IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0395

FRONTLINE ASSET STRATEGIES, LLC,

Defendant Below, Petitioner,

v.

ROBERT RUTLEDGE and CAROL BARCLAY, on behalf of themselves and others similarly situated,

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

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INTRODUCTION

Proof is the Achilles heel of debt buying and debt collecting machines. Powered by intimidated consumers, form affidavits, overloaded court dockets, and default judgments, debt buyers purchase debt for pennies on the dollar, and farm the accounts out to collection mills, often with little to no attention paid to detail or documentation. Not infrequently, debt collectors, either through mistake or deceit, attempt to collect from the wrong consumers, past the applicable statutes of limitations, amounts other than what is owed, or on debts owned or collected on by different entities. In turn, these same debt collectors frequently seek to compel these unassuming debtors to arbitrate their claims, despite having no proof that the debtors ever agreed to do so.

To prevent being steamrolled by these machines, a powerful tool in a consumer's arsenal, and one that is infrequently used due to the unsophisticated nature of many alleged debtors, is to demand proof that the parties agreed to arbitrate: proof of the existence of a debt that included an arbitration clause, and proof of a debt collector's right to collect on a debt in the form of an authenticated purchase or assignment (or series of purchases or assignments) of that right. This matter is before this Court because Petitioner Frontline Asset Strategies, LLC ("Petitioner" or "Frontline") failed to present such proof to the circuit court, resulting in denial of Petitioner's Motion to Compel Arbitration.

Respondents Robert Rutledge and Carol Barclay were subject to the unlawful debt collection tactics of Petitioner, which self-identified in the circuit court as "an agent for both Beneficial West and Credit One," the alleged original creditors, but which now self-identifies before this Court as "an agent of the assignees of those agreements who purchased Respondents' debts from their original creditors." Confusing its status even further, Petitioner has also argued that it is an assignee both of a right to collect on the alleged debts and an assignee of a right to compel Respondents to arbitration. (AR 0180, 0181, 0184, 0185). Despite anticipated arguments

to the contrary, as discussed herein, these are not distinctions without differences.

Regardless of how this Court views Petitioner's status – as an agent or an assignee – the circuit court's conclusion that Petitioner failed to produce evidence that these parties formed an agreement to arbitrate was correct. The circuit court's finding that Petitioner failed to produce sufficient proof that it had ever been assigned the right to collect debts from Respondents is substantiated by the record, and Petitioner makes no new arguments with respect to that factual finding on appeal. Respondents therefore respectfully request that the ruling below be affirmed.

COUNTERSTATEMENT OF THE CASE

I. Procedural Background

On August 10, 2018, Respondents Robert Rutledge and Carol Barclay filed a lawsuit in the Circuit Court of Raleigh County West Virginia against Petitioner Frontline seeking to represent themselves and a class of similarly situated individuals with West Virginia addresses to whom Frontline – a third-party debt collector – sent collection letters which deceptively and incorrectly reflected the amounts allegedly due in violation of *West Virginia Code* § 46A-2-124, 127, and 128(c). (AR 0001-0012).

On March 25, 2019, Petitioner removed the case to the United States District Court for the Southern District of West Virginia. Petitioner first filed its Motion to Compel Arbitration in the district court on April 25, 2019; Respondents filed a memorandum in opposition on May 22, 2019; and Petitioner filed a reply on May 29, 2019. On December 17, 2019, the case was remanded back to the circuit court.

More than eight months after filing its initial deficient Motion to Compel Arbitration, on January 6, 2020, now in the circuit court, Petitioner again filed its Motion to Compel Arbitration. (AR 0029-0142). Petitioner made no attempt in either forum to conduct any discovery to support its position that the parties agreed to arbitrate their disputes. Indeed, despite having already seen

the deficiencies in its motion as highlighted by Respondents in their opposition brief in the district court, Petitioner filed an identical motion with the circuit court, attaching the same declaration of one Lauren Savage dated April 25, 2019. Briefing on this motion concluded on February 14, 2020 and on March 25, 2020 the circuit court entered an order denying the Motion to Compel Arbitration. This appeal followed, with Petitioner filing its brief on August 31, 2020.

II. Relationships Among the Parties

According to Petitioner's Motion to Compel Arbitration and documents submitted in support thereof, Respondent Rutledge allegedly incurred a debt with lender Beneficial West in 2008 ("Rutledge's Alleged Debt"). On September 19, 2017, Petitioner sent Respondent Rutledge the collection letter at issue in the underlying suit. (AR 0149). The letter listed "Cach, LLC" as the "Current Creditor to whom the debt is owed" and stated that "your account has been turned over to Frontline Asset Strategies, LLC for collections." *Id.* In its Motion to Compel Arbitration, Petitioner asserted that "[s]ometime prior to September 19, 2017, the original creditor sold Rutledge's Alleged Debt to Cach, LLC" and that Cach, LLC hired Petitioner to collect on Rutledge's Alleged Debt. (AR 0031). The documents Petitioner presented in connection with Rutledge's Alleged Debt include: 2007 and 2008 home loan application and disclosure documents (AR 0049-0137), an arbitration rider allegedly executed by Rutledge in 2008, a 2013 notice of account transfer (AR 0138), and the September 19, 2017 letter Petitioner sent to Respondent Rutledge. (AR 0149).

Notably absent among these documents was any documentary proof of (i) Cach, LLC's purchase of the debt; or (ii) documentary proof that Petitioner was hired to collect the debt. In other words, Petitioner neglected to prove not one but two links in the chain-of-assignment with respect to any right to compel Mr. Rutledge to arbitration.

According to Petitioner's Motion to Compel Arbitration and documents provided in support thereof, Respondent Barclay allegedly incurred a credit card debt with Credit One Bank, N.A. on an unspecified date but before October 6, 2017 ("Barclay's Alleged Debt"). (AR 0032). On October 6, 2017, Petitioner sent Respondent Barclay the collection letter at issue in the underlying suit. (AR 0161). The letter listed "LVNV Funding, LLC" as the "Current Creditor to whom the debt is owed" and stated that "[y]our account has been turned over to Frontline Asset Strategies, LLC for collections." *Id.* In its Motion to Compel Arbitration, Petitioner asserts that "[s]ometime prior to October 6, 2017, the Credit One debt was sold to LVNV Funding, LLC who in turn hired Defendant to collect the debt." (AR 0032). The documents Petitioner presented in connection with Barclay's Alleged Debt include: an unsigned and undated Visa/Mastercard Cardholder Agreement and the October 6, 2017 collection letter Petitioner sent to Plaintiff Barclay. (AR 0153, AR 0161).

