IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0395

FRONTLINE ASSEST STRATEGIES, LLC,
Defendant Below,
Petitioner,

vs.

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

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

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PETITIONER FRONTLINE ASSET STRATEGIES, LLC'S BRIEF

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I. ASSIGNMENT OF ERROR

Assignment of Error: The Circuit Court found that material factual disputes existed, but then erroneously applied a deferential standard of review applicable to motions to dismiss a complaint in denying Petitioner, Frontline Asset Strategies, LLC's ("Frontline") motion to compel arbitration. But public policy emphatically favors arbitration, the law requires all doubts to be resolved in favor of arbitrability, and the Federal Arbitration Act and the Revised Uniform Arbitration Act both envision that courts will hold summary evidentiary proceedings to resolve disputed issues of fact as to whether an enforceable arbitration agreement exists – and whether it is enforceable by the party seeking to compel its enforcement, either as an assignee of the original creditor, or under the doctrine of equitable estoppel as this Court found to be the case, under analogous circumstances, in *Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 805 S.E.2d 805 (2017).

II. STATEMENT OF THE CASE

The central issue in this interlocutory appeal is whether the Circuit Court erroneously applied the deferential standard applicable to motions to dismiss, which gives the benefit of every doubt to the non-moving party, to deny Frontline's motion to compel arbitration – a method of alternative dispute resolution that is a favorite of both federal and West Virginia public policy. There is no genuine dispute that each Respondent is bound by their contract with the original lenders, each of which contains broad arbitration provisions (and class action waivers). Respondents, instead, disputed only whether Frontline has standing to invoke those provisions. Both Parties requested leave from the Circuit Court to conduct additional discovery to supplement the record below. Rather than allowing the discovery requested by both sides to assist in better developing an evidentiary record on which that court could decide this disputed issue, and then have a further proceeding, if needed, to resolve the disputed issue, the Circuit

Court instead erroneously drew every inference against Frontline, and incorrectly denied the motion.

A. Summary Procedural History

On August 10, 2018, Respondents filed this putative class action against Frontline in the Circuit Court of Raleigh County. (A.R. 245). Their complaint alleges that Frontline's debt collection letters to them violated West Virginia Code §§ 46A-2-124, -2-127.[1] (A.R. 1-12). On October 11, 2018, Frontline answered the complaint. (A.R. 245). On or about March 25, 2019, Frontline removed this action to the United States District Court for the Southern District of West Virginia. (*Id.*) On December 17, 2019, the case was remanded back to the Circuit Court. Thereafter, on January 6, 2020, Frontline filed a Motion to Compel Arbitration, and filed a separate motion for judgment on the pleadings challenging the merits of Respondent's claims. (*Id.*)

As discussed in detail below, the Circuit Court denied Frontline's Motion to Compel in its Order dated March 30, 2020 (the "Order"), and, in the same Order, denied Frontline's motion for judgment on the pleadings. (A.R. 239-243). Frontline filed its timely and complete Notice of Appeal from the Order on June 11, 2020.

B. Relevant Factual Background

1. Frontline

Frontline, a Minnesota limited liability company, is in the business of collecting debts owed to other entities. In the ordinary course of business, debt buyers and credit originators regularly assign accounts to Frontline to attempt to collect delinquent debts on credit card

[1] Frontline does not believe it was served with the exhibits (Frontline's own collection letters) to the original complaint. The letters were, however, provided in connection Frontline's Motions and are attached to the Appendix Record at: 1) Exhibit 1 – A.R. 149; 2) Exhibit 2 – A.R. 210; and Exhibit 3 – A.R. 161.

accounts, installment accounts, service accounts, and/or other credit lines or obligations. (A.R. 46-47). Respondents' complaint challenges the legality of Frontline's letters to them attempting to collect debts on behalf of Frontline's clients – assignees of the original creditors.

