IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0007

Ford Motor Credit Company, LLC,

Plaintiff-Petitioner,

v.

Ronald R. Miller,

Defendant-Respondent.

On Appeal from Order Denying
Plaintiff's Motion to Compel Arbitration
Circuit Court of Wyoming County, West Virginia
(The Honorable Micheal M. Cochrane)

REPLY BRIEF OF PLAINTIFF-PETITIONER FORD MOTOR CREDIT COMPANY, LLC

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Respondent Miller's brief complains about Ford Credit, its representation, and arbitration generally. Yet, it leaves uncontested significant aspects of Ford Credit's challenge to the decision below. First, this Court has never imposed the type of evidentiary burden that the Circuit Court faulted Ford Credit for not meeting. Second, Miller did not challenge the *existence* of an agreement to arbitrate between the parties until after the time to do so had passed. And third, *Citibank, N.A. v. Perry*, 238 W. Va. 662, 666, 797 S.E.2d 803, 807 (2016) is both directly on point and fatal to Miller's waiver argument. Ultimately, these still-undisputed arguments are dispositive of this appeal.

The Circuit Court legally erred by holding that Ford Credit's prima facie burden to demonstrate an agreement to arbitrate between the parties required more than producing their written and signed agreement to arbitrate. Miller himself had provided the exact same agreement to the court as an attachment when opposing Ford's motion to compel arbitration. The court additionally abused its discretion by permitting Miller to change his argument at the hearing to challenge for the first time whether an agreement to arbitrate existed, and then denying Ford Credit the opportunity to respond to that surprise argument. Vacatur of the Circuit Court's order is necessary to remedy either of these errors. And because West Virginia law

forecloses Miller's outstanding waiver and unconscionability arguments, this Court should remand with instructions to compel arbitration.

I. FORD CREDIT SATISFIED ITS PRIMA FACIE BURDEN BY PRODUCING MILLER'S SIGNED AGREEMENT TO ARBITRATE.

In West Virginia, a party may show the existence of a valid arbitration agreement "by providing copies of [a] written and signed agreement[ ] to arbitrate." *State ex rel. Troy Grp., Inc. v. Sims*, 244 W. Va. 203, 210, 852 S.E.2d 270, 277 (2020) (internal quotation marks omitted). Ford Credit did just that. Less than a week after Miller filed his class-action counterclaim, Ford Credit sought to enforce its arbitration rights. JA32-53. Its motion to compel arbitration described and presented the parties' Retail Contract, which contains an arbitration clause, an assignment to Ford Credit, and Miller's signature. JA52-53. In West Virginia, nothing more is required. *Sims*, 244 W. Va. at 210, 852 S.E.2d at 277 ("Petitioners met their initial burden . . . by producing, as an attachment to their motion . . . a written copy of the arbitration agreement containing [Respondent's] signature."). Once Ford Credit satisfied its initial burden, Miller was required to disprove the existence of an agreement to arbitrate between the parties or demonstrate that the agreement is unenforceable. *Sims*, 244 W. Va. at 209-10, 852 S.E.2d at 276-277. The Court erred by denying Ford Credit's motion when that burden went unfulfilled.

Miller makes every effort to shift attention from the framework that *Sims* set forth. He accuses Ford Credit of ignoring court orders. Respondent's Br. at 2-3. He

derides counsel's preparation and familiarity with the law. *Id.* at 5-6. And he recasts this appeal of a *legal error* as nothing more than a request from Ford Credit that this Court "prop up institutional parties who failed to adequately present their cases at the lower court level." *Id.* at 3. The editorializing is as false as it is beside the point. Relevant here, Miller's brief reveals three undisputed principles which, together, are controlling: (1) the discovery that occurred in *Sims* speaks to Miller's evidentiary burden, not Ford Credit's; (2) *Sims* has not been overruled; and (3) this Court has not issued a single decision which compels the evidentiary burden applied below, including in *Frontline* and *Sims* (which actually favor Ford Credit).