Similar to the dispositive deficiency in Plaintiff Rutledge's case, Petitioner provided no documentary evidence to establish whether LVNV purchased the debt from Credit One Bank or another intervening debt buyer, nor any evidence that Frontline ever purchased the debt.

III. The Alleged Arbitration Clauses

When looking at the arbitration clauses presented by Petitioner two categories are particularly relevant to the inquiry before this Court: (i) identity and definition of the parties and (ii) rights of assignment. Each is addressed in turn below.

A. Identity and definition of the parties:

Rutledge: For Respondent Rutledge's Alleged Debt, Petitioner presented a document titled "Arbitration Rider," allegedly executed on March 3, 2008 and states that it is "signed as part of Your Agreement with Lender and is made a part of that Agreement." (AR 0140). Loan application documents for Rutledge's Alleged debt indicate that the "Lender" is Beneficial West. (AR 0073).

Nowhere in the Arbitration Rider is the term "Lender" defined or expanded.

Barclay: The "Disclosure Statement and Arbitration Agreement presented by Petitioner in connection with Barclay's Alleged Debt states that, "'we,' 'us,' 'our' and 'Credit One Bank' refer to Credit One Bank, N.A. its successors or assigns." (AR 0154). Credit One has therefore specifically indicated that the agreement is inheritable by those qualifying as *valid* successors or assignees.

B. Assignment Rights:

Rutledge: The Arbitration Rider presented by Petitioner in connection with Rutledge's Alleged Debt makes no reference to assignments, successors, or agents, with the right to elect arbitration explicitly limited to the lender and borrower. (AR 0140-0142).[1]

Barclay: The Disclosure Statement and Arbitration Agreement presented by Petitioner in connection with Barclay's Alleged Debt states, "[t]his Arbitration Agreement shall survive . . . (iii) any transfer or assignment of your Account, to any other person." Based on the above, entities other than Credit One may invoke arbitration *so long as they can prove* status as a parent company, affiliate company, predecessor and successors.

IV. Petitioner's Motion to Compel Arbitration

Defendant filed its Motion to Compel Arbitration for the second time on January 6, 2020. The motion was identical to the version filed in federal court eight months earlier, right down to the reference to "this District Court" rather than "this circuit court." (AR 0030). Attached to the motion was a declaration from Lauren Savage, the then-current Director of Compliance &

[1] In its order denying Petitioner's Motion to Compel Arbitration, the circuit court included a factual finding that "[t]he arbitration agreements contain the provision that the right to elect arbitration is assignable with the original debt." Given that the Rutledge Arbitration Rider contains no such provision or similar provision, Respondents believe this finding was made in error by the circuit court.

Litigation for Petitioner. In its motion, Petitioner argued that valid arbitration agreements existed; that the Savage Declaration provided sufficient evidence of assignment authorizing Petitioner to enforce the arbitration clauses to which it was not a signatory; and that arbitration, if compelled, should proceed on an individual basis. (AR 0029-0045). The Savage Declaration provided an overview of Petitioner's business, what Petitioner (not Savage) has concluded about how it came to collect on Respondents' accounts, and a statement that the Declarant reviewed the account documents attached as exhibits to the Declaration. (AR 0046-0048).

V. The Circuit Court's Order Denying Motion for Judgment on the Pleadings and Compelling Arbitration

On March 25, 2020, the circuit court denied Petitioner's Motion for Judgment on the Pleadings and Compelling Arbitration.[2] Upon reviewing the Savage Declaration and the exhibits attached thereto, the circuit court noted in its order that "[w]hile in many cases an affidavit is sufficient to carry the day for the moving party, the substance of that affidavit is critical to analyzing the case." (AR 0242). The circuit court further observed that in her declaration, Savage "does not state nor did Defendant provide evidence as to any assignment directly from Beneficial of West Virginia to Defendant nor any intermediate assignments prior to Defendant acquiring Mr. Rutledge's debt." *Id.* For this reason, as to Rutledge's Alleged Debt, the circuit court concluded that, "[w]ithout establishing a link between Defendant and the original lender supporting an arbitration mandate, Defendant cannot prevail." *Id.* As to Respondent Barclay, the circuit court

[2] While the title of this ruling references Petitioner's Motion for Judgment on the Pleadings, this motion is not discussed in the order nor does Petitioner assign error to the circuit court's omission of analysis on the motion. In any event, a denial of a motion for judgment on the pleadings is not entitled to interlocutory review. Syl. pt. 1, *Gooch v. W. Va. Dep't of Public Safety,* 195 W.Va. 357, 465 S.E.2d 628 (1995) (summary judgment denials are interlocutory and not appealable); *Wilfong v. Wilfong*, 156 W. Va. 754, 197 S.E.2d 96 (1973) (denial of motion for judgment on pleadings converted to summary judgment not appealable); *Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 811 S.E.2d 875 (2018) (order denying motion to dismiss not appealable).

held that "Defendant has not provided evidence that Plaintiff executed an agreement which included the binding arbitration clause." (AR 0242).[3]

The circuit court therefore denied the motion, stating that "the defendant has not established that Plaintiffs can prove no set of facts to support Plaintiffs' claim that that the arbitration clauses were not assigned or transferred when the debts were transferred." (AR 0243).

SUMMARY OF ARGUMENT

In its Motion to Compel Arbitration before the circuit court, Petitioner argued that it had the right to enforce arbitration agreements allegedly between Respondents and their initial creditors because Petitioner was an agent of *the initial creditors*, Beneficial West and Credit One. (AR 0042-0044). Having lost that argument, on appeal Petitioner asks this Court to find that it is an agent of *the assignees of the initial creditors* and therefore has a right to compel Respondents to arbitration. (Pet. Br. 5, 6, 11). Petitioner has not proven an agreement to arbitrate under either scenario. The following statements from Petitioner's briefs illustrate this change in theory:

> Petitioner's Motion to Compel Arbitration (AR 0043) (emphasis added):
>
> The arbitration provision at issue here can clearly be enforced by **Defendant, an agent of both Beneficial West and Credit One**. When the Beneficial West and Credit One Debts were assigned to Defendant for collections, **Defendant became an agent of Beneficial West for the Rutledge claim and Credit One for the Barclay claim.**
>
> Petitioner's Initial Appellate Brief at 11 (emphasis added):
>
> To repeat, the truly contested issue is not whether arbitration agreements exist. They do – at least with the original creditors. The issue is whether Frontline has standing to invoke those agreements **as the agent of the assignees of those agreements who purchased Respondents' debts from their original creditors.**

[3] While Respondents agree with this finding, they point out here that even with a finding of an existing arbitration agreement for Barclay and the original creditor, there would still be a failure to prove assignment given that the Savage declaration provided even "less supportive detail" for the Barclay account.