2. Respondents

Respondents Rutledge and Barclay, individually, and seeking to represent a class of similarly-situated debtors, sued Frontline alleging that its debt collection communications were deceptive, in violation of West Virginia law.

a. The Rutledge Debt and Agreement to Arbitrate

On March 3, 2008, Mr. Rutledge entered into a contractual Personal Credit Line Account Agreement with Beneficial West Virginia, Inc. ("Beneficial") as evidenced by his physical signature on the credit agreement documents, with an account number ending in 6278. ("Credit Agreement") (A.R. 108-110; 128-131). In conjunction with the original transaction, Mr. Rutledge executed an Arbitration Rider on March 3, 2008 that was incorporated by reference as part of the Credit Agreement agreeing to arbitrate all claims arising from the debt. (A.R. 140-142).

Specifically, the Arbitration Rider states in the beginning:

> you agree that either Lender or you may request that any claim, dispute, or controversy..., arising from or relating to this Agreement or the relationships which result from this Agreement, including the validity or enforceability of this arbitration clause, any part thereof or the entire agreement [], shall be resolved, upon the election of you or us by binding arbitration...

(A.R. 140, ¶1).

The Arbitration Rider further provided:

> **THE PARTIES ACKNOWLEDGE THAT THEY HAD A RIGHT TO LITIGATE CLAIMS THROUGH A COURT BEFORE A JUDGE OR JURY, BUT WILL NOT HAVE THAT RIGHT IF EITHER PARTY ELECTS ARBITRATION. THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WAIVE THEIR RIGHTS TO LITIGATE SUCH**

CLAIMS IN A COURT BEFORE A JUDGE OR JURY UPON ELECTION OF ARBITRATION BY EITHER PARTY.

(A.R. 141, bold emphasis in Original).

Further, Mr. Rutledge acknowledged in his Credit Agreement that he was giving up his right to participate in a class action:

> No class actions or private attorney general actions in court or in arbitration or joinder or consolidation of claims in court or with other persons are permitted in arbitration without the written consent of the parties.

(A.R. 141, ¶ 1). The Credit Agreement also advised Mr. Rutledge could unilaterally reject the Arbitration provision (A.R. 141, ¶ 7). Mr. Rutledge has never contended that he rejected the Arbitration Rider.

Mr. Rutledge eventually defaulted on his debt. (A.R. 136) CACH, LLC bought Mr. Rutledge's Debt and hired Frontline to attempt to collect the debt, a fact disclosed in the subject September 19, 2017 letter. (A.R. 149). As such, it is Frontline's position that it is vested with the right to exercise all collection rights in the Rutledge Debt, including the right to enforce the arbitration clause in the Credit Agreement.

b. The Barclay Debt and Agreement to Arbitrate

Ms. Barclay's debt arises from a debt obligation she originally owed to Credit One Bank from charges she incurred on her Credit One Bank credit card account but did not pay. Sometime prior to October 2017, Ms. Barclay signed up for the credit card account ending in number 7556, and thereafter received a Credit One Bank Visa/Mastercard Cardholder Agreement ("Cardholder Agreement") (A.R. 153-159). Significantly, the Cardholder Agreement states in the very first paragraph, "By requesting and receiving, signing *or using your Card*, you agree as follows:" (A.R. 154, ¶ 1, emphasis added).

The Cardholder Agreement then goes on to state:

> **. . . EITHER YOU OR WE CAN REQUIRE THAT ANY CONTROVERSY OR DISPUTE BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY TRIAL AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING.**

(A.R. 158, bold emphasis in Original).

Ms. Barclay's Cardholder Agreement contains further provisions governing arbitration:

> **Agreement to Arbitrate:**
> You and we agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This Arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 et seq., and (to the extent State law is applicable), the State law governing the Card Agreement.

(A.R. 158).

The arbitration provision further prohibits anything other than individual arbitration:

> **No Class Arbitration of Consolidation or Joinder of Parties:** All parties to the arbitration must be individually named. Claims by persons other than individually named parties shall not be raised or determined. Notwithstanding anything else that may be in this Arbitration Agreement or the Card Agreement, no class action, private attorney general action or other representative action may be pursued in arbitration, nor may such action be pursued in court if any party has elected arbitration.

