their answer in January 2022 asserting the affirmative defense of mandatory arbitration, they worked with Bishop's counsel to include *pro se* Defendant Robert Falls in the litigation, they responded to Bishop's written discovery, and they worked cooperatively to enter into a protective order so that Bishop's counsel could provide certain materials from prior litigation he had volunteered at the outset of the case. The Ampler Defendants also awaited a determination of the applicability of potential insurance coverage (which likely would have resulted in new counsel appointed by the insurer), and they cooperated with Bishop's counsel to substitute the correct legal entity as a defendant (which had been misidentified as "Ampler Restaurant Group" in Bishop's original complaint). (*Id*.) Indeed, it was just *two* months after Bishop's employer, Ampler Burgers Ohio, became a defendant that the Ampler Defendants filed the motion to compel arbitration.

Bishop does not dispute any part of the reason for delay or timeline explained by the Ampler Defendants. Instead, without citation to case law, she simply summarily claims that these actions (most of which were actions by Bishop herself) and the time over which they occurred

amount to waiver. (Resp. at 24-25.) That runs directly afoul of the *nearly 20 cases* cited by the Ampler Defendants confirming that participating in discovery and responding to an opposing party's actions or court deadlines does not amount to waiver under West Virginia law. (Brief at 19-30.) Of those cases, Bishop unsuccessfully attempts to distinguish just two, *Citibank, N.A. v. Perry*, 238 W. Va. 662, 797 S.E.2d 803 (2016) and *Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.*, No. 16-0904, 2017 WL 5192490 (W. Va. Nov. 9, 2017) But the fact that the defendant in *Citibank* waited four and half years before moving to compel arbitration only further supports the Ampler Defendants' position, because if the Court found no waiver after such a delay, then surely there is no delay where Ampler Defendants moved to compel arbitration within two months of Bishop's employer being named as a defendant. Similarly, Bishop's attempt to distinguish *Cabot Oil* by stating it has "unique circumstances" misses the point, where waiver was not found even though the defendant waited eight years to compel arbitration.

Bishop has failed to rebut the overwhelming legal authority that responding to the opposing party's actions or court deadlines *cannot* amount to waiver under such a short duration of time. *See e.g., Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc*., 380 F.3d 200, 206 (4th Cir. 2004) ("We are unwilling to include activity that the moving party did not initiate in assessing that party's" waiver of the right to arbitrate); *Coleman-Reed v. Ocwen Loan Servicing LLC*, No. CV 2:15-13687, 2016 WL 6469329, at *6 (S.D. W. Va. Oct. 28, 2016) ("Because Coleman-Reed, not Ocwen, instituted the motion for sanctions to which Ocwen responded, the court need not consider it in assessing Ocwen's" waiver of right to arbitrate.). (*See also* Brief at 19-31 (citing nearly 20 other cases supporting the same).)

Bishop advances just two other arguments in favor of waiver. First, she claims that waiver is supported by the Ampler Defendants' demand for a jury trial, even though the record clearly shows that the Ampler Defendants did not – and could not – demand a jury trial via the civil cover

sheet. (*See* Brief at 23 (citing W. Va. R. Civ. P. 38(b) and *Litigation Handbook*.)) Second, she claims that somehow she "relied on [Ampler Defendants'] extensive litigation" by engaging in discovery and producing the transcripts from prior litigation. (Resp. at 25.) Petitioners fail to comprehend how their conduct induced Bishop to do anything, when she is the one who served discovery concurrent with her Complaint and her counsel volunteered the transcripts and other materials at the outset of this case. (Roberge Declaration, ¶ 8, Appx. 421-23.)

The burden of establishing waiver is high, and requires a "voluntary, intentional relinquishment of a known right" and "proof of a voluntary act which implies a choice by the party to dispense with something of value." *Parsons*, 785 S.E.2d at 850 (quotations omitted). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed. A waiver of legal rights will not be implied, except clear and unmistakable proof of an intention to waive such rights." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) (citation and quotations omitted) Under that high standard, there is no waiver here. The Circuit Court's finding to the contrary must be reversed. (Order, ¶¶ 11-41, 50, 58, Appx. at 453-56, 458, 460.)[7]

III. CONCLUSION

The Circuit Court erred in failing to compel Bishop to arbitrate her claims. The Ampler Defendants respectfully request that the Court reverse the Order denying their motion to dismiss or stay and compel arbitration.

[7] The Ampler Defendants also argued that the Circuit Court erred in considering prejudice to Bishop as an element of its waiver analysis. (Order, ¶¶ 54-55, Appx. 459-460; Brief at 29-30.) Bishop failed to respond to this argument, effectively conceding the same.

Respectfully submitted this 25th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2023, a copy of the foregoing "***Reply Brief of Petitioners***" was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I further certify that on July 25, 2023, the foregoing "***Reply Brief of Petitioners***" was served by first-class, United States mail, postage prepaid, on the following:

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