The two asks are materially different both factually and legally. But, perhaps presciently, the circuit court explored both theories and found that evidence presented by Petitioner (then Defendant) in the form of a declaration with alleged account documents attached, "does not state nor did Defendant provide evidence as to any assignment directly from [the original creditor] to Defendant nor any intermediate assignments prior to Defendant acquiring [Respondent's] debt" and that "without establishing a link between Defendant and the original lender supporting an arbitration mandate, Defendant cannot prevail." (AR 0242).

On appeal, in addition to arguing that the circuit court should have found that Petitioner has a right to compel arbitration either as a recipient of some interest by an assignee, or as an agent of the original creditor, Petitioner also assigns error to the legal standard applied by the circuit court. However, given the objective findings set forth in its order denying Petitioner's Motion to Compel Arbitration, the circuit court would have reached the same conclusion regardless of the legal standard applied and therefore any error associated with such application would be harmless.

Additionally, while not clearly designating it as an assignment of error, Petitioner avers that the circuit court acted in contravention of the FAA by not permitting third-party discovery before ruling on the Motion to Compel Arbitration. In essence, Petitioner accuses the Circuit Court of reversible error for not saving Petitioner from itself. Petitioner chose to file its Motion to Compel prior to discovery occurring in state court and without curing any of the deficiencies Respondents had specifically identified in their opposition to the Motion to Compel Arbitration filed in federal court. Petitioner neglects to mention that it chose not to conduct any such discovery in the many months this case was pending in federal court, even after Respondents pointed out the factual deficiencies in Petitioner's initial Motion to Compel. In any event, such a decision was within the judge's discretion and third-party discovery would have been fruitless given the deficiencies and

contradictions in the evidence presented by Petitioner. Similarly, the circuit court was not required to hold a trial on these issues when the lack of evidence demonstrated no possibility that Defendant below could ever carry its burden of proof based on the scant evidence presented..

Finally, on appeal, Petitioner claims for the first time that Respondents are equitably estopped from resisting arbitration. This argument should be rejected outright since it was not raised in, or addressed by, the circuit court and because this case does not present the compelling circumstances in which a nonsignatory to an arbitration agreement may compel a non-willing signatory to arbitration.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves issues that have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs and record on appeal. Respondents believe the questions presented are therefore not appropriate for oral argument in accordance with Rules 18, 19 and 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

Standard of Review

"When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before [this Court], [the] review is *de novo.*" Syl. Pt. 1, *W. Va. CVS Pharmacy LLC v. McDowell Pharmacy Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017). This Court's standard of review is *de novo* whether the circuit court applied a motion to dismiss legal standard or a summary judgment standard when ruling on a motion to compel arbitration. *See Atl. Credit & Fin. Special Fin. Unit, LLC v. Stacy*, No. 17-0615, 2018 WL 5310172, at *4 (W. Va. Oct. 26, 2018) (discussing application of *de novo* review both when the motion to compel arbitration is decided as a summary judgment motion and as a motion to dismiss).

"When a trial court is required to rule upon a motion to compel arbitration pursuant to the

Federal Arbitration Act, 9 U.S.C. § § 1 – 307 (2006) the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *See* syl. pt. 2, *TD Auto Finance LLC v. Reynolds*, 243 W.Va. 31, 842 S.E. 2d 783 (2020) (quoting syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250 (2010)). The party seeking to compel arbitration bears the initial burden to show a valid agreement. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002).

I. Petitioner Failed to Prove that it Had the Right to Compel Respondents to Arbitration

In its Motion to Compel Arbitration, Petitioner argued, in relevant part, that: (a) "Valid Arbitration Agreements Exist" and (b) "The Affidavit[4] Attached to Defendant's Motion is Sufficient Evidence of Assignment." On appeal, Petitioner argues that: (A) the circuit court applied the incorrect legal standard in finding that: (i) no valid arbitration agreement existed and (ii) that Petitioner did not prove assignment; (B) the circuit court erred in ruling on the Motion to Compel Arbitration without permitting additional discovery or holding a trial or evidentiary hearing and (C) Respondents are equitably estopped from refusing to arbitrate. Petitioner's arguments on appeal should be rejected for the following reasons.

A. The Circuit Court Applied the Correct Legal Standards Below

a. There is no presumption of arbitrability when the issue of whether the parties agreed to arbitrate is contested

On appeal, Petitioner argues that in ruling on the Motion to Compel Arbitration, the circuit court "artificially, and erroneously, superimposed upon the arbitration motion the plaintiff-deferential legal standard applicable to a threshold motion to dismiss designed to test the legal

[4] The document attached was an unsworn declaration, not an affidavit.

sufficiency of a complaint's allegations – not to determine factual disputes as to the existence and enforceability of an arbitration agreement . . . ." (Pet. Br. at 8). Even though this is the primary Assignment of Error set forth by Petitioner on appeal, Petitioner does not identify for this Court, – nor did it identify for the circuit court, – what it views as the proper legal standard. Rather, Petitioner recites arbitration-related policy statements, including, that "Motions to compel arbitration . . . must be addressed with a healthy regard for the federal policy favoring arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (Pet. Br. at 13).

As an initial overarching matter, it is well settled that this deferential standard does *not* apply when, like here, the dispute concerns *whether the parties agreed to arbitrate* the claims. The United States Supreme Court has made clear that courts apply the presumption of arbitrability "only where a *validly formed* and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Granite Rock v. Intl' Bd. Of Teamsters*, 561 U.S. 287, 291 (2010) (emphasis added); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (finding arbitration is to be on "equal footing with all other contracts").