(A.R. 159).

Ms. Barclay never disputed that she used the credit card, and thus assented to the terms of the Cardholder Agreement. Further, as partially quoted above, the Cardholder Agreement specifically includes an arbitration clause that prohibits lawsuits, including class action lawsuits, and requires instead the use of arbitration to resolve all disputes. (*See gen.*, A.R. 158-159).

Sometime prior to October 6, 2017, Credit One Bank sold its right, title and interest in the Barclay Debt to LVNV Funding, LLC. After LVNV acquired the Barclay Debt, LVNV

authorized Frontline to serve as LVNV's collection agent for the Barclay Debt, which includes contacting Ms. Barclay to try to resolve the debt. (A.R. 47-48).

Therefore, it is Frontline's position that all collection rights in the Barclay Debt were transferred to and became vested in Frontline, including the right to collect the balance owed on the account and enforce the arbitration clause in the Cardholder Agreement.

3. Frontline Moves to Compel Arbitration

Frontline moved to compel arbitration pursuant to the broad arbitration provisions contained in Respondents' credit agreements with their original creditors. Frontline's Motion argued that Respondents claims were subject to the arbitration provisions in their respective Credit Agreements and therefore were required to be submitted to an arbitrator. More specifically, Frontline argued that both arbitration provisions prohibited Respondents from initiating lawsuits, including class action lawsuits, instead requiring the use of arbitration to resolve any Agreement disputes. (A.R. 34-45).

Frontline supported its motion with an Affidavit of Lauren Savage, Frontline's Director of Compliance & Litigation, attaching documentation supporting the existence of arbitration agreements with the original creditors, as well as certain documents supporting its claimed right to invoke the arbitration provisions as a valid assignee that only the current owner of the subject debts would have in their possession. (A.R. 46-163). Frontline was able to obtain these documents, without the need for discovery, because of their agent relationship with the current owners of the subject debts. Had the Circuit Court granted the Parties mutual request for leave to conduct discovery to more fully develop the record below, the questions and concerns reflected in the Circuit Court's Order could have been fully addressed and satisfied.

Indeed, neither Respondent contested the extent or breadth of these arbitration provisions, nor that they were contractually bound to them vis-à-vis their original creditors. Instead,

Respondents sole challenge was the bald assertion that Frontline lacked authority to invoke those arbitration provisions. Specifically, they challenged the sufficiency of the evidence proffered by Frontline to demonstrate that Frontline was the authorized agent of the assignee of each Respondent's debt (each debt having been assigned only once, from the original creditor to Frontline's clients), and thus was authorized to invoke the arbitration provisions to which Respondents had agreed with their original creditor. In other words, the gravamen of Respondents' opposition was their argument that Frontline "failed to show that ***these*** parties entered into any agreement to arbitrate, because it has failed to prove that it was ever assigned the right to arbitrate any claims with these Plaintiffs." (A.R. 0165, original emphasis).

Alternatively, Respondents twice requested leave to take discovery: "Plaintiffs should have an opportunity for discovery regarding the facts of the purported assignment, including the universe of documentation regarding any and all transfers of Plaintiffs' accounts." (A.R. 0166). "Because Defendant fails to offer sufficient evidence of assignment of the right to compel arbitration, Defendant fails to carry its burden. In the alternative, Plaintiffs should be afforded the right to discovery regarding this discrete issue." (A.R. 0173).

In reply, Frontline argued that it had sufficiently demonstrated its entitlement to compel arbitration of the parties' dispute pursuant to their arbitration agreements with the original creditors. While it defended the sufficiency of its proofs, Frontline, like Respondents, alternatively requested an opportunity to adduce additional evidence, explaining that Frontline would need to obtain additional supporting documentation from entities that are not parties to this litigation:

> If the Court decides that Defendant should be required to provide the documents showing the transfer and assignment of the debt [from] the original creditor, Defendant requests that it be given additional time to obtain and provide those documents.

(A.R. 0185).

