IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FORD MOTOR CREDIT COMPANY, LLC

Petitioner,

v.

Docket No. 22-0007
Circuit Court of Wyoming County
Underlying Circuit Court No.: 20-C-76

RONALD R. MILLER,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Petitioner Ford Motor Credit[1] initiated this case by suing Mr. Miller for $9,650.75. *JA1-15*. Petitioner chose the Circuit Court of Wyoming County as its venue for the lawsuit and proceeded against Mr. Miller as it has with hundreds of other lawsuits that it files in this State against consumers. After being sued by Petitioner, Mr. Miller brought his own claims. He filed his Answer and Counterclaims alleging multiple violations of law including threats of illegal and uncollectable fees. *JA16-30*. Mr. Miller brought claims against Ford for violations of W. Va. Code § 55-8-7; W. Va. Code § 46A-2-127(g) and W. Va. Code § 46A-2-128; Negligence; and, Unjust Enrichment. *JA16-30*. Mr. Miller issued discovery requests on March 25, 2021, prior to the filing of Petitioner's motion to compel arbitration. *JA31*. Petitioner's motion to compel arbitration was not filed until April 9, 2021, when Petitioner apparently determined that the public court system is perfectly fine for its claims against consumers, but unacceptable for claims against Petitioner. *JA32-50*.

Mr. Miller responded to Petitioner's motion to compel arbitration[2] and thereafter a hearing was held on September 21, 2021. *JA415*, Lines 16-17. Despite having five months to gather its evidence and present it to the Court, the record is clear in illustrating Petitioner's absolute failure to prove the existence of a valid arbitration agreement. No affidavits, witnesses, or even a simple request to enter evidence into the record occurred.[3] Instead, Petitioner treated the hearing purely perfunctory, and argued that motions to compel arbitration are *fait accompli*.

It is incontestable that during the proceeding, occurring five (5) months after Ford filed its motion to compel arbitration, Petitioner did not move for the admission of any evidence, including

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[1] Ford Motor Credit Company LLC hereinafter "Petitioner" or "Ford."
[2] *JA182-208*.
[3] *JA216-296*.

even merely an affidavit, which is customary in such proceedings. The alleged documents provided by Petitioner had not been authenticated and no affidavit or witness had been produced by Petitioner. The lack of authentication is also uncontested. Respondent presented the Court with well-established case law reflecting the long-standing principle that a movant for arbitration possesses the burden of establishing a valid enforceable agreement. The lower court stated it would make its ruling and expressly denied Petitioner's request for another chance to remedy its clear failure.[4] That Petitioner recognized its failure to carry its burden and made oral motions to produce actual evidence is illuminating. The lower court denied Petitioner's oral motion to reargue its motion that had been pending for five months. *JA294*, Lines 8-21.

Boldy ignoring the lower court's ruling, the Petitioner filed a supplement to its motion to compel arbitration which included new evidence, an affidavit of Miguel Brookes, an employee of the Petitioner. *JA297-307*. Mr. Miller filed a motion to strike[5] the filing of Petitioner and a hearing was held on November 12, 2021. On December 6, 2021, Judge Cochrane entered an order denying the Petitioner's motion to compel arbitration noting a failure to prove the existence of a valid and enforceable agreement. *JA387-397.*

II. SUMMARY ARGUMENT

The Petitioner in this case plainly failed to prove the existence of a valid and enforceable contract to arbitrate, which is fatal to the entirety of its arguments. Instead of properly proving the existence of an enforceable arbitration agreement, Petitioner attempted to meets its evidentiary

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[4] *JA294*, Lines 8-21.

> Mr. Price: Your Honor, for clarification, while the Court wants to see this new case, does Ford Motor Credit have an opportunity to submit a brief based upon its review of the case?
> Mr. Stonestreet: I object. The motion is today, Brian.
> The Court: I would like to just read it myself and go from there, Mr. Price. I think I understand your argument, and therefore, I will deny that request for a brief.

[5] *JA308-311.*

burden **after** the lower court expressly ruled no additional briefing or motions would be accepted on the issue. Petitioner's brief, somehow, repeatedly blames Respondent for its failure to carry its burden. None of Respondent's conduct, whether it be reliance on recent case law, or use of demonstrative exhibits, excuses the Petitioner's failure to prove the existence of a valid enforceable agreement.

