IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-49

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

v.

KENNA BISHOP, *Respondent.*

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

BRIEF OF THE PETITIONER

Counsel for Petitioner

Gregory W. Guevara, *Pro Hac Vice*
Tyler J. Moorhead, *Pro Hac Vice*
BOSE McKINNEY & EVANS, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000; (317) 684-5173 (Fax)
gguevara@boselaw.com
tmoorhead@boselaw.com

Larry J. Rector (6418)
Amy M. Smith (6454)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
(304) 933-8000 – Main
larry.rector@steptoe-johnson.com
amy.smith@steptoe-johnson.com

Counsel for Respondent

Rodney A. Smith (9750)
M. Alex Urban (13480)
Rod Smith Law PLLC
108½ Capitol Street, Suite 300
Charleston, West Virginia 25301
rod@lawwv.com
aurban@lawwv.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding that, as non-signatories, Petitioners Ampler Burgers Ohio LLC d/b/a Burger King ("Ampler Burgers"), Leslie McLaughlin ("McLaughlin"), Sheila Spaulding ("Spaulding"), and Teresa Stephens ("Stephens) (collectively, the "Ampler Defendants" or "Ampler"), cannot enforce the Arbitration Agreement (the "Agreement") against Respondent, Kenna Bishop ("Bishop"). Although the Agreement specifically identifies Ampler Burgers LLC as the contracting entity, Ampler Burgers Ohio LLC is the legal affiliate by whom Bishop was employed and the Agreement mandates arbitration of claims involving all "affiliated entities, and each of their employees."

2. The Circuit Court erred in concluding that Bishop's claims are not subject to the Agreement, which covers all employment claims, including "discrimination, harassment, or retaliation under . . . any state or local discrimination laws."

3. The Circuit Court erred in concluding that the Agreement is not supported by mutual consideration. The Agreement provides that "[y]our decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by this policy" and "the Company agrees to be bound by this policy."

4. The Circuit Court erred in concluding that the Agreement is a procedurally and substantively unconscionable adhesion contract. Bishop was an adult when she signed the Agreement in connection with the inception of her employment with Ampler Burgers, and the Agreement contains mutually applicable terms relating to confidentiality, discovery, and scope.

5. The Circuit Court erred in concluding that the Ampler Defendants waived their right to enforce the Agreement. Delay, in and of itself, is not a basis on which a court may refuse

to enforce an otherwise binding agreement to arbitrate. The Ampler Defendants did not "actively litigate" the case, and Bishop was not prejudiced by their actions.

II. STATEMENT OF THE CASE

For a three-week period from March 23, 2021, to April 14, 2021, Bishop was employed by Ampler Burgers as a team member at a West Virginia Burger King® franchised restaurant in Elkview, West Virginia (the "Restaurant"). (Declaration of Cody Bruns ("Bruns Decl."), ¶ 4, Appx. at 70.) As part of her onboarding process, Bishop signed an Arbitration Agreement whereby she agreed to arbitrate any employment-related claims. (Bruns Decl., ¶ 8, Ex. 1, Appx. at 71, 73-76.)

Bishop filed this lawsuit against Ampler Burgers and her former supervisors[1] on September 15, 2021, alleging hostile work environment/sexual harassment, retaliation, and constructive discharge under the West Virginia Human Rights Act ("WVHRA"), all claims subject to arbitration under the Agreement. (*See* Complaint, Appx. 1-23.) The Ampler Defendants timely filed their Answer on January 14, 2022, denying Bishop's claims and invoking the defense of arbitrability. (Answer, Appx. at 54.)

On November 9, 2022, the Ampler Defendants filed their Motion to Dismiss or Stay and Compel Arbitration and supporting brief (the "Motion" Appx, at 60). Bishop opposed the Motion on multiple grounds and, on December 22, 2022, the Circuit Court entered its "[Proposed] Order Denying Defendants' Motion to Dismiss or Stay and Compel Arbitration" (the "Order" Appx at 451).