C. Disregarding Frontline's Request for Leave to Conduct Third-Party Discovery to Further Document Its Standing to Invoke the Arbitration Provisions of the Original Credit Agreements, the Circuit Court Denies Frontline's Motion to Compel Arbitration

In a single, March 30, 2020 Order, the Circuit Court denied both Frontline's Motion to Compel Arbitration and its Motion for Judgment on the Pleadings. Rather than treating the two motions separately, that court conflated them, and their distinct legal frameworks and decisional standards. In so doing, it 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 sufficiency of a complaint's allegations – not to determine factual disputes as to the existence and enforceability of an arbitration agreement under the Federal Arbitration Act (or West Virginia's version of the Revised Uniform Arbitration Act). Notably, the Circuit Court also failed to substantively evaluate and rule on the motion for judgment on the pleadings which dealt with different matters of law that have been previously established in favor of Frontline in recent federal circuit court cases. (A.R. 213-215).

As a result, when it deemed Frontline's initial proffer insufficient, the Circuit Court denied the motion outright instead of holding its merits ruling in abeyance and authorizing discovery to permit the parties to adduce necessary evidence on the disputed issue of whether the arbitration rights had been assigned in such a manners as to permit Frontline to invoke them (or scheduling an evidentiary proceeding on the disputed issues).

As relevant to the arbitration motion, the Circuit Court found as fact:

> 3. Both [Respondents] had originally incurred debt to assignors of the debt [Frontline] was attempting to collect.
>
> 4. The original lending agreements in both [Respondents'] claims contained similar arbitration clauses that permitted either party to elect alternative dispute resolution to resolve their differences without securing the

agreement of the other party.

5. The arbitration agreements contain the provision that the right to elect arbitration is assignable with the original debt.

6. As to Plaintiff Rutledge's account, Beneficial of West Virginia and Plaintiff Rutledge executed a three page Arbitration Rider on March 3, 2008.

(A.R. 239-240).

The Circuit Court then made three Conclusions of Law. Of the three, only the third concerned the legal standard for ruling on a motion to compel arbitration. The other two recited the standard for dismissal of a complaint at the pleadings stage:

1. The facts are to be reviewed in a light most favorable to the non-moving party *Mason v. Torellas*, 238 W.Va. 1, 792 S.E.2d 12 (W.Va. 2016).

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. *Kopelman & Associates v. Collins*, 196 W. Va. 489, 473 S.E.2d 910 (W.Va. 1996).

3. When reviewing a motion to compel arbitration under an arbitration agreement a court must consider the validity of the agreement and whether the claims asserted are covered by the arbitration agreement. *Golden Eagle Resources, II, v. Willow Run Energy*, 836 S.E.2d 23 (W.Va. 2019).

(A.R. 240).

Having jumbled the legal standards together, the Circuit Court proceeded to ignore the merits of the Motion for Judgment on the Pleadings, which were premised on substantive legal arguments having nothing to do with the arbitration motion, and instead treat the Motion to Compel Arbitration as if it were a motion to dismiss. The Circuit Court then determined that the affidavit proffered by Frontline to support the assignment of the credit contracts containing the arbitration agreements to Frontline's customers was insufficient, and that it was also insufficient to prove that Respondent Barclay had bound herself to the original creditor's arbitration

agreement-containing Credit Agreement (though this issue was not even raised by Barclay as a basis for her opposition).

The Circuit Court, however, did not authorize discovery on the disputed factual issues – as both sides had requested – or schedule a hearing at which additional evidence could be adduced and witnesses examined. Instead, that court found "that for the purposes of a Rule 12(b)(6) Motion to Dismiss the defendant has not established that Plaintiffs can prove no set of facts to support Plaintiffs' claim that the arbitration clauses were not assigned or transferred when the debts were transferred." (A.R. 243). Completing its conflation of the two distinct motions, the Circuit Court concluded by decreeing: "Defendant's motion to dismiss and compel arbitration is therefore DENIED." (*Id.*).