In addition to failing to prove an agreement to arbitrate, Petitioner also waived any potential rights to seek arbitration by suing Mr. Miller in Wyoming County Circuit Court. Petitioner demonstrated a desire to present its legal issues in Wyoming County Circuit Court until Mr. Miller filed his Answer and Counterclaim. The Appeal should be denied.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this matter because "the facts and legal arguments are adequately presented" in the appellate briefing pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure.

IV. ARGUMENT

A. Ford Motor Credit is bound by the consequences of its failure to present any evidence to overcome its slight burden of proof before or during a hearing requiring just that.

Ford's petition asks this Court to rule that low burdens are no burdens, at all, and should be overlooked in favor of its arguments that motions to compel arbitration are effectively *fait accompli*. The function of this esteemed Court is not to prop up institutional parties who failed to adequately present their cases at the lower court level.

Ford requests that this Court protect it from the consequences of its own failure to adequately prepare for a hearing in which it possessed the evidentiary burden. As discussed *infra*, Ford is the party that initiated this lawsuit and now wishes to flee to arbitration after the layman

consumer Respondent attempted to protect himself and hold it accountable for its illegal conduct.[6] As Ford notes, *ad nauseum*, in its petition, providing evidence of a valid (and validly assigned) arbitration agreement is not a high burden. However, it is an *existent* burden – one which Ford entirely shirked assuming the lower court would simply accept as satisfied out of hand before proceeding on to the arguments that it *had* prepared to present. The hearing transcript is clear on Ford's failure to meet its burden.[7]

Ford provided no evidence that a valid arbitration agreement existed, and therefore the lower court did not allow it to proceed, *arguendo*, that one did. Ford's insistence that it be permitted to ignore its minor burden in support of denying Mr. Miller access to the state court *which it had haled him into* is especially egregious in this case. Ford filed its motion to compel arbitration without regard to its burden and noticed the motion for a hearing more than five (5) months following the filing of its motion, giving it ample time to provide proof or, at the very least, secure it for presentment during the hearing which it, itself, noticed. The lower court, relying on caselaw that included a then-recent Opinion, *Frontline Asset Strategies, LLC v. Rutledge*, No. 20-0395, 2021 WL 1972277, at *3 (W. Va. May 17, 2021), correctly ruled that, as this Court stated in that case citing Syl. Pt. 3, *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286 (2018) and its predecessors, threshold issues are just that, threshold, and burdens must still be met.

Throughout its petition, Ford confusedly conflates two (2) occurrences in this case in a misplaced effort to illustrate some nature of hypocrisy on the part of Mr. Miller and the lower court. The first is its grievance that the Respondent, at the hearing which was Ford's opportunity to present its threshold evidence, discussed, at the time, very recent caselaw which supported his

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[6] *See* Complaint, *JA1-15;* Answer to Complaint and Counterclaim, *JA16-30;* and, Motion to Compel Arbitration, *JA32-53.*
[7] *JA216-296.*

position that Ford's failure to overcome its low burden of proof was fatal to its motion in its entirety. This case was publicly available to anybody with internet access and it is unquestionable that Ford has multiple qualified counsel on both the national and state level capable of tracking this Court's decisions regarding issues of importance.[8] Therefore, Ford's criticism that it was subjected to some sort of "surprise tactic" at its own hearing is entirely unfounded. The *Frontline* decision occurred after Mr. Miller filed his response to Ford's motion to compel arbitration, making it impossible to have included in the already filed response brief. Ford's obsession with its lack of familiarity of *Frontline* also misses the larger and more important point: The burden to prove the existence of a valid arbitration agreement is always the movant's burden.[9]

The second occurrence, which Ford again relates to its lack of familiarity with *Frontline*, is its own offering of ***evidence*** days after its opportunity to present such evidence.[10] The Respondent obviously objected to this thirteenth-hour filing attempting to correct Ford's fatal error, and moved to strike.[11] In its petition, Ford refers to this as "ironic,"[12] somehow believing publicly-available caselaw presented at the hearing and a Plaintiff's *affidavit* presented days later to be a one-for-one parallel in regard to "surprise tactics."

This is obviously not the case. Multiple times throughout its brief, Ford points to W. Va. R. Civ. P. 6(d) to demonstrate how its own failure to prepare for the hearing on its own motion

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[8] http://www.courtswv.gov/supreme-court/memo-decisions/spring2021/20-0395memo.pdf.

[9] 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. P.t 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d. 293 (2010).