[1] Stephens is a District Manager for the district in which the Restaurant is located. (Bruns Decl., ¶ 5, Appx. at 70.) Spaulding is the Restaurant's General Manager, and McLaughlin is a former Team Lead. (Bruns Decl., ¶¶ 6, 7, Appx. at 70.) Former Ampler Burgers co-worker Robert Falls is also named as a defendant.

The Order – signed by the Circuit Court in the exact form as tendered by Bishop's counsel – merely adopted wholesale Bishop's arguments and made several clear errors of law. Because the Ampler Defendants are contractually entitled to enforce the Agreement, because Bishop's claims are subject to the arbitration requirement, because there is mutual consideration for the Agreement, because the Agreement is not substantively or procedurally unconscionable, and because the Ampler Defendants did not waive their right to demand arbitration, the Ampler Defendants respectfully request that the Circuit Court's Order be reversed and that Bishop be compelled to arbitrate her claims.

III. SUMMARY OF ARGUMENT

Bishop was employed by Ampler Burgers Ohio LLC, an "Ampler Owned Burger King® Restaurant," as a Team Member for three weeks in March and April 2021. During her onboarding process, and as a condition of her employment, she signed an Arbitration Agreement whereby she agreed to arbitrate her employment claims against Ampler Burgers LLC, together with its affiliates (including Ampler Burgers Ohio LLC) and their employees. After she filed this lawsuit, the Ampler Defendants sought to stay the case and compel arbitration, and the Circuit Court denied the Motion, which the Ampler Defendants now appeal.

Both federal and West Virginia laws reflect a strong public policy in favor of arbitration, and any doubts or ambiguities as to the scope of an arbitration agreement should be resolved in favor of arbitration. The Circuit Court, which merely adopted wholesale Bishop's proposed Order rather than conducting its own analysis of the issues, made five errors of law which require reversal of the Order and remand to compel arbitration of Bishop's claims.

First, the Ampler Defendants may enforce the Agreement. Even though Ampler Burgers LLC was a signatory to the Agreement, Bishop was employed by Ampler Burgers Ohio LLC, a

legal affiliate of Ampler Burgers LLC, and the arbitration requirement specifically includes affiliates of Ampler Burgers LLC and their employees.

Second, the claims at issue in this case are squarely within the scope of the arbitration clause, which mandates arbitration of all employment claims, including "claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under . . . any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations."

Third, because the Agreement was entered into in the context of Bishop's employment with Ampler Burgers and is binding on both parties, it is supported by adequate consideration.

Fourth, the Agreement is neither procedurally nor substantively unconscionable – and certainly not both. Bishop was an adult when she signed the Agreement in connection with her initial employment with Ampler Burgers. As well, the confidentiality and discovery provisions are mutual and do not unduly favor one party over the other, and the limited carve-out for equitable claims involving theft of trade secrets/confidential information and unfair competition does not render the Agreement unconscionable under applicable law.

Finally, the Ampler Defendants did not waive their right to demand arbitration by "voluntarily and intentionally" relinquishing that right. Delay alone – in this instance eight months from the date when the Ampler Defendants filed their Answer and raised the arbitrability defense, and just over two months after the proper corporate defendant, Ampler Burgers Ohio LLC, was named as a party – is insufficient to establish waiver. In addition, the Ampler Defendants' limited participation in discovery, which consisted primarily of responding to Bishop's written discovery and serving a single set of discovery on Bishop – is insufficient under existing law to constitute

waiver. As well, Bishop was not prejudiced by producing materials in discovery that her attorney believed were relevant and offered to produce in the first interaction between counsel.

For these reasons, the Circuit Court erred in denying the Ampler Defendants' Motion, thereby warranting reversal and an order compelling arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for oral argument under W. Va. R. App. P. 20 because it involves substantial issues of public concern regarding whether a simple arbitration agreement entered into freely between competent parties can be enforced pursuant to its terms. Given the number of assignments of error and the public importance, the Ampler Defendants submit that the 20 minutes of argument per side provided by W. Va. R. App. P. 20(e) is necessary. The Ampler Defendants do not anticipate the resolution of this matter be through memorandum decision as a reversal is requested and "[a] memorandum decision reversing the decision of a lower tribunal should be issued in limited circumstances." W. Va. R. App. P. 21(d).