III. SUMMARY OF THE ARGUMENT

Both the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), and the Revised Uniform Arbitration Act, West Virginia Code § 55-10-1, *et seq.* ("RUAA"), reflect the "emphatic" public policy, both federal and state, in the recognition and judicial enforcement of contractual agreements to arbitrate. These acts require all doubts to be resolved in favor of arbitrability. Further, where there are factual disputes as to whether the party resisting arbitration is bound to an agreement to arbitrate, both acts call for those disputes to be tried – not resolved against arbitration as the Circuit Court did here.

The Circuit Court, however, disregarded the relevant legal framework. Instead, it misapplied the Rule 12(b)(6) standard to resolve all doubts *against* arbitrability. The law requires judicial enforcement unless a court faced with a contested motion to compel arbitration affirmatively finds as fact that no enforceable agreement to arbitrate exists. The confused and confusing Order of the Circuit Court thus undermines the public policy favoring arbitration, and is inconsistent with the provisions of both acts.

Here, by Respondents' own concession, the *existence* of arbitration provisions in the operative contracts with the original creditors is uncontested. The Circuit Court's assertion to the contrary with regard to Ms. Barclay is simply erroneous (and is inconsistent with its fact-finding earlier in its Order that both Respondents were parties to contracts containing arbitration provisions with their original lenders). It is a common provision, readily recognized by courts, that where a cardholder agreement provides that use of the card constitutes acceptance of the terms of the cardholder agreement, the cardholder in fact agrees to such terms when she used the card, and Respondents never argued that she had not done so.

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.

Frontline is not the original creditor, nor is it the purchaser of the Respondents' debts. Instead, the debt-purchasing entities, non-parties to this action, assigned the debts to Frontline to attempt collection. Frontline expressly represented that it would need time to obtain additional documentation from these non-parties if the Circuit Court found its initial proffer insufficient. That court should not have proceeded to rule against Frontline and foreclose its ability to obtain and submit proofs satisfactory to that court. Instead, that court should have authorized focused discovery limited to that issue, held an evidentiary hearing, if necessary to decide any remaining disputed factual issues, and, only then, proceeded to decide the issue, and grant (or deny) Frontline's motion to compel arbitration.

Additionally, and alternatively, remand is necessary to permit Frontline to demonstrate that Respondents are equitably estopped from refusing to arbitrate their disputes with Frontline consistent with this Court's *Bluestem Brands* precedent.

Consistent with the FAA, and the RUAA, this Court should vacate the decision of the Circuit Court and direct that court to permit expedited discovery limited to the disputed issue of whether Frontline is entitled to invoke the arbitration agreements to which the Respondents bound themselves, thereafter permit supplementary evidentiary submissions, and, if necessary, hold a summary evidentiary hearing, to decide any disputed facts that hinge on witness credibility.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 19(a) of the West Virginia Rules of Appellate Procedure provides for oral argument when the case involves:

> (1) cases involving assignments of error in the application of settled law;
>
> (2) cases claiming an unsustainable exercise of discretion where the law governing that discretion is settled; [and]
>
> (3) cases claiming insufficient evidence or a result against the weight of the evidence; . . .

Here, this case is appropriate for Rule 19 argument because it involves errors in the application of settled law; an unsustainable exercise of discretion by the Circuit Court where the law is settled; and the Circuit Court contending Frontline presented insufficient evidence. Thus, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

V. STANDARD OF REVIEW

In ruling upon a motion to compel arbitration pursuant to the FAA, "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." *Kirby v. Lion Enters.*, 233 W. Va. 159, 160, 756 S.E.2d 493, 494 (2014) (Syl. Pt. 2) (quoting *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010) (Syl. Pt. 2)).

This Court reviews *de novo* a Circuit Court's ruling denying a Petitioner's motion to compel arbitration. *Citibank, N.A. v. Perry*, 238 W. Va. 662, 664, 797 S.E.2d 803, 805 (2016). *see also, McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 222, 681 S.E.2d 96,107 n. 11 (2009). This Court also reviews *de novo* all questions of law, *Chrystal KM. v. Charlie A.L.*, 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995).