[10] The hearing on Ford's Motion to Compel Arbitration was held on September 21, 2021. *JA216-296.* Ford's supplemental brief was filed on September 24, 2021. *JA297-307.* Ford was ten (10) days late in the presentation of its evidence. *See* W. Va. R. Civ. P. 6(d).

[11] *See* Motion to Strike, *JA308-311.*

[12] *Petitioner's Brief*, Page 12.

somehow *unfairly* resulted in its motion being denied. However, W. Va. R. Civ. P. 6(d) makes no mention of arguments or caselaw and it supports the Respondent's position, not the Petitioner's. This rule requires the submission of affidavits, seven (7) days prior to the proceeding. In its entirety, it states:

> (d) For motions — affidavits —
>
> > (1) Service; motion. — Unless a different period is set by these rules or by the court, a written motion (other than one which may be heard ex parte), notice of the hearing on the motion, and any supporting brief or affidavits shall be served as follows:
> >
> > > (A) at least 9 days before the time set for the hearing, if served by mail, or
> > >
> > > (B) at least 7 days before the time set for the hearing, if served by hand delivery or by fax to the opposing attorney, or if left with a person in charge at the opposing attorney's office, or in the event that the opposing party is not represented by counsel, then if served by hand delivery or by fax to the opposing party, or if left at the party's usual residence with a person capable of accepting service pursuant to Rule 4(d)(1)(B).
> >
> > (2) Service; response. — Unless a different period is set by these rules or by the court, any response to a written motion, including any supporting brief or affidavits, shall be served as follows:
> >
> > > (A) at least 4 days before the time set for the hearing, if served by mail, or
> > >
> > > (B) at least 2 days before the time set for the hearing, if served by hand delivery or by fax to the opposing attorney, or if left with a person in charge at the opposing attorney's office, or in the event that the opposing party is not represented by counsel, then if served by hand delivery or by fax to the opposing party, or if left at the party's usual residence with a person capable of accepting service pursuant to Rule 4(d)(1)(B).
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> > (3) Filing. — Unless the court sets a different period, a written motion, notice of hearing on the motion, and any supporting briefs or affidavits shall be filed at least 7 days before the hearing, and any response to a motion and supporting briefs or affidavits shall be filed at least 2 days before the hearing.

Id.

Nowhere within that rule does it state that a defendant exercising his consumer rights against a sophisticated corporation represented by multiple licensed attorneys must disclose each and every publicly-available case which he might present in an oral argument before the court. **What it does state, however, multiple times, is that affidavits are subject to timing rules.** And an affidavit, of course, is central to this case, as that is exactly what Ford attempted to proffer days after its deadline had passed, and which the lower court rightfully denied.

W. Va. R. Civ. P 6(d), which the Petitioner invokes multiple times throughout its brief desperately asking this Court to fix its mistake, **is actually fatal to its own argument**, as it makes no mention of (1) any notice of caselaw to be argued or (2) any requirement that a circuit court acquiesce to a *plaintiff's* demand that it be allowed to brief a publicly-available case with precedential authority which it should have been prepared to discuss in the first place. What it *does* make mention of, however, is "**any supporting briefs or affidavits**" which "**shall be filed at least 7 days before the hearing.**" *Id.* (emphasis added). The record is clear that Petitioner's supplemental affidavit violates this rule, in addition to violating the lower courts express ruling on the oral motion attempting to repair Petitioner's failures.

The Petitioner cites myriad caselaw in support of its position that it should have been permitted another chance to present its arguments to the circuit court, none of which is persuasive in support of its position, but some of which actually support the Respondent. As the Petitioner points out, this Court has stated before, in *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 601, 694 S.E.2d 815, 934 (2010), that "[a] longstanding legal maxim adhered to by this Court is that 'the law aids those who are diligent, not those who sleep upon their rights.'" *Id.* (quoting *Dimon v. Mansy*, 198 W.Va. 40, 48, 479 S.E.2d 339, 347 (1996). The Petitioner's diligence is the very issue at question in this case when it states that it was surprised by the Respondent's

"argument" that it had not demonstrated a threshold issue in any arbitration case: whether a legal arbitration existed or, in this case, was validly assigned. The Petitioner attempts to confuse the issue by reference to the Respondent sending it and the lower court affidavits shortly before the hearing. However, these affidavits did not come from the Respondent, himself, but rather were illustrative of the fact that providing an affidavit to show a valid assignment is not an unknown or uncommon practice when litigating an arbitration issue in a case. Many litigants do this, and Respondent should not be punished (more than it is already in having to respond to Petitioner's inconsistent litigation tactics) for not reminding the emboldened Petitioner sooner that it skipped a step in overcoming its light burden. Certainly, it is not the Respondent's obligation to remind the Petitioner that W. Va. R. Civ. P 6(d) would have required its proof (an affidavit) seven days prior to the hearing, and not three days after failing to meets its burden. That Petitioner repeatedly invokes a rule that it violated, Rule 6(d), is undeniable.[13]