West Virginia law is likewise clear that assent to arbitration is required. "Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *State ex rel. U-Haul Co. of W. Va. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013). Further, "[a]n agreement to arbitrate will not be extended by construction or implication." *Id.* (quoting syl. pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011)). Therefore, for there to be a valid, binding contract compelling arbitration, the party moving to compel must show a clear manifestation of an agreement between the parties. *See U-Haul,* 232 W. Va. at 439; *see also* Syl. Pt. 3, *Bluestem Brands, Inc. v. Shade,* 239 W. Va. 694, 805

S.E.2d 805 (2017) ("A meeting of the minds of the parties is a sine qua non of all contracts.") The West Virginia Supreme Court of Appeals' understanding of this issue is fully consistent with the United States Supreme Court's repeated emphasis that arbitration is a creature of contract. *See AT & T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011); *Stolt–Nielsen S.A. v. Animalfeeds Int'l Corp.,* 559 U.S. 662, 684 (2010).

b. Standards of review on a motion to compel arbitration

As to the applicable standard of review, courts have recognized that "[m]otions to compel arbitration 'exist in the netherworld between a motion to dismiss and a motion for summary judgment." *Atl. Credit & Fin. Special Fin. Unit, LLC v. Stacy,* No. 17-0615, 2018 WL 5310172, at *4 (W. Va. Oct.26, 2018) (citing *Shaffer v. ACS Gov't Servs., Inc.*, 321 F. Supp. 2d 682, 683-684 (D. Md. 2004)). As the United States District Court for the Eastern District of Virginia noted, "[r]ecently, a number of district courts in the Fourth Circuit have determined the burden of proof is 'akin to the burden on summary judgment' because motions to compel arbitration often require courts to consider evidence outside of the pleadings." *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 299 (E.D. Va. 2019), *aff'd sub nom. Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286 (4th Cir. 2020).[5] The *Gibbs* court explained this "modified summary judgment approach" used for motions to compel arbitration as follows:

> [T]he district court views the facts in the light most favorable to the nonmovant, drawing all justifiable inferences in the party's favor. Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Defendants, as the "moving parties," have the burden to show that the "[a]rbitration [c]lauses apply to Plaintiffs." *Hancock v. Am. Tel. & Tel., Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012). If defendants meet that burden, plaintiffs may "rebut that showing with evidence establishing a genuine dispute as to whether the provisions apply." *Id.*

[5] Federal court opinions applying West Virginia law are not binding on this Court, though they are often viewed persuasively. *Barr v. NCB Mgmt. Servs., Inc.*, 711 S.E.2d 577, 584 (2011).

Gibbs, 421 F. Supp. 3d at 299.

c. The circuit court applied the correct legal standards of review below

In ruling on Petitioner's Motion to Compel Arbitration, the circuit court considered matters outside the pleadings. Specifically, the circuit court considered the affidavit of Lauren Savage and the documents attached thereto, including documents purported to be related to Respondents' debt accounts. (AR 0046-163). The following were included among the conclusions of law set forth in the circuit court's order denying Petitioner's Motion to Compel Arbitration:

1. The facts are to be reviewed in a light most favorable to the non-moving party.
2. The burden is on the moving party to prove beyond doubt that the non-moving party can prove no set of facts that will support his claim.

(AR 0240). Comparing the conclusions of law above, which the circuit court used to guide its analysis in consideration of the Motion to Compel Arbitration, with the modified summary judgment approach set forth in *Gibbs,* reveals two nearly identical approaches. The circuit court's reviewing facts in a light most favorable to Respondents (the non-moving parties) is akin to the first step in the modified summary judgment standard set forth above in which facts are viewed in the light most favorable to the nonmovant, drawing all justifiable inferences in the party's favor. The circuit court's consideration of whether Petitioner (the moving party) proved beyond doubt that Respondents could prove no set of facts to support their claims – in other words, whether there remained a genuine issue of fact – is materially identical to the modified summary judgment approach which results in granting a motion to compel arbitration if the party moving to compel arbitration demonstrates the absence of any genuine issue as to any material fact. Based on these similarities, the circuit court applied the modified summary judgment approach and reached the same factual conclusions that must be considered under that approach, even if the language may not have exactly mirrored *Gibbs* as affirmed by the Fourth Circuit..

As further illustrated below, the evidence presented by Petitioner in support of its Motion

to Compel Arbitration, and considered by the circuit court in its analysis, lent itself to one logical conclusion, not multiple interpretations. The circuit court correctly found that the declaration provided by Petitioner, "does not state nor did Defendant provide evidence as to any assignment directly from [original creditor] to Defendant nor any intermediate assignments prior to Defendant acquiring [Respondent's] debt." (AR 0242). The objective nature of this finding explains why Petitioner does not articulate which of the circuit court's factual findings would be different if the court had applied a different, more "correct," legal standard. Nor does it explain how application of a different legal standard would lead to a conclusion that valid and enforceable arbitration agreements exist between Petitioner and Respondents.

Instead, Petitioner asks this Court to put the proverbial cart before the horse by elevating pro-arbitration policy above logical fact-finding: a request that has been explicitly rejected by the Supreme Court and which should likewise be rejected by this Court. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.")

B. The Circuit Court Properly Concluded that the Evidence Presented by Petitioner Did Not Controvert All Facts Supporting Respondent's Position that Petitioner Does Not Possess the Right to Compel Arbitration

a. Courts apply state law contract principles of formation – including proof of assignment -- to determine whether parties agreed to arbitrate their disputes.

Under the Federal Arbitration Act ("FAA"), a trial court's task on a motion to compel arbitration is limited to answering two simple questions: (1) does a valid arbitration agreement exist between the parties, and (2) does the dispute at issue fall within the scope of the agreement. *See* 9 U.S.C. § 2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-28 (1985); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995); *Chiron Corp. v.*

Ortho Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000); *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 388, 787 S.E.2d 650, 659 (2016). "Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists. However, courts should not assume that the parties agreed to arbitrate unless there is "clea[r] and unmistakabl[e]" evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995), citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986).

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). "[T]o be valid, an arbitration agreement must conform to the rules governing contracts, generally.... [T]he subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; and (4) mutual assent.... Absent any one of these elements, the Arbitration Agreement is invalid." *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013), citing *State ex rel. AMFM, LLC v. King*, 230 W.Va. 471740 S.E.2d 66 (2013). It is well established that the burden to prove the existence of a contract falls on the party attempting to enforce the alleged contract.[6]

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[6]*See, e.g., Mendez v. Puerto Rican Int'l Companies, Inc.*, 553 F.3d 709 (3d Cir. 2009) (denying employer's motion to stay action pending arbitration as to forty-one employee plaintiffs when employer failed to produce evidence they had agreed to arbitration); *Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972, 978 (E.D. Cal. 2008) ("The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and that its terms bind the other party."); *Spaces, Inc. v. RPC Software, Inc.*, No. 06-2520, 2007 WL 675505 (D. Kan. Mar. 1, 2007) (party seeking to compel arbitration **"bears the initial summary-judgment-like burden of establishing that it is entitled to arbitration";** competing affidavits on issue of whether parties agreed to arbitration created a genuine issue of material fact) (emphasis added); *Newman v. Hooters of Am., Inc.*, No. 8:06-civ-364-EAK-TGW, 2006 WL 1793541, at *2 (M.D. Fla. June 28, 2006) ("Under Defendant's reasoning, if Plaintiff began working, then she must have executed an Arbitration Agreement. **This Court will not rely on 'if, then' scenarios and reverse factual**