Because the assignment of error here assert that the Circuit Court committed legal errors in applying an incorrect legal standard, and failing to conduct further proceedings to resolve disputed factual issues before denying Frontline's motion to compel arbitration, the standard of review is *de novo*.

VI. ARGUMENT

A. The FAA and the RUAA Embody the Strong Public Policy in Favor of Arbitration and Enforcement of Agreements to Arbitrate that Are Otherwise Valid Under Applicable State Law

The FAA, governs arbitration provisions in any "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and "reflects an emphatic federal policy in favor of arbitral dispute resolution," *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (internal quotation marks and citations omitted)). Motions to compel arbitration thus "must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650, 659 (2016) (quotation omitted).

The RUAA (applicable at least to the Barclay agreement that was entered into after July 1, 2015), likewise embodies West Virginia's own public policy favoring arbitration:

> **Declaration of public policy; legislative findings.**
>
> The Legislature finds that:
>
> (1) Arbitration, as a form of alternative dispute resolution, offers in many instances a more efficient and cost-effective alternative to court litigation.
>
> (2) The United States has a well-established federal policy in favor of arbitral dispute resolution, as identified both by the Federal Arbitration Act, 9 U.S.C. §1, et seq., and the decisions of the Supreme Court of the United States.
>
> (3) Arbitration already provides participants with many of the same procedural rights and safeguards as traditional litigation, and ensuring that those rights and safeguards are guaranteed to participants will ensure that arbitration remains a fair and viable alternative to court litigation and guarantee that no party to an arbitration agreement is unfairly prejudiced by agreeing to an arbitration agreement or provision.

West Virginia Code § 55-10-2 (2015).

Of course, if there is any inconsistency between the provisions of the FAA and the RUAA, the Supremacy Clause of the United States Constitution commands that the latter must yield to the former.

The FAA also recognizes that arbitration is fundamentally a matter of contract, providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has explained that "arbitration is simply a matter of contract between the parties; it is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Therefore, an arbitration agreement must contain the elements required for proper formation of any contract. Further, the determination of whether there is a valid arbitration agreement between the parties is to be determined by applicable state contract law. *See Arthur Andersen LLP P. Carlisle*, 556

U.S. 624, 630-31 (2009); *Accord, State ex rel. Clites v. Clawges*, 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (2009) ("[T]he issue of whether an arbitration agreement is a *valid* contract is a matter of state contract law"). As the Circuit Court correctly noted in the March 25, 2020 Order, there are two threshold questions in this case, as there are in every case involving a motion to compel arbitration: "whether a valid arbitration agreement exists" and "whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *Golden Eagle Resources, II, v. Willow Run Energy,* 836 S.E. 2d 23 (W.Va. 2019).

B. Both the FAA and the RUAA Require Evidentiary Proceedings to Resolve Disputed Factual Issues

Under the FAA, all applications to compel arbitration are treated as motions: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." 9 U.S.C. § 6. Likewise, the RUAA contemplates the filing of a "Motion to compel or stay arbitration." West Virginia Code § 55-10-9 (2015).

Further, both acts require *evidentiary* proceedings where there are factual disputes concerning the existence or enforceability of the arbitration agreement at issue. The FAA thus provides: "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. § 6. Similarly, the RUAA provides, at § 55-10-9(a):

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> ...
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

C. The Circuit Court Erred by Resolving the Disputed Factual Issues Against Frontline Without Further Proceedings to Resolve Any Remaining Factual Disputes, Including Holding an Evidentiary Hearing, if Necessary

Here, the threshold existence of the arbitration agreements was not genuinely at issue. The Circuit Court found that: 1) each Respondent had incurred debts to the original lenders; 2) that Frontline was attempting to collect those debts on behalf of assignors; 3) that the original lending agreements in both cases contained similar arbitration clauses that permitted either party to invoke arbitration; and 4) that these agreements provided that their arbitration provisions were assignable with the original debt. (A.R. 239-240). That court further determined that Mr. Rutledge had signed his agreement. *Id.*