Again, this was the Petitioner's motion which it set for a hearing. It should not be a "surprise tactic" to Ford that it has the burden of providing threshold evidence *for its own motion.* It failed to, then demanded the lower court to simply ignore that requirement or allow it time in addition to the five (5) months it already had between the motion's filing and the hearing to brief a precedential case which had been publicly available for months.

A court is not obligated to bolster a plaintiff's case when it fails to offer supporting evidence, just as this Court is not obligated to bolster a petitioner's case when the circuit court refused to do so, as well. When a plaintiff fails to meet a burden, as the plaintiff did in this case, the issue is settled.

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[13] The hearing on Ford's Motion to Compel Arbitration was held on September 21, 2021. *JA216-296.* Ford's supplemental brief was filed on September 24, 2021. *JA297-307.*

B. Ford's reliance on *Sims* is woefully misplaced and only further illustrates Petitioner's inconsistent application of the rules.

As stated in the lower court's Order, in *Sims*, the movant for arbitration actually proved it possessed arbitration rights and even submitted to a Rule 30(b)(7) corporate deposition to authenticate and prove its alleged documents. Not so in the instant case. In fact, the Petitioner in this case outright refused to participate in any discovery and filed for a protective order.[14] This Court noted the actual discovery efforts in *Sims* and reasoned as follows:

> [Movant's] Rule 30(b)(7) representative, Ms. Orum provided the following compelling information **during her deposition in the underlying litigation which supports the authenticity of the document and the signature**. Ms. Orum **testified** that in producing Ms. Willis' arbitration agreement, she retrieved it from the human resources server ("the server") in Ms. Willis' electronic personnel file. Only the director of IT and Ms. Orum have access to the server. Ms. Orum testified that her assistant has viewing access to certain folders and files within the server, but does not have any edit access. Ms. Orum stated that she does have edit access; however, she was not specific as to what exactly she could edit...When asked about what metadata exists regarding Ms. Willis' arbitration agreement, Ms. Orum **testified** that the only metadata that could be produced with regard to this specific arbitration agreement because it was a PDF document was the date the document was scanned into the server and who scanned it. Ms. Willis' arbitration agreement was scanned into the server on December 21, 2016.

State ex rel. Troy Group, Inc. v. Sims, 244 W. Va. 203, 852 S.E.2d 270, 279 (2020). (emphasis added). Here, Petitioner refused to participate in discovery, no depositions have been taken, and it is clear that Petitioner failed to ever present evidence of its arbitration rights after having more than five months to do so.[15] The Petitioner has the burden to prove it possesses arbitration rights. This Court, like the lower court, cannot find that Mr. Miller agreed to arbitration with Ford with the lack of evidence presented and fair consideration of the litigation activity of Petitioner. *See Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021).

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[14] *JA158-161. See also*, Ford's objections to nearly one hundred discovery requests. *JA54-157.*
[15] *Id.*

This is yet another example of Ford asking this Court to protect it from its own failure when the lower court refused to do so. Ford challenges the obvious distinguishment between *Sims* and the instant case regarding proof of assignment and validity by again shifting blame to the Respondent. In its brief, Ford dismisses the difference by stating that Mr. Miller "did not identify any issues requiring discovery in opposing Ford Credit's motion to compel arbitration." Petitioner's Brief, p. 17. This is tortured logic and simply untrue. Ford was sent interrogatories, requests for production of documents, and requests for admission by Mr. Miller on March 25, 2021. *JA31*. Several of those discovery requests do, in fact, identify issues requiring discovery, despite Ford's brazen refusal to participate in litigation outside of its own motion which it did not adequately prepare. For example, Request for Production No. 5[16] requests that Ford provide "[a]ll agreements relating to the alleged amounts owed at issue or any other document whereby the [Respondent] allegedly entered into an agreement to be obligated to pay to any amount including late fees, interest, or other charges imposed on the amounts owed," and Request for Production No. 19[17] requests that Ford "[p]roduce hard copies of all retrievable information in computer storage which related in any way to this case, the alleged debts at issue, any underlying debts, including without limitation: the transactions between you the defined class and/or between you and any third-party." (emphasis added). Ford's outright refusal to participate in the discovery process in this case was unwarranted, but, more importantly, reflects the key difference between this and the *Sims* cases – that, in *Sims*, the arbitration movant actually authenticated the agreement, participated in discovery, and ultimately carried the burden.[18]