V. ARGUMENT

A. Standard of Review

"'When an appeal from an Order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo.*'" *Citizens Telecomms. Co. of W Va. v. Sheridan*, 239 W. Va. 67, 799 S.E.2d 144, Syl. pt. 2 (2017) (quoting *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.,* 238 W. Va. 465, 796 S.E.2d 574 (2017)). This Court's "review is also plenary to the extent [the Court's] analysis requires [the Court] to examine the circuit court's interpretation of the parties' agreement." *Hampden Coal, LLC v. Varney,* 240 W. Va. 284, 290, 810 S.E.2d 286, 292 (2018) (citing *Zimmerer v. Romano,* 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009)).

"Both federal and state laws reflect a strong public policy recognizing arbitration as an expeditious and relatively inexpensive forum for dispute resolution." *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 146, 785 S.E.2d 844, 852 (2016) (citing W. Va. Code § 55–10–2 [2015] (arbitration "offers in many instances a more efficient and cost-effective alternative to court litigation")). There is a strong presumption of arbitrability pursuant to federal policy, and any doubts or ambiguities as to the scope of an arbitration clause should be resolved in favor of arbitration. *U.S. ex rel. TBI Invs., Inc. v. BrooAlexa, LLC*, 119 F. Supp. 3d 512, 526 (S.D. W. Va. 2015).

B. The Ampler Defendants Are Entitled to Enforce the Arbitration Agreement

The Circuit Court first erred in holding that the Ampler Defendants cannot enforce the Agreement because the Ampler Defendants are not signatories and "Ampler Burgers, LLC is the only entity that is a signatory to the Arbitration Agreement . . . ." (Order, ¶ 62, Appx. at 461.) According to the Order, "because Ms. Bishop was an employee of Ampler Burgers Ohio," rather than Ampler Burgers LLC, the Arbitration Agreement "does not apply or limit Ms. Bishop's rights in any way." (Order, ¶ 66, Appx. at 462.) The Circuit Court was mistaken.

Ampler Burgers Ohio LLC and Ampler Burgers LLC are sister companies, each with the common ultimate parent of Ampler QSR LLC, a Delaware limited liability company. (Bruns Decl., ¶ 3, Appx. at 70.) Ampler Burgers Ohio LLC and Ampler Burgers LLC utilize the same employee handbook and the same Arbitration Agreement. (*Id.*) The Agreement provides:

> I have reviewed Ampler Burgers Dispute Resolution and Arbitration Policy and Agreement and ***agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Ampler Burgers***. I understand that final and binding arbitration will be the sole and exclusive remedy ***for any such claim or dispute against [the Company] or any affiliated entities, and each of their employees, officers, directors or agents***, and that by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had

> to a jury trial on issues covered by the Dispute Resolution and Arbitration Policy and Agreement.

(Bruns Decl., ¶ 8, Ex. 1, Appx. at 71, 73-76) (emphasis added). Ampler Burgers Ohio LLC is an "affiliated entity" of Ampler Burgers LLC, and McLaughlin, Spaulding, and Stephens are "employees" of that "affiliated entity." (Bruns Decl., ¶ 3, Appx. at 70.)

Also during her employee onboarding process, Bishop signed an acknowledgment having received and reviewed the Ampler Burgers entities' employee handbook, titled the Ampler Burgers "Employee Handbook & Culture Code for Ampler Owned Burger King Restaurants" (the "Handbook"). (Resp. in Opp. to Mot. to Comp., Ex. 39, Appx. 359-409.) The Handbook includes the Company's policy prohibiting sexual harassment at issue in this case, and it is replete with references to multiple Ampler "companies" to which it applies, including numerous usages of the plural possessive "companies."[2]

Under West Virginia law, "[a] non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration." *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 805 S.E.2d 805, 814, Syl. pt. 4 (2017). West Virginia law views arbitration agreements in an employment context no differently than in a commercial context. *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286, 292-93 (2018). "Well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Bluestem Brands*, 239 W. Va. at 702 (quotation omitted). "[A] willing non-signatory

[2] *See id*., Acknowledgment Receipt of Employee Handbook, Ampler_099-100, Appx. 403-404; Ampler Employee Handbook and Culture Code at Ampler_054 (cover page) and Ampler_058-064, Appx. 362-368 (referring to "companies" and including the sexual harassment policy specifically referenced in the Agreement).

seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory, which takes into consideration the relationships of persons, wrongs and issues." *Id*. (quoting *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198 (2015)). The Court cited *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995), for the proposition that "courts have widely held 'parties [are] estopped from avoiding arbitration [where] they ha[ve] entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves.'" *Id*. at 702.