That court, however, found that Frontline's supporting affidavit was insufficient to prove that the original creditors had assigned right to assert arbitration in a manner that could be enforced by Frontline. (A.R. 243). It further found that the affidavit was insufficient to show that Ms. Barclay had "executed" her credit agreement containing the arbitration provisions. (A.R. 243).[2]

Having found disputed issues of fact to exist, the Circuit Court concluded – erroneously applying the Rule 12(b)(6) standard applicable to motions to dismiss – that "the defendant has not established that Plaintiffs can prove no set of facts to support Plaintiffs' claim that the

[2] This issue, in fact, is a non-issue. There is no dispute that Ms. Barclay used her credit card, and her Credit Agreement contains a notice at the beginning of the Credit Agreement providing that the Credit Agreement becomes operable "by using your card." By using the card, Ms. Barclay demonstrated an intent to be bound by the terms of the Credit Agreement. *See Bluestem Brands,supra*, 239 W.Va. at 699, 805 S.E.2d at 810 (consumer consented to arbitration provisions by continuing to use credit account following receipt of notice of change of terms). *See also*, e.g., *Ackerberg v. Citicorp USA, Inc.*, 898 F.Supp.2d 1172, 1176 (N.D. Cal. 2012) (use of credit card manifests consent to arbitration provision, collecting cases); *cf. Schultz v. AT & T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691-92 (N.D. W. Va. 2005) (plaintiff assented to an arbitration provision contained within AT&T Welcome guide by "activating and/or continuing use of the phone").

arbitration clauses were not assigned or transferred when the debts were transferred" and denied Frontline's motion to compel arbitration. *Id.* This was legal error and flatly contrary to the requirement of both the FAA and the RUAA that disputed issues of fact must be adjudicated – not presumed in favor of the party opposing arbitration.

This principle is illustrated by the Tenth Circuit's decision in *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014) (Gorsuch, J.). In that case, the trial court, faced with a contested motion to compel arbitration, authorized discovery on the contested issues (as both sides requested here). When contested factual issues remained, "the court issued an order in which it found that material disputes of fact still prevented it from saying for certain whether or not the parties had agreed to arbitrate." *Id.* at 978. And, like the Circuit Court did here, "rather than proceeding to resolve the conflicting factual accounts through trial as the Act requires, the court entered an order denying arbitration outright." *Id.*

The Tenth Circuit vacated and remanded with directions to the trial court to try the disputed fact issues. In so doing, that court provided a tutorial on how trial courts are to adjudicate contested factual issues under the FAA:

> What happens when it's just not clear whether the parties opted for or against arbitration? The FAA tells district courts to "proceed summarily to the trial" of the relevant facts. 9 U.S.C. § 4. Once the facts are clear, courts must then apply state contract formation principles and decide whether or not the parties agreed to arbitrate.

Id. at 977 (citation omitted).

This Court, similarly, has vacated and remanded a circuit court order denying arbitration that merely identified disputed issues of fact without resolving them. As this Court wrote in *Certegy Check Servs. v. Fuller*, 241 W. Va. 701, 705, 828 S.E.2d 89, 93 (2019), where "the parties presented competing versions of the facts by way of affidavits, but the circuit court...never resolved the disputes between the parties," its order denying a motion to compel

arbitration had to be vacated. This Court continued, "[w]e believe that, in order to facilitate review, the circuit court necessarily had to resolve the disputed facts relevant to resolution of the motion at hand. *Id.* (Citation omitted).

The Tenth Circuit made clear that what the district court did there, and what the Circuit Court did here, is completely contrary to the requirements of the FAA: "One thing the district court may never do is find a material dispute of fact *does* exist and then proceed to *deny* any trial to resolve that dispute of fact." *Id.* at 978 (original emphasis). This Court's precedent also supports this principle, and likewise requires that the Circuit Court's order here be vacated.