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[16] *JA100.*
[17] *JA112-113.*
[18] *JA158-161. See also*, Ford's objections to nearly one hundred discovery requests. *JA54-157.*

By citing the *Sims* case, Petitioner only further demonstrates its complete failure to meet its burden. The *Sims* case included sworn testimony, authentication of documents, and actual participation in discovery. The contrast is stark: Petitioner refused depositions, refused to participate in any discovery by filing a protective order, failed to provide sworn testimony, and failed to authenticate documents. The record in this case is clear: No sworn testimony was offered to the Court, no West Virginia Rule of Evidence was ever uttered, and no request to move for the admission or consideration of a single piece of evidence was attempted.[19]

The Petitioner has stonewalled discovery, failed to meet its burden, and never proved a chain of assignment as required by *Frontline*.[20] In *Frontline*, this Court held that "Frontline has not established that the arbitration rights of the original creditors were effectively assigned to it. Therefore, Frontline has failed to show that a valid arbitration agreement exists between it and Respondents." *Id.* Such failure obviously occurred in this matter and the *Sims* case does not support the Petitioner's position.

C. The *Frontline* case, along with numerous other cases establishing a movant's burden in arbitration proceedings, is dispositive.

Petitioner contends that the lower court misapplied this Court's holding in *Frontline* when it declined to compel arbitration in this matter. *Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021). In *Frontline*, the defendant appealed an order from the Circuit Court denying its motion to compel arbitration. The WVSCA stated that "[a] party, such as Frontline, cannot enforce the original creditor's right to compel arbitration **without proving assignment of that right**." *Id.* (emphasis added). "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is

[19] *JA216-296.*
[20] *See Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021).

extinguished in whole or in part and the assignee acquires a right to such performance." *Restatement (Second) of Contracts* § 317(1) (1981). "An agreement to arbitrate will not be extended by construction or implication." Syl. Pt. 3, *SWN Production Company, LLC v. Long*, 240 W. Va. 1, 807 S.E.2d 249 (2017). The law is clear in establishing that the movant carries the burden of proving such assignment of the right to arbitrate. *Id.* Petitioner failed to provide evidence that an arbitration agreement exists between the parties or was assigned with the right to collect the original debt. Without actual proof or evidence provided to the Court, Petitioner cannot compel arbitration.

In *Pearson v. United Debt Holdings, LLC*, 123 F. Supp. 3d 1070 (N.D. Ill. 2015), Defendant, United Debt Holdings (UDH) moved to compel arbitration just as Petitioner has here. The Court reasoned as follows:

> The Court is without sufficient evidence to find that there exists an agreement to arbitrate... **the record is devoid of evidence** supporting the conclusion that the document attached to UDH's motion [to arbitrate] is the agreement into which Pearson entered and reference in the Complaint. The document is not physically signed. No witness affirms that the documents were found in Plain Green of UDH's business records, that they were presented to Pearson when he took out his loan, or that the document actually bears Pearson's electronic signature. UDH does not argue that the agreement constitutes any type of evidence that is self-authenticating under Rule 902 of the Federal Rules of evidence.

Id. at 1073-1074. In *Pearson*, UDH failed to provide an affidavit. Here, the affidavit does not prove arbitration or any actual evidence of assignment. Petitioner asserts that an affidavit attached to a supplemental filing **after** the hearing on the motion to compel arbitration was held and **after** this Court instructed that its ruling was forthcoming. Permitting a party to present evidence that a nonmovant has no chance to rebut, after a Court instructs that a ruling is forthcoming, is inherently unfair and violates W. Va. R. Civ. P 6(d).

D. Even without consideration of *Frontline*, the law is clear that movants for arbitration always possess the burden to prove a valid enforceable agreement

Even though Petitioner claims it was surprised by *Frontline* and that it possessed an evidentiary burden, it has long been the law that the burden to prove the existence of a valid and enforceable agreement to arbitrate between the parties belongs to the Petitioner. *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.*, 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.*, 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 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.*, 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").