This same result is found in countless cases across the country. *See, e.g.*, *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir.1988) (non-signatory affiliate company could compel signatory plaintiff to submit its contract dispute to arbitration even though dispute arose from a contract that plaintiff entered into with its parent company); *Aldrich v. Univ. of Phoenix, Inc*., No. 3:15-CV-00578-JHM, 2016 WL 915287, at *5 (W.D. Ky. Mar. 4, 2016), *aff'd*, 661 F. App'x 384 (6th Cir. 2016) (subsidiary was entitled to enforce arbitration agreement where employee handbook defined "the Company" to include the parent company *and* its affiliates and subsidiaries); *Goer v. Jasco Indus., Inc.*, 395 F. Supp. 2d 308, 315 (D.S.C. 2005) (non-signatories could compel arbitration because arbitration agreement was entered into between plaintiff and related corporate entity of non-signatories); *Broaddus v. Rivergate Acquisitions, Inc.*, No. 3:08-0805, 2008 WL 4525410, at *1 (M.D. Tenn. Oct. 1, 2008) ("Plaintiff, by agreeing to arbitrate with the 'Company,' agreed to arbitrate with its agent and subsidiary corporation, . . . which was Plaintiff's employer."); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110, 1112 (3d Cir. 1993) (non-signatory company could compel arbitration where it was a sister company with common ownership to the signatory).[3]

[3] *See also Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (shareholders in corporation could enforce arbitration provision in employment contract even though they were non-signatories); *Wallace v. Rick Case Auto, Inc.*, 979 F.

The present case is readily distinguishable from *West Virginia Dept. of Health and Human Resources v. Denise*, 245 W. Va. 241, 858 S.E.2d 866 (2021), in which this Court affirmed the denial of a motion to compel arbitration by an unaffiliated client of the employer with whom the plaintiff's agreement to arbitrate applied. That arbitration agreement applied only to disputes between the employee, Rene Denise, and her employer, Sunbelt Staffing, LLC. *Id.*, 858 S.E.2d at 868-69. Denise, a nurse, was assigned by Sunbelt to work at a West Virginia Department of Health and Human Resources ("DHHR") hospital, a Sunbelt client. *Id.* at 869.

Denise filed suit against DHHR, among others, alleging that she had been subjected to sexual harassment by a co-worker, hostile work environment, and retaliation, all in violation of the WVHRA. *Id.* DHHR sought to compel arbitration under the Consultant Employment Agreement. *Id.* In affirming the Circuit Court's decision denying the motion, this Court noted that there is nothing in the Federal Arbitration Act that "'authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement.'" *Id.*, 858 S.E.2d at 870 (*quoting E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002)) (emphasis in original). The arbitration agreement signed by Denise applied to disputes "between Sunbelt and Consultant," and there was no language requiring Denise to arbitrate claims