It is well settled that a party cannot enforce the original creditor's right to compel arbitration without proving assignment of that right. *See Bey v. Midland Credit Mgmt., Inc.*, GJH-15-1329, 2016 WL 1226648, at *5 (D. Md. Mar. 23, 2016) (noting that, "only if Defendants are indeed the assignees of Plaintiffs' debts may they enforce the arbitration agreements," and reviewing proof of assignments).[7] Bare conclusions of a debt collector's affiant does not evidence

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inferences to establish the existence of a contract.") (emphasis added); *Michelle's Diamond v. Remington Fin. Grp.*, 2008 WL 4951032, at *6 (Cal. Ct. App. Nov. 20, 2008) ("**[D]efendants have failed to meet their burden of demonstrating the existence of an enforceable arbitration agreement. Consequently, plaintiffs' burden to establish a defense to arbitration did not arise.**") (emphasis added); *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 881 (Haw. 2013) ("The burden was on Kaiser, as the party moving to compel arbitration, to demonstrate that Michael mutually assented to the arbitration agreement."); *NCO Portfolio Mgmt. Inc. v. Gougisha*, 985 So. 2d 731 (La. Ct. App. 2008) (denying petition to confirm arbitration awards against alleged debtors on grounds that unsigned, generic, "barely legible" copies of arbitration agreements without any supporting documents tying them to specific consumers were insufficient to prove existence of agreement to arbitrate); *Frankel v. Citicorp Ins. Services, Inc.*, 913 N.Y.S.2d 254 (App. Div. 2010) (denying motion to compel arbitration when credit card issuer **"failed to demonstrate that the parties agreed to arbitration because the evidence was insufficient to establish"** that creditor had mailed the arbitration clause to plaintiff) (emphasis added); *In re Advance EMS Services, Inc.*, No. 13-06-00661, 2009 WL 401620, at *3 (Tex. App. Feb. 12, 2009) (employer who submitted unsigned, undated copy of arbitration policy, without direct evidence that employee had acknowledged receipt of policy, **"has not carried its burden to show the existence of a valid arbitration agreement"**) (emphasis added). *See also Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013) (When a party opposing arbitration comes forth with reliable evidence that she did not intend to be bound by arbitration agreement, court must decide motion to compel arbitration under summary judgment standard).

[7] *See also Henggeler v. Brumbaugh & QUandahl, P.C., LLO,* 894 F. Supp. 2d 1180, 1188 (D. Neb. 2012) (denying motion to compel arbitration when defendant did not demonstrate valid assignment of the purported debt, noting it would be "prudent to exercise caution and to demand sufficiently documented proof of consumer indebtedness in a case, such as this, involving a debt buyer"); *Matute v. Main St. Acquisition Corp.*, No. 11-cv-62375-KMW, 2012 WL 4513420 (S.D. Fla. Oct. 2, 2012) (denying arbitration where movant failed to present sufficient admissible evidence that it was ever assigned the right to compel arbitration from the original creditor); *Buford v. Palisades Collection, L.L.C.*, 552 F. Supp. 2d 800, 809 (N.D. Ill. 2008) (debt collector failed to show it acquired all rights under the agreement between the plaintiff and creditor when it did not provide the assignment or purchase contract between the defendant and creditor, thus failing to show the right to arbitration).

assignment from an original creditor to a debt collector, or to any other intermediary," *Alarcon v. Vital Recovery Servs.*, 706 Fed. Appx. 394, 2017 WL 6349399 (9th Cir. 2017) (denying a motion to compel arbitration where "[t]here is no evidence at all that [the original creditor] assigned its rights to [the debt collector] or any other intermediary assignee" and finding the bare conclusion of the debt collector's affiant, without supporting documents, to be inadmissible hearsay).

The factual hurdle to prove assignment is steep, and Petitioner is not the first collector to fail to carry that burden. For instance, in *Webb v. Midland Credit Mgmt.*, No. 11-c-5111, 2012 WL 2022013 (N.D. Ill., May 31, 2012), the debt buyer defendant, Midland Credit Management, sought to enforce an arbitration provision of an agreement between the consumer plaintiff and his original creditor, Citibank. In support of its motion, the debt buyer offered an affidavit explaining how Midland came to own the debt. This is no small feat, because debts are often sold multiple times. In *Webb*, for instance, the debt was sold five times before Midland finally became in possession of the debt. *Id* at 3. The court first looked to the affidavit of Midland's employee to analyze whether Midland had carried its burden to prove assignment of the right to arbitrate. Midland's affidavit, though detailed, failed to meet the requirements of Rule 803(6) of the Federal Rules of Evidence because the affiant relied on documents created by third parties whose record keeping procedures were unknown to the affiant. Without the requisite foundation, the affiant's testimony could not be considered, and the *Webb* Court ruled that the debt buyer failed to "show an unbroken chain of assignment entitling them to stand in [the original creditor's] shoes and enforce the arbitration provision contained in Webb's credit card agreement." *Id.* at *15.

These proof-of-formation requirements exist for important reasons. As the *Webb* court noted, a "cursory review of the literature demonstrates that the possibility of a debt collector attempting to collect a debt that it does not actually own, either through assignment or otherwise,

is very real." *Webb,* at fn. 8, citing Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo–Signing and Lack of Proof in Debt Buyer Cases,* 6 J. BUS. & TECH. L. 259 (2011); Rick Jurgens & Robert J. Hobbes, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts,* THE NAT'L CONSUMER LAW CTR.(July 2010), http:// www.nclc.org/images/pdf/pr-reports/debt-machine.pdf; FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), http://www.ftc.gov/os/2010/07/Debtcollection report.pdf.

Petitioner thus was tasked with proving its right to collect Respondents' debts both because of these very real concerns about a purported debt collector's right to collect a debt, and because of the need to prove mutual assent to arbitrate.

b. The circuit court properly found that the Savage Declaration did not prove assignment with a corresponding right to compel arbitration

In considering the declaration of Lauren Savage, the circuit court explained that "[w]hile in many cases an affidavit is sufficient to carry the day for the moving party, the substance of the affidavit is crucial in analyzing the case." (AR at 0242). The circuit court further observed that neither Savage nor Petitioner provided evidence of assignment from the original creditors to Petitioner or to any intermediate assignments and that "[w]ithout establishing a link between [Petitioner] and the original lender supporting an arbitration mandate, [Petitioner] cannot prevail." (AR 0242). Requiring proof of such a link is in line with the Supreme Court's directive that "[a]n agreement to arbitrate will not be extended by construction or implication." *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 281 (2011), *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Brown,* 565 U.S. 530 (2012).