In this case, Petitioner simply failed to carry its burden to prove that a valid and enforceable arbitration agreement was ever agreed to between the parties and its late filed affidavit is simply that it failed to prove it possessed arbitration rights. If Petitioner actually proved an agreement, it obviously would not have had to make a filing after the proceeding to repair its fatal error.

E. Petitioner's arguments beyond its failure to evidence a valid assignment fail on the merits[21]

Even if the lower court had not ruled that Petitioner failed to provide actual evidence of a valid arbitration agreement, Respondent has sufficiently established multiple grounds which are fatal to any attempt to compel arbitration.

1. Petitioner waived any right to arbitrate the dispute

Petitioner has waived any right to enforce arbitration between the parties. Waiver is a "voluntary, intentional relinquishment of a known right" which may be "inferred from actions or

[21] Respondent's arguments herein are further analyzed in its Response to Petitioner's Motion to Compel Arbitration and Stay the Action.

conduct." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 57 S.E.2d 725, 735 (W. Va. 1950). "[A]n arbitration requirement may be waived through the conduct of the parties." *See State ex rel. Barden & Robeson Corp. v. Hill,* 539 S.E.2d 106, 111 (W. Va. 2000)(citing *Earl T. Browder, Inc. v. Cnty. Court of Webster Cnty.,* 102 S.E.2d 425, 430 (W. Va. 1958)) (holding that defendant's neglect or refusal to arbitrate dispute constituted waiver of right to require arbitration)).[22] Conduct which is "inconsistent with the right" to arbitrate is considered an implied waiver of such rights. *Beall v. Morgantown & Kingwood R. Co.*, 190 S.E. 333, 336 (W. Va. 1937).

Ford engaged in conduct inconsistent with its right to compel arbitration when it chose to initiate proceedings against Respondent in the Circuit Court of Wyoming County. Petitioner voluntarily chose to initiate proceedings in Wyoming County, and "[v]oluntary choice is of the very essence of waiver." *See Hoffman,* 57S.E.2d at 735. A party waives its right to arbitrate by acting inconsistently with that right. *See State ex rel. Barden & Robeson Corp. v. Hill,* 539 S.E.2d 106, 111 (W. Va. 2000). Petitioner's litigation conduct and choice to initiate proceedings in Wyoming Circuit Court constitutes a clear waiver of any purported right to arbitrate. Petitioner never indicated any desire to send its dispute with Mr. Miller into arbitration when it sued Mr. Miller in Wyoming Circuit Court. Only after Respondent leveled claims against Petitioner did it attempt to enforce any arbitration agreement. Petitioner clearly believes West Virginia Courts are acceptable forums to sue self-represented litigants, then objects once it is faced with claims in the very same court. Such blatant forum shopping is against public policy and should be deterred by this Court.

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[22] In the same tone, the Supreme Court of the United States has made clear that the "strong federal policy in favor of enforcing arbitration agreements" is based upon the enforcement of a contract, not a preference for arbitration as an alternative form of dispute resolution. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213,217-24 (1985). "Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context." *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987).

2. Conduct of Petitioner does not promote efficiency, which is the primary purpose of arbitration.

The primary virtue of arbitration is efficiency. According to the United States Supreme Court, "Congress' clear intent, in the [FAA], [was] to move the parties in an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hasp. v. Mercury Canst. Corp.*, 460 U.S. 1, 22 (1983). Ford Motor Credit's position in this case - that a party can affirmatively indicate its desire to litigate in public courts, aggressively pursue claims, and then strategically invoke arbitration, flies in the face of efficiency and fairness.

V. CONCLUSION

The Petitioner simply failed to meet its burden. This is why Petitioner desperately submitted evidence *after* the arbitration proceeding at issue. Obviously, if Petitioner actually met its burden, it would not have had to file three (3) briefs and an affidavit *after* the proceeding. This appeal is nothing more than an attempt to re-do a hearing that did not go well for Petitioner.

Based on the foregoing recitations of fact and arguments of law, the Respondent respectfully requests that this Honorable Court affirm the order denying Petitioner's Motion to Compel Arbitration. The Respondent further requests all such other relief as this Court may deem just and proper.

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RONALD R. MILLER,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2022, true and accurate copies of the foregoing ***"Response Brief of Respondent"*** was deposited in the U.S. Mail contained in a postage, prepaid, envelope addresses to counsel for the Petitioner as follows:

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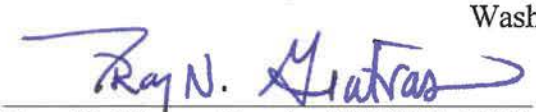

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