Supp. 2d 1343, 1350 (N.D. Ga. 2013) (subsidiary employer could enforce arbitration agreement entered with parent company; plaintiffs' "employment based claims clearly are 'related to' the employment relationship memorialized in the agreement, even if the claims do not allege a breach of that particular agreement"); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc*., 10 F.3d 753, 757-58 (11th Cir. 1993) (fact that company was not a signatory to agreement was not an impediment to arbitration; "the focus of [the Court's] inquiry should be on the nature of the underlying claims asserted by [plaintiff] against [company] to determine whether those claims fall within the scope of the arbitration clause"); *Arnold v. Arnold Corp.-Printed Commun's. for Bus.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (party cannot avoid practical consequence of agreement to arbitrate merely by naming non-signatory parties as defendants, which would effectively nullify arbitration rule); *Klopfer v. Queens Gap Mountain, LLC*, 816 F. Supp. 2d 281, 291 (W.D. N.C. 2011) (non-signatory subsidiary companies could compel arbitration because agreement was entered into between plaintiff and its parent company); *Collie v. Wehr Dissolution Corp*., 345 F. Supp. 2d 555, 562 (M.D. N.C. 2004) ("If plaintiffs could sue individual defendants, they could too easily avoid the arbitration agreements that they signed with corporate entities.") (quotation omitted); *Printed Commun's for Bus*., 920 F.2d at 1281 (non-signatory corporate officers sued in their individual capacity could, under agency principles, invoke the arbitration agreement between plaintiff and corporate defendant for conduct that occurred in their official capacities).

against an unaffiliated client of Sunbelt, such as DHHR, which was neither a party to the agreement or an affiliate of such a party. *Id.*

Here, Bishop agreed to arbitrate any claims not only against Ampler Burgers LLC, but also against any "affiliated entities" (*i.e.*, Ampler Burgers Ohio LLC) and each of their respective "employees, officers, directors or agents" (*i.e.*, McLaughlin, Spaulding, and Stephens). Unlike DHHR, *the Ampler Defendants are specifically identified as parties to whom the arbitration mandate applies*. As in *Bluestem Brands*, this is a case where the Agreement "supplies essential context for the signatory's claims." *Id.* Bishop signed the Agreement as a condition of her employment with Ampler Burgers, an Ampler owned Burger King® franchised restaurant, and the claims at issue arise out of and relate to that employment relationship.

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

The Circuit Court next erred in finding that Bishop's "claims do not fall with[in] the scope of claims subject to the Arbitration Agreement" (Order at ¶ 72, Appx. at 463), which the court determined was an independent basis to deny the Motion. (Order, ¶¶ 76-77, Appx. at 464.) To the contrary, Bishop's WVHRA hostile work environment/sexual harassment, retaliation, and constructive discharge claims are expressly covered by the Agreement, which requires her "to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment[,]" specifically including "claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under . . . any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations." (Bruns Decl., ¶ 10, Ex. 1 at Ampler_000039-40, Appx. at 71, 73-74.)

There is a strong presumption of arbitrability pursuant to federal policy, and any doubts or ambiguities as to the scope of an arbitration clause must be resolved in favor of arbitration. *U.S. ex rel. TBI Invs., Inc.*, 119 F. Supp. 3d at 526. Unless it can be said with positive assurance that an arbitration clause cannot be interpreted to cover an asserted dispute, a court should uphold a claim that the dispute is subject to arbitration. *E. Coast Hockey League, Inc. v. Pro. Hockey Players Ass'n*, 322 F.3d 311, 314-15 (4th Cir. 2003). Here, there is no doubt or ambiguity and under the plain terms of the Agreement that Bishop's claims are covered by the arbitration clause.

D. The Arbitration Agreement Is Supported by Mutual Consideration

In determining whether a valid agreement to arbitrate exists, such agreements are treated like any other contract, and courts apply ordinary state law principles that govern the formation of contracts. *Beckley Health Partners, Ltd. v. Hoover*, 247 W. Va. 199, 875 S.E.2d 337, 342 (2022). Under West Virginia law, "[t]he elements of a contract are an offer and an acceptance supported by consideration." *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 287, 737 S.E.2d 550, 556 (2012). Moreover, "the burden of establishing *prima facie* evidence of an agreement to arbitrate is a light one," and a party can meet its burden by simply providing copies of a written and signed agreement. *State ex rel. Troy Grp., Inc. v. Sims*, 244 W. Va. 203, 210, 852 S.E.2d 270, 277 (2020).

Here, the Circuit Court summarily concluded that because the Ampler Defendants are not mentioned by name in, or identified as signatories to, the Agreement, and because Bishop accepted employment with Ampler Burgers Ohio LLC (rather than Ampler Burgers LLC), there was no consideration for her agreement to arbitrate. (Order, ¶¶ 80, 82-86, Appx. 464-465.) This was also reversible error.