1. Miller provides no explanation for why the discovery discussed in *Sims* is at all relevant to Ford Credit's burden to show the existence of a valid arbitration agreement between the parties. *See* Respondent's Br. at 9-11. As explained in Ford Credit's opening brief, *Sims* did not rely on the parties' discovery to determine whether the party seeking to compel arbitration had made its prima facie showing. Petitioner's Br. at 17-18; *Sims*, 244 W. Va. at 210, 852 S.E.2d at 277. To the contrary, *Sims* said nothing about the evidence produced during discovery when evaluating whether petitioners satisfied this "light" burden. 244 W. Va. at 210-211, 852 S.E.2d at 277-278. The Court's analysis first turned to the deposition of petitioners' Rule 30(b)(7) expert when discussing why the party *opposing* arbitration

had failed to disprove the existence of a valid agreement. *Sims*, 244 W. Va. at 210-212, 852 S.E.2d at 277-279.

Miller does not dispute this reading of *Sims*. Respondent's Br. at 9-11. He simply insists that because *Sims* "included" arbitration-related discovery, Ford Credit cannot rely on the legal standard that *Sims* announced. *Id.* at 11. This Court should not allow the *fact* that discovery occurred in *Sims* to overshadow the *role* it played in the broader burden-shifting framework.

Miller also ignores that discovery only occurred in *Sims* because the party opposing arbitration timely disputed the authenticity of the signature on the agreement. *See id.* at 10-11. Again, as discussed in Ford Credit's opening brief (at 17), the *Sims* respondent requested discovery on "issues surrounding the creation and execution of the [arbitration] agreement." *Sims*, 244 W. Va. at 206, 852 S.E.2d at 273. There, unlike here, the party *opposing* arbitration had submitted an affidavit stating that "she did not remember ever seeing or signing" an arbitration agreement. *Id.* The circuit court granted limited discovery on those issues. *Id.*

Miller, in contrast, did not question the authenticity of his signature or request discovery on issues surrounding the creation and execution of the Retail Contract.[1]

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[1] Miller contends that Ford Credit's representations about the scope of his discovery requests are "simply untrue." Respondent's Br. at 10. But he does not identify a single discovery request addressing the authenticity of his signature on the contract that both parties independently submitted to the court. *Id.* There are none. *See generally* JA54-157 (Ford Credit's responses to Miller's discovery requests).

Far from it. Miller attached to his opposition brief an identical copy of the Retail Contract that Ford Credit attached to its motion to compel arbitration. JA201-202. He then cited to that contract for the proposition that he "signed a contract as part of the purchase of [his vehicle.]" JA183. Despite Miller's contention that Ford Credit's reliance on *Sims* is "woefully misplaced," Respondent's Br. at 9, the only distinctions between this case and *Sims* are ones that undermine Miller's interpretation of the case.

2. Miller does not argue that *Sims* has been overruled. In fact, Miller does not take any clear stance on the relationship between *Sims*—a case which expressly sets forth the burden that applies to parties where compelling arbitration is sought—and *Frontline*—the case which Miller insists applies here. At most, Miller appears to argue that *Frontline* reflects a rule specific to assignees seeking to compel arbitration. Respondent's Br. at 11-12. This Court should reject that argument.

First, neither *Frontline* itself, nor the cases it relies upon, purport to create a special categorical rule for assignees. *See Frontline Asset Strategies, LLC v. Rutledge*, No. 20-0395, 2021 WL 1972277, at *3-6 (W. Va. May 17, 2021); *see also, e.g., SWN Prod. Co., LLC v. Long*, 240 W. Va. 1, 5, 807 S.E.2d 249, 253 (2017) (applying "generic principles of contract law" to determine whether arbitration clause was enforceable as to assignee). Rightly so. A standard which imposes a higher evidentiary burden upon an assignee than would have applied to the assignor

is at odds with the principle that the rights of an assignee are coextensive with the rights originally possessed by the assignor. Syl. Pt. 10, *Lightner v. Lightner*, 146 W. Va. 1024, 1034, 124 S.E.2d 355, 362 (1962); Petitioner's Br. at 23-24. Miller presents no sound reason to create this conflict.