The Savage Declaration is insufficient to prove much of anything, assignment of the right

to compel arbitration included. Savage states that her declaration is based on her personal knowledge of "Frontline's operations" and also based on "records available to me as they are kept in the ordinary course of business and information obtained from other employees . . . ." (AR 0046). Savage states that she has "reviewed the documents that Frontline has possession of in the ordinary course of its business" regarding Respondents' accounts and located certain documents which are attached as exhibits to the Declaration. (AR 0047-0048). She does not, however, claim any personal knowledge, or make any statements regarding, the creation, transfer, receipt, maintenance, or retrieval of the records.[8]

Moreover, despite Petitioner noting in its initial brief that some of Respondents' account records presented by Petitioner came from the original creditors (of which Petitioner claims to be an agent), the Savage Declaration makes no mention of obtaining documents from the current creditor but instead asserts that all of the records she reviewed were kept by Frontline "in the ordinary course of its business." (AR 0047-0048). The only mention of assignment in the Declaration does not concern Savage's knowledge of assignment; rather, Savage states that, "**Frontline has determined** during the course of its investigation into the claims asserted in the Complaint that it was assigned delinquent credit accounts for [Respondents]. (AR 0047) (emphasis added). Not only is this assertion inadmissible hearsay, but, as the *Webb* court likewise found, it also fails to explain or demonstrate the rights assigned, the duties delegated, the records and information transferred, and the parties involved during these assignments of delinquent accounts.

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[8] While "[a] qualified witness is not required ... to have personally participated in or observed the creation of the document ..., or know who actually recorded the information ... [.]' a foundation witness must "be someone with knowledge of the procedure governing the creation and maintenance of the records sought to be admitted *Atl. Credit & Fin. Speical Fin. Unit, LLC v. Stacy*, No. 17-0615, 2018 WL 5310172, at *6 (W. Va. Oct. 26, 2018).

To even entertain the notion that Petitioner somehow received rights under an arbitration clause to which it was not a party, either via assignment or agency theory, at a bare minimum Petitioner would have to prove that it is validly authorized to collect on Respondents' alleged debt accounts. The chain would then have to be linked back to the original creditors. There can be no assignment if even one link in the chain is missing.

It is not particularly difficult to prove this chain of title and, in turn, an assignment of the right to enforce an arbitration agreement. For illustrative purposes, Respondents point the Court to the recent decision of *Valentine v. LVNV Funding LLC*, No. 20-c-1161, 2020 WL 5946975 (N.D. Ill. Oct. 7, 2020) wherein, like here, a debt collector sought to enforce an arbitration agreement entered into by the plaintiff and the original creditor. Over plaintiff's objections, the court enforced the arbitration agreement because the debt collector provided adequate proof of the chain assignment. Specifically, the debt collector attached (1) an affidavit from the original creditor, which itself "attaches the Bills of Sale and Assignment between" the original creditor, and the subsequent assignees; and (2) a declaration from the debt collector defendant, which in turn attached a "Declaration of Account transfer" between the initial assignees and the defendant. 2020 WL 5946975, at *3; *see also* Doc. Nos. 18-1 and 18-2 (affidavits and attachments). The district court was thus able to find that "[e]ach document indicates the transfer of *all* the rights, title, and interest in the account." *Id.*

Here, not only has Petitioner failed to provide underlying agreements evidencing that it is authorized to collect on Respondents' accounts, it suspiciously has not even identified those entities which allegedly provided Petitioner such authorization. Such an agreement with these unknown entities would describe whether Petitioner was merely delegated the duty of collecting on the accounts, whether Petitioner was also assigned rights from the arbitration clauses, and any

limitations on an agency relationship between the parties.

As explained in the Restatement (Second) of Contracts,[9] "'Assignment' is the transfer of a right by the owner (the obligee or assignor) to another person (the assignee)" and "duties are said to be 'delegated.'". RESTATEMENT (Second) of Contracts § 315 cmt. c (1981). Given the different rights and duties that can be transferred and assigned under various agreements, the details of such an agreement must be part of the record in determining what rights and duties exist in a particular dispute between two parties such as the one before this Court. [10]

C. The Circuit Court was Not Required to Permit Third-Party Discovery or Hold a Trial as to Arbitration Before Ruling on the Motion to Compel Arbitration

Petitioner contends that both the FAA and the RUAA require evidentiary proceedings to resolve disputed factual issues and that failure to conduct such a proceeding, as well as the circuit court's ruling on the Motion to Compel Arbitration before additional discovery on the arbitration issue, was legal error. (Pet. Br. at 17). Petitioner is incorrect.

a. Courts Use Discretion in Determining Whether Additional Discovery is Needed

When considering a motion to compel arbitration, some trial courts may look at only the agreement between the parties whereas others may "consider any extrinsic evidence detailing the formation and use of the contract." *Barr v NCM Mgmt. Servs., Inc.*, 227 W. 507, 514, 711 S.E.2d 577, 584 (2011); *also see Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. 421, 440, 781

[9] With respect to questions of contract law yet to be definitively decided in West Virginia, the Supreme Court of Appeals recognizes the principles set forth in the Restatement (Second) of Contracts as authoritative. *See, e.g., Ryan v. Ryan*, 220 W. Va. 1, 5-6, 640 S.E.2d 64 (2006) (relying on Restatement to analyze contract issue revolving around mistake of fact, while noting adoption of Restatement position by other jurisdictions).

[10] *See Dempster v. AAAA Self Storage & Moving,* No. 19-0555 2020 WL 4357590, at *2 (W. Va. July 30, 2020) (granting motion to compel arbitration filed by managerial agent of signatory because agreement signed by non-movant "clearly stated that [signatory]'s personal representatives would receive the benefits set forth in the agreement, and the arbitration clause is not excluded.")