This Court analyzed this issue in *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E.2d 286 (2018), in which the plaintiff employee filed a claim under the WVHRA against his

former employer and former supervisor. *Id*., 810 S.E.2d at 290-91. The defendants filed a motion to compel arbitration pursuant to the arbitration agreement the plaintiff signed as a condition of his employment. *Id*. The plaintiff argued that the agreement lacked consideration because the agreement stated that the consideration the plaintiff received for entering the agreement was written as his "employment and continued employment" with "Blue Diamond," even though he was never employed by Blue Diamond. *Id.* at 293 (quotation omitted).

On appeal, this Court found adequate consideration for the agreement to arbitrate. "We agree with the petitioners that a mutual agreement to arbitrate is sufficient consideration to support an arbitration agreement." *Id*. "'Under West Virginia law, a mutual agreement between an employer and an employee to arbitrate their claims establishes adequate consideration.'" *Id.* at 294 (*quoting Evans v. TRG Customer Sols. Inc.*, No. 2:14-00663 2014 WL 12659420, *4 (S.D. W.Va. July 29, 2014)). This Court rejected the plaintiff's contention that the correction of the typographical error referencing Blue Diamond by an addendum executed by the parties required new, independent consideration, because "[t]he parties were clearly aware at the time the Agreement was signed that Hampden Coal was the employer—not Blue Diamond." *Id*.

In the present case, the Agreement contains a mutual promise to arbitrate: "I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration . . . ." (Bruns Decl., ¶ 8, Ex. 1, Appx at 71, 73-76). That is all that is needed to establish mutual consideration sufficient for an enforceable arbitration agreement. *See Toney v. EQT Corp.*, No. 13-1101, 2014 WL 2681091, at *3 (W. Va. June 13, 2014) ("[t]he mutual commitments to arbitrate alone constitute sufficient consideration to support the contract"); *Evans v. TRG Customer Sols., Inc.*, No. CV 2:14-00663, 2014 WL 12659420, at *4 (S.D.W. Va. July 29, 2014) (a mutual agreement to arbitrate

between an employer and employee establishes adequate consideration.) The Ampler Defendants have satisfied their "light" burden to establish an enforceable arbitration agreement supported by adequate consideration. *Sims*, 852 S.E.2d 270, 277.

E. The Arbitration Agreement Is Not an Unconscionable Adhesion Contract

The Circuit Court next erred in holding that the Agreement is unconscionable. Under West Virginia law, a contract is unconscionable only "if it is both procedurally and substantively unconscionable." *New v. GameStop, Inc*., 232 W. Va. 564, 577, 753 S.E.2d 62, 75 (2013). In this case, the Agreement is neither. (Order, ¶¶ 88-100, Appx. 465-468.)

1. The Arbitration Agreement Is Not Procedurally Unconscionable

"Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction." *New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62, 65-66 (2013). The Circuit Court found that the Agreement is procedurally unconscionable because Bishop signed the Agreement when she "had just reached the age of majority," and she "was then presented with an Arbitration Agreement explaining that Ampler Burgers, LLC was her employer and the 'Company' with the right to enforce the Arbitration Agreement," even though Ampler Burgers Ohio LLC was her actual employer. (Order, ¶¶ 92-93, Appx. 466-467). According to the Circuit Court, Bishop "in no way had a 'reasonable opportunity to understand' that she was entering an Agreement with Defendant Ampler [Burgers] Ohio." (Order, ¶ 93, Appx. at 467.) Under West Virginia law, these limited findings fail to establish procedural unconscionability.

This Court has repeatedly rejected this argument. *See*, *e.g.*, *New*, 232 W. Va. 564, 753 S.E.2d 62, 75–77 (2013) (rejecting plaintiff's argument that she was merely "a high school graduate" because she "failed to offer any evidence that she was incapable due to age, literacy or lack of sophistication to understand the clear terms of the arbitration agreement"); *Rent-A-Ctr., Inc. v. Ellis*, 241 W. Va. 660, 672, 827 S.E.2d 605, 617 (2019) (rejecting plaintiff's arguments that the arbitration agreement was procedurally unconscionable because it was a take-it-or-leave it form, she was an unsophisticated high school graduate, there was unequal bargaining power, and she signed the agreement along with many other documents on her first day of employment); *Hampden Coal*, 810 S.E.2d at 298 (rejecting plaintiff's arguments that the arbitration agreement was procedurally unconscionable because he was a simple coal miner with a high school education and had to sign the agreement to keep his job).