Second, *Frontline* would not justify the Circuit Court's decision even if it set forth an assignee-specific rule. In *Frontline*, there was no "link" between the arbitration agreement and the assignee seeking to compel arbitration and no document which set forth the terms of the assignment. *Frontline*, 2021 WL 1972277, at *4. The assignors—two credit card companies—sold cardholders' debt to third parties. *See id.* at *1-3. The third parties then hired Frontline to collect upon the debt. *Id.* The terms of agreement between the cardholders and their original creditors did not cover the original sale, or the subsequent hiring of Frontline. *Id.*

The link that was missing in *Frontline* is fully present here. On the day that Miller purchased his truck from Mountaineer Automotive, he signed a contract that contained an arbitration clause and an express assignment from the dealership to Ford Credit. JA52-53. To underscore that point: The assignment in the contract Miller signed covered the entirety of Mountaineer's rights under the contract, including the right to arbitrate. JA52; Petitioner's Br. at 22.

3. Miller is wrong in arguing that the Circuit Court merely applied well-settled law. In the 30-line string cite that Miller presents in support of his flawed

understanding of *Frontline*, Respondent's Br. at 13-14, he does not cite a single case decided by this Court or that applies West Virginia law. This matters: "[w]hether an arbitration agreement was validly formed . . . [is] evaluated under state law principles of contract formation." *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 134, 717 S.E.2d 909, 918 (2011).

Nor does Miller explain how these out-of-state cases are consistent with West Virginia law or why they merit persuasive force. In West Virginia, "the burden of establishing . . . an agreement to arbitrate is a light one," *Sims*, 244 W. Va. at 210, 852 S.E.2d at 277—somewhere "in the netherworld between a motion to dismiss and a motion for summary judgment," *Frontline*, 2021 WL 1972277, at *5 (internal quotation marks omitted). Yet, nearly half of Miller's cases apply far higher standards under other law.[2] The remaining cases in Miller's compilation are factually inapposite because they involve parties who sought to compel arbitration

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[2] *Spaces, Inc. v. RPC Software, Inc.*, No. 06-2520-KHV, 2007 WL 675505, at *1 (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"); *Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972, 978-979 (E.D. Cal. 2008) (contending that the burden to show an arbitration agreement exists "is a substantial one"); *Michelle's Diamond LLC v. Remington Fin. Grp., Inc.*, No. G040163, 2008 WL 4951032, at *2 (Cal. Ct. App. Nov. 20, 2008) ("[P]etitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence . . . ." (internal quotation marks omitted)); *Newman v. Hooters of Am., Inc.*, No. 8:06-CIV-364-EAK-TGW, 2006 WL 1793541, at *2 (M.D. Fla. June 28, 2006) (denying motion to compel arbitration where the moving party failed to "conclusively establish that the Plaintiff executed a written Arbitration Agreement").

without presenting a contract that contained an arbitration agreement and the opposing party's signature. *Mendez v. Puerto Rican Int'l Cos.*, 553 F.3d 709, 710 (3d Cir. 2009); *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 884-885 (Haw. 2013); *NCO Portfolio Mgmt. Inc. v. Gougisha*, 985 So. 2d 731, 736-737 (La. Ct. App. 2008); *Frankel v. Citicorp Ins. Servs., Inc.*, 913 N.Y.S.2d 254, 257-258 (N.Y. App. Div. 2010); *In re Advance EMS Servs., Inc.*, No. 13-06-00661-CV, 2009 WL 401620, at *3 (Tex. App. Feb. 12, 2009). There is no question that Ford Credit cleared that low bar.