S.E.2d 198, 217 (2015) (holding that ,"[i]f necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract"). However, a court is not required to permit additional discovery where it determines that such discovery would be fruitless. *See Shorts v. AT&T Mobility,* No. 11-1649, 2013 WL 2995944, *6 (W.Va. June 17, 2013) (finding that lower court's denial of discovery related to arbitration clause was not error when such discovery would have been fruitless). Such is the case here.

b. The Third-Party Discovery Petitioner Seeks Would be Fruitless

In its Reply Brief in Support of Motion to Compel Arbitration, Petitioner stated, "[i]f the Court decides that [Petitioner] should be required to provide the documents showing the transfer and **assignment of the debt from the original creditor**" then "additional time would be necessary to obtain documents from those third-parties." (AR 0185) (emphasis added).[11] When submitting its Motion to Compel Arbitration, Petitioner had access to and presented the evidence it believed best supported its purported right to compel arbitration. This included the evidence from Petitioner's own records as well as documents Petitioner obtained from the current owners of the debts."[12] Despite having such access, and having every incentive to establish as much of the chain of assignment as feasible, Petitioner failed to provide evidence of the critical link in the chain between Petitioner and the entities for which it claims to be an agent and which it describes as the current owners of the debts. The circuit court thus reasonably concluded, and this Court may also

[11] On appeal, the Petitioner again focuses its argument on the need for *third-party* discovery that cannot be obtained informally. (Pet.. Br. at 8).

[12]Petitioner explained in its initial brief that the documents presented in its Motion to Compel Arbitration included "certain documents supporting its claimed right to invoke the arbitration provision as a valid assignee . . . ." (Pet. Br. at 6). Petitioner further explained that it "was able to obtain[] these documents, without the need for discovery, because of their agent relationship with the current owners of the subject debts." *Id.*

conclude as part of its *de novo* review, that additional discovery is not warranted because it would be fruitless. This is because even if Petitioner is permitted to obtain the discovery it previously requested ("documents showing the transfer and assignment of the debt from the original creditor"[13]) Petitioner will still not have linked *itself* to the rest of the chain. Petitioner should not be permitted yet a third-attempt[14] to obtain and present records which have been within its custody or control all along.

c. No Evidentiary Hearing or Trial Concerning Arbitration Was Required

Petitioner incorrectly asserts that the circuit court was required to hold a trial or evidentiary hearing on the arbitration issue. Petitioner states that such a requirement exists under 9 U.S.C. § 4, which states, in relevant part, "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

No such trial is required, however, if the court can conclude that no agreement existed as a matter of law. The Fourth Circuit Court of Appeals addressed this question recently in *Hill v. Employee Resource Group, LLC,* 816 Fed. Appx. 804 (4th Cir. 2020) where, like here, the defendant did not request a trial under section 4 below but had instead simply insisted that the parties agreed to arbitrate as a matter of law. The *Hill* court explained that:

> In "deciding whether 'sufficient facts' support a party's denial of an agreement to arbitrate, "the district court is obliged to employ a standard such as the summary judgment test." *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *see also Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014) (Gorsuch, J.) ("[T]he [FAA's] summary trial can look a lot like summary

[13]Based on this request, and the change in the way Petitioner describes itself in this court versus the trial court (from self-described **agent of original creditors** to self-described **agent of assignees** of original creditors) one could conclude that Petitioner itself is confused about its legal status and any corresponding rights.

[14] The first opportunity was when Petitioner moved to compel arbitration in federal court and the second opportunity was when it moved to compel arbitration in the circuit court.

> judgment."). If the record reveals a genuine dispute of material fact regarding the existence of an agreement to arbitrate, then "the 'court shall proceed summarily' and conduct a trial on the motion to compel arbitration." *Berkeley*, 944 F.3d at 234 (quoting 9 U.S.C. § 4.). "In other words, to obtain a jury trial, *the parties must show genuine issues of material fact regarding the existence of an agreement to arbitrate*." *Id.*, citing *Chorley Enters.*, 807 F.3d at 564; *cf. Howard*, 748 F.3d at 978 ("When it's apparent from a quick look at the case that no material disputes of fact exist it may be permissible and efficient for a district court to decide the arbitration question as a matter of law through motions practice....").

Hill, 816 Fed. Appx 807 (emphasis added). In *Hill*, the Fourth Circuit affirmed the district court's denial of the motion to compel arbitration *on the papers*, noting that, because it had concluded that no arbitration agreements existed as a matter of law, it "need not address the question of whether it is possible to waive the right to a trial under section 4 and, if so, whether [defendant] in fact did so." Here, as in *Hill*, the Court can conclude both that there was no agreement to arbitrate as a matter of law, and that Petitioner did not request a trial below. *See also Jin v. Parsons Corp.*, 966 F.3d 821, 826-27 (D.C. Cir. 2020) (same, noting that case law finding disputes of fact should go to trial "does not mean, however, that a district court can never deny a motion to compel arbitration without holding a trial in accordance with § 4" and citing *Howard, supra* for proposition that a "summary trial can look a lot like summary judgment.")

Notably, no decision of this Court requires a circuit court to hold a trial in such circumstances. Petitioner's reliance on this Court's decision in *Certegy Check Services, Inc. v. Fuller*, 241 W.Va. 701, 828 S.E.2d 89 (2019) does not compel a different result. In *Certegy*, this Court found fault with the circuit court's failure to make sufficient findings of fact and conclusions of law to support its decision to deny a motion to compel arbitration. Specifically, in *Certegy*, the circuit court "never clearly identified which of the [competing] facts it relied upon and never resolved the disputes between the parties." 241 W.Va. at 705. By contrast, here, the circuit court engaged in a thorough discussion of the relevant facts and made clear which facts supported its

decision. The circuit court specifically found that, with respect to Rutledge, Ms. Savage's affidavit did not establish a link between Frontline and the original lender supporting an arbitration mandate, and that according, "Defendant cannot prevail." (AR 0242). As to Barclay, the circuit court found that Ms. Savage "after providing general information states that she has reviewed the documents in the possession of Defendant... with less supportive detail." (*Id.*) The circuit court recited the documents discussed in Ms. Savage's affidavit but found that:

> [The collection letter] does not indicate to the court that the account had been assigned. While it is clear that the original owner is not Defendant's customer, there is no particular statement of assignment. There is however, an indication that nothing in the letter changes or alters Plaintiff's rights. *Defendant has not provided evidence that Plaintiff executed an agreement which included the binding arbitration clause.*

[AR 0243, emphasis added]. Accordingly, the circuit court made specific findings based on the record supporting its decision, and remand on this issue is not warranted.

For the above reasons, the circuit court did not err in electing not to hold a trial or evidentiary hearing on arbitration.

D. Petitioner Waived an Estoppel Argument, but Even Absent Such Waiver, Estoppel Does Not Apply

In its Initial Brief, Petitioner argues for the first time that this case should be remanded to allow litigation on whether Respondents are equitably estopped from opposing Petitioner's attempts to compel arbitration. (Pet. Br. at 18). Equitable estoppel was not addressed in any manner in Petitioner's Motion to Compel Arbitration. Additionally, Petitioner's Initial Brief does not assign any error to the absence of a discussion of equitable estoppel in the circuit court's order denying arbitration. Thus, it is unclear why two pages of Petitioner's Initial Brief are devoted to equitable estoppel.