D. Alternatively, Frontline Is Entitled to Remand to Litigate the Issue of Whether Respondents Are Equitably Estopped from Resisting Frontline's Invocation of the Arbitration Provisions

While the Circuit Court focused solely on the issue of direct contractual privity, direct privity is not an absolute requirement for seeking enforcement of arbitration provisions. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (Non-party may seek enforcement of arbitration agreements under doctrine of equitable estoppel). Indeed, this Court has had cause to apply this doctrine in a similar situation in *Bluestem Brands, Inc. v. Shade*, *supra*, 239 W. Va. 694, 805 S.E.2d 805 (cited earlier in fn.1 for the proposition that use of a credit account can constitute assent to an agreement to arbitrate).

In *Bluestem Brands,* this Court, reversing a circuit court's order denying Bluestem's motion to compel arbitration, invoked equitable estoppel to enforce an arbitration agreement on the motion of a non-signatory after finding that the dispute between the non-signatory and signatory related to or arose out of the underlying contract. 239 W. Va. at 702, 805 S.E.2d at 813. There, Bluestem, a retailer of consumer goods under the "Fingerhut" trade name, had partnered with various banks to offer credit to its customers. 239 W. Va. at 697, 805 S.E.2d at 808. Shade, the plaintiff-respondent, had agreed to cardholder agreements containing arbitration

clauses with certain of Bluestem's partner banks. 239 W. Va. at 697-698, 805 S.E.2d at 808-809. Bluestem was not a signatory to any of these credit agreements. 239 W. Va. at 701, fn. 5, and 703; 805 S.E.2d at 812, fn. 5, and 814.

After Shade defaulted, a debt collector began collection efforts and commenced suit against her. Shade then filed a third-party complaint against Bluestem alleging that the finance charges and interest rate charged for her account purchases were in violation of the WVCCPA. 239 W. Va. at 698, 805 S.E.2d at 809. Bluestem moved to compel arbitration and dismiss the third-party complaint. *Id.* The circuit court concluded that an arbitration agreement entered into by the parties was not binding on Bluestem since Bluestem was a non-signatory to a contract between the bank and its customer. *Id.* Upon review, this Court found that Shade was equitably estopped from resisting arbitration with Bluestem because "without the credit agreement—which provided for the fees and interest rates the debtor now complains of" Bluestem would have had no cause of action for allegedly violating the WVCCPA. 239 W. Va. at 703; 805 S.E.2d at 814.

Similarly here, Respondents' lawsuit alleges that Frontline (a non-signatory to their respective Credit Agreements) was in violation of the WVCCPA by falsely suggesting that the total amounts due under Respondents respective Credit Agreements were entirely principle and did not include (or mention) any interests, costs of other expenses. (A.R. 2-7). Without the Credit Agreements that provide for the fees or interests, Respondent cannot make out a claim alleging WVCCPA violations. Instead, Respondents claims solely rely on statutory violations stemming from their respective Credit Agreements and are therefore inextricably tied to those agreements since the agreements are the source of the contractual authority the originating lenders used to charge Respondents the amounts due as referenced in Frontline's collection letters. Frontline thus is entitled to assert and demonstrate on remand that Respondents cannot

be permitted to simultaneously pursue their WVCCPA claims against Frontline while at the time insisting that Frontline cannot invoke the Credit Agreements' arbitration provisions.

VII. CONCLUSION

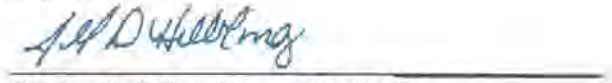
As explained above, the Circuit Court committed reversible legal error when, after identifying disputed factual issues, it denied Frontline's Motion to Compel Arbitration instead of permitting Frontline to adduce additional evidence from non-parties and resolving the disputed factual issues. By doing so, the Circuit Court disregarded the express requirements of both the FAA and the RUAA. This Court should vacate the Circuit Court's March 30, 2020 Order, and remand this case to the Circuit Court with instructions to proceed to resolve the disputed factual issues, and further permit Frontline to demonstrate that Respondents are equitably estopped from resisting compliance with their arbitration agreements.

Respectfully submitted,

Dated: August 31, 2020

GORDON REES SCULLY MANSUKHANI, LLP

Signed:



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2020, a true and correct copy of the foregoing **Petitioner's Opening Brief** was served via email to the following:

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