* * *

Miller fails to explain why *Sims* does not apply; declines to argue that *Sims* was overruled; and cannot otherwise identify a single decision from this Court that justifies the evidentiary burden applied below. The Circuit Court erred in denying Ford Credit's motion to compel arbitration and stay action.

II. MILLER FORFEITED HIS CHALLENGE TO THE EXISTENCE OF AN ARBITRATION AGREEMENT BY DECLINING TO TIMELY RAISE IT.

Miller did not challenge the existence of an agreement to arbitrate in his opposition to Ford Credit's motion to compel or at any point within the time period allowed under Rule 6 of the West Virginia Rules of Civil Procedure. *See* JA182-199. This is undisputed. *See generally* Respondent's Br. at 3-8; Petitioner's Br. at 25 n.5. As a result, Ford Credit lacked any notice of Miller's position until two hours

before the hearing, JA264, and did not hear the argument in full until halfway through the proceeding, *see* JA262-274. To make matters worse, the Circuit Court curbed Ford Credit's ability to respond, JA279, then gave dispositive weight to Miller's late-raised argument, JA392-396. Rule 6 is designed to avoid this type of "prejudicial[] surprise." *Truman v. Auxier*, 220 W. Va. 358, 361, 647 S.E.2d 794, 797 (2007) (per curiam) (internal quotation marks omitted).

Instead of disputing any of this—which he cannot—Miller attacks arguments that Ford never made. It is not that Rule 6 required Miller to "remind" Ford Credit of its burden of proof, Respondent's Br. at 8, but that West Virginia law does not impose the burden that Miller advanced at the hearing and that the Circuit Court adopted. *See supra* 2-8. Rule 6, along with general forfeiture principles, prohibits parties from raising fundamentally different arguments at a hearing than were presented in their briefs. Petitioner's Br. at 24-26.

Rule 6(d)(2) governs "*any response* to a written motion, including any supporting briefs or affidavits," W. Va. R. Civ. P. 6(d) (emphasis added). The purpose of this rule and its counterpart, Rule 6(d)(1), is to prevent "prejudicial[] surprise," *Truman*, 220 W. Va. at 361, 647 S.E.2d at 797 (internal quotation marks omitted), and afford both parties "[]sufficient time in which to prepare for a hearing," *id.*; *see also Cremeans v. Goad*, 158 W. Va. 192, 195-196, 210 S.E.2d 169, 171 (1974) (recognizing that the policies underlying Rule 6 pertain to both the

moving and non-moving party). At minimum, then, Rule 6(d) requires that both parties fairly present each of their arguments with enough time for the opposing party to meaningfully respond.[3] *Truman*, 220 W. Va. at 361, 647 S.E.2d at 797; *see also W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226 (4th Cir. 2019) (when the moving party "clearly present[s] their arguments . . . in their opening brief," courts "reasonably can and should expect the [non-moving party] to respond in kind").

When Ford Credit filed its motion to compel arbitration, it understood *Sims* to apply and sought to comply with the rule that *Sims* set forth. *See* JA52-53. After Miller filed his opposition brief, Ford Credit understood its compliance with *Sims* to be undisputed. Ford Credit prepared for and presented oral argument in response to each point raised in Miller's brief. JA219-260. To Ford Credit's surprise, the entirety of Miller's oral argument revolved around an argument that he had never before raised. JA262-274, 281-288, 292-294. Miller guaranteed himself an unfair advantage by concealing his central challenge to Ford Credit's motion to compel arbitration and raising it for the first time at the hearing.

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[3] Miller seems to suggest that he could argue anything he wanted at the hearing without regard to his written opposition because Rule 6—which, again, covers "any response to a written motion" and "any supporting briefs or affidavits," W. Va. R. Civ. P. 6(d)(2)—does not expressly "mention . . . arguments or caselaw." Respondent's Br. at 6. To describe Miller's view of the scope of Rule 6 is to refute it. If a supporting brief is subject to Rule 6(d)'s timing requirements, but arguments and caselaw are not, the loophole to Rule 6(d) is very nearly as big as the rule itself.