Any equitable estoppel arguments are foreclosed to Petitioner for two reasons. First, because Petitioner did not raise an equitable estoppel argument in the circuit court below, it has

waived such an argument on appeal. *See Zaleski v. West Virginia Mutual Ins. Co.*, 224 W. Va. 544, 550, 687 S.E.2d 123, 129 (2009) ("[B]ecause this argument is being raised for the first time on appeal, we must necessarily find that the argument has been waived"); *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. 320, 329, 480 S.E.2d 529, 538 (1996) (West Virginia Supreme Court of Appeals has "long held that theories raised for the first time on appeal are not considered.")

Second, assuming *arguendo* that Petitioner had properly raised equitable estoppel in the circuit court and then properly raised a rejection of equitable estoppel on appeal, it would be rejected because "the doctrine of equitable estoppel is applied only in very compelling circumstances, where the interests of justice, morality and common fairness clearly dictate that course." *Bayles v. Evans*, 243 W.Va. 31, 842 S.E.2d 235, 245 (2020) (citing *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 948 (3d Cir. 1998)). Such "compelling circumstances" do not include a nonsignatory debt collector attempting to compel arbitration of challenges to its unlawful collection tactics where the consumers' claims exist irrespective of the underlying agreements between Respondents and a third-party creditor. The interests of justice, morality, and common fairness will remain intact if such a debt collector must defend its unlawful debt collection tactics in court.

Petitioner's attempt as a willing nonsignatory to compel a non-willing signatory to arbitration has been referred to as "Alternative Estoppel." which "takes into consideration the relationships of persons, wrongs, and issues." *Bluestem Brands, Inc. v. Shade,* 239 W. Va. 694, 805 S.E.2d 805, 813 (2017) (citing *Chesapeake Appalachia, L.L.C. v. Hickman*, 781 S.E.2d 198 (2015)). This Court's decision in *Bluestem* does not compel a finding allowing the doctrine of equitable estoppel to compel arbitration here. In *Bluestem*, equitable estoppel was introduced in

the circuit court and the circuit court's order denying arbitration specifically addressed – and rejected – the equitable estoppel arguments. 805 S.E.2d 805 (2017).

This Court held in *Bluestem* that a non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Syl. pt. 4, *Bluestem.* Applying this rule, estoppel was appropriate in *Bluestem* because the plaintiff's claims there directly challenged certain aspects of financing set forth in the agreement containing the arbitration provision; specifically, the Court found that plaintiff's allegations for "unlawful late fees and usurious interest rates pertain *exclusively* to charges arising pursuant to the credit provided to her, thereby permitting the use of estoppel to compel arbitration of these claims." *Id.* at 814. *Bluestem* also involved allegations of a "rent-a-bank" scheme wherein Bluestem was allegedly using a third-party as a front for its creditor activity. The Court found that the "existence of the credit purportedly extended under the agreement is the necessary underpinning of her 'rent-a-bank' allegations. Without the credit agreement which provided for the fees and interest rates she now complains or and sets the stage for the relationships and 'scheme' she alleges – she would have no cause of actions." *Id.* In addition, there was no question in *Bluestem* that defendant had the right to collect the debts; the parties simply disagreed as to whether Bluestem had adequately provided notice of subsequent modification of certain terms and conditions. *Id.* at 810.

None of this analysis applies to Respondents' claims here. Their complaint makes no reference to any agreement entered into with a third-party creditor, *see* AR 0001-12, nor do their claims arise from any such agreement. Instead, Respondents challenge Petitioner's debt collection activity arising out of debt collection letters Petitioner sent to them which misleadingly

representing whether amounts due were principle, interest, or costs. AR 0007-8. And Respondents vigorously dispute that Petitioner has demonstrated chain of title with respect to its right to collect the debts.

While this Court does not appear to have specifically considered the application of "alternative estoppel" to a straightforward debt collection case like this one, courts around the country have overwhelmingly rejected the tactic. *See, e.g., Ioane v. MRS BPO, LLC,* No. 20-00040, 2020 WL 5351031, at *4 (D. Hawai'i Sept. 4, 2020) (rejecting nonsignatory estoppel theory upon finding "Plaintiff's TCPA and FDCPA claims rely on and are founded in federal consumer protection statutes, not his Customer Agreement with Verizon. The allegations in the Complaint object to receiving text messages from Defendant and not receiving information regarding how to dispute an alleged debt; they do not reference any term of the Customer Agreement, allege any violation of it, or seek to enforce or benefit from any of its terms. . . Defendant thus has not shown that Plaintiff must rely on the terms of the Customer Agreement in asserting his claims against Defendant."); *Pagain v. Integrity Solution Servs., Inc.,* 42 F.Supp. 3d 932, 935 (E.D. Wisc. 2014) (rejecting estoppel argument when plaintiff "is not relying on the agreement at all...[s]he is relying on state and federal statutes that prohibit debt collectors . . . from attempting to collect invalid or illegal debts"); *Pacanowski v. Financial*, 271 F.Supp. 3d 738, 748 (M.D. Pa. 2017) (same, noting plaintiff "does not contest the debt that arose under the contract, but rather [the debt collector's] representations in attempting to collect the debt under the FDCPA"); *Mims v. Global Credit & Collection Corp.*, 803 F.Supp. 2d 1349, 1358 (S.D. Fla. 2011) (same, explaining, "Plaintiff alleges only that Global violated the FDCPA and the TCPA by leaving messages without identifying itself and without indicating the calls were being made in an effort to collect a debt. Although the claims presume the existence of the Agreement, they do so purely for the purpose of noting there is an

underlying debt.")

To allow Petitioner to compel arbitration through equitable estoppel when (i) it waived the argument; (ii) it has not demonstrably proven any right to collect debts from Respondents; and (iii) its claims do not rely on the existence of this third party agreement, would eviscerate the limited protections afforded by the FAA that require proof that these parties agreed to arbitrate their claims. Petitioner's estoppel argument should be rejected in its entirety.

CONCLUSION

For all the reasons set forth above, Respondents respectfully request that this Court affirm the circuit court's Order denying Petitioners' motion to compel arbitration.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2020, a true and correct copy of the foregoing **Respondent's Brief** was served by United States Mail, first class, postage prepaid, addressed to the following:

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