The actual timeline of events completely undercuts Miller's assertion that it would have been "impossible" for him to have raised a *Frontline* argument in his opposition brief. Respondent's Br. at 5. *Frontline* was decided on May 17, 2021, which was over a month after Ford Credit filed its motion to compel arbitration, *see* JA50, but nearly a month before Miller filed his opposition, *see* JA200, and nearly four months before the deadline for Miller to supplement his opposition brief, *see* W. Va. R. Civ. P. 6(d)(2). Miller was the *only* party who could have accounted for *Frontline* in his briefing. He declined to do so. Nor does the recency of *Frontline* justify Miller's delay—by his own admission, the "case was publicly available to anybody with internet access." Respondent's Br. at 5.

If the Circuit Court believed it was appropriate to overlook the requirements of Rule 6 here, it should have done so deliberately and evenhandedly. Syl. Pt. 3, *State ex rel. Ward v. Hill*, 200 W. Va. 270, 276, 489 S.E.2d 24, 30 (1997). Nothing in the record suggests that the Circuit Court considered Rule 6 at all. Instead, the court simply overruled Ford Credit's objection to Miller's forfeited argument, JA264, and denied Ford Credit the opportunity to submit responsive briefing on *Frontline*, JA294. This compounded Miller's unfair advantage, prejudiced Ford Credit, and amounts to an abuse of discretion.

III. MILLER IGNORES THIS COURT'S DECISION IN *PERRY* – A CASE WHICH IS SINGULARLY DISPOSITIVE TO THE QUESTION OF WAIVER.

As Ford Credit argued in its opening brief, this Court need not remand for the Circuit Court to consider Miller's waiver argument because it squarely conflicts with *Citibank, N.A. v. Perry*, 238 W. Va. 662, 666, 797 S.E.2d 803, 807 (2016). Petitioner's Br. at 27-28. There, this Court held that Citibank had not waived its right to enforce an arbitration agreement even though it had (1) filed a collection action, (2) moved for judgment on the pleadings, (3) waited for over three years, and (4) agreed to a scheduling order before filing a motion to compel arbitration. *Perry*, 238 W. Va. at 666, 797 S.E.2d at 807; *see* Petitioner's Br. at 28. Miller does not cite *Citibank* and it does not explain why the case would not control on these facts, where Ford Credit filed a motion to compel arbitration less than a month after Miller filed his answer and counterclaim, *see* JA415.[4]

The cases that Miller relies upon pre-date *Citibank* and stand only for the broad, uncontroverted proposition that a party's conduct may constitute waiver of its arbitration rights. Respondent's Br. at 14-15 (citing *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950); *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000); *Beall*

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[4] Not only did Ford Credit cite the *Citibank, N.A. v. Perry* case in its opening brief, but Miller's counsel actually litigated that case as counsel for Perry so is well-aware of the Court's holding there.

v. Morgantown & Kingwood R.R. Co., 118 W. Va. 289, 190 S.E. 333, 336 (1937)). Miller's complete unresponsiveness to the most analogous decision from this Court only proves Ford Credit's point: The most appropriate and efficient remedy here is vacatur of the Circuit Court's order and remand with directions to compel arbitration.[5]

CONCLUSION

For the foregoing reasons, this Court should vacate the Circuit Court's order denying Ford Credit's motion to compel arbitration and remand with directions to compel arbitration, or at a minimum, to rule on the waiver and enforceability questions raised in Miller's opposition brief.

June 13, 2022

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[5] Ford Credit argued in its opening brief that Miller's unresolved unconscionability arguments are also foreclosed by law. Petitioner's Br. at 28-29. As Miller neither acknowledges nor refutes Ford Credit's position, he has waived any argument to the contrary. *Amaya v. Power Design, Inc.*, 833 F.3d 440, 449 (4th Cir. 2016) (courts "generally do not consider arguments raised for the first time on appeal (much less when sprung . . . at oral argument").

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