Further, when Bishop began her employment, she acknowledged she was working for an "Ampler Owned Burger King Restaurant[.]" (Resp. in Opp. to Mot. to Comp., Ex. 39 at Ampler_000054, Appx. at 358.) She agreed that the arbitration requirement applied to Ampler Burgers and its affiliates and their employees. (Bruns Decl., ¶ 8, Ex. 1, Appx. at 71, 73-76.) The Circuit Court made no finding – and it could not reasonably be concluded – that Bishop did not understand that she was signing the Agreement and acknowledging the Handbook in connection with her employment with her new employer, Ampler Burgers Ohio LLC.

Accordingly, the Agreement is not procedurally unconscionable.

2. *The Arbitration Agreement Is Not Substantively Unconscionable*

Nor is the Agreement substantively unconscionable, which it must also be to be unenforceable. In support of its erroneous holding on this issue, the Circuit Court pointed to certain provisions that were "exceptionally one-sided with an overly harsh effect" on Bishop, namely:

confidentiality of the arbitration proceedings; discovery protocols; and an exception to the arbitration requirement that permits Ampler Burgers to seek injunctive relief in court to enjoin unfair competition and/or unauthorized disclosure of trade secrets or other confidential information. (Order, ¶¶ 95-97, Appx. 467-477.) Again, this holding is in error.

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." *New*, 753 S.E.2d at 65–66 (quotation omitted). The factors to be weighed vary on a case-by-case basis, but generally, "courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns. In assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable." *New*, 753 S.E.2d at 65–66, Syl. pts. 11-12 (quotations and citations omitted). In making this assessment, "the paramount consideration is mutuality. Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability." *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 137, 717 S.E.2d 909, 921 (2011) (quotations omitted).

The confidentiality provision contained in the Agreement states: "All statements and information made or revealed during arbitration are confidential, and neither you nor the Company may reveal any such statements or information, except on a 'need to know' basis or as permitted or required by law." (Bruns Decl., ¶ 8, Ex. 1, Appx. at 71, 73-76). This is a *mutual* confidentiality requirement and, contrary to the Circuit Court's finding does not "shield the wrongdoing perpetrated on Plaintiff and require her to remain silent" about the sexual harassment Bishop

allegedly "was forced to endure." (Order, ¶ 95, Appx. at 467.) This confidentiality provision only prevents disclosure of statements and information "revealed during arbitration" – much like the confidentiality associated with a mediation. There is nothing in West Virginia law to suggest that this provision is unconscionable, and courts within the Fourth Circuit have held affirmatively that this sort of mutual confidentiality provision is not. *See*, *e.g.*, *Carmax Auto Superstores, Inc. v. Sibley*, 215 F. Supp. 3d 430, 436 (D. Md. 2016), *aff'd*, 730 F. App'x 174 (4th Cir. 2018) ("The Court agrees with CarMax that there is nothing substantively unconscionable about the [arbitration] confidentiality provision. The confidentiality provision is neither unreasonably favorable to the more powerful party nor is it otherwise unreasonably and unexpectedly harsh.") (quotations omitted); *Lawrence Bailey, et al., Plaintiffs, v. Thompson Creek Window Co., et al.,* No. CV 21-00844-LKG, 2021 WL 5053094, at *8 (D. Md. Nov. 1, 2021) ("[t]he presence of this confidentiality clause does not render the arbitration agreement substantively unconscionable").

With regard to discovery protocols, the Agreement provides:

> If a dispute is submitted to arbitration, either you or the Company may make a reasonable request for copies of relevant documents from each other, and both parties shall provide each other with a list of the witnesses they intend to call to testify at the arbitration at least ten days before the arbitration, unless otherwise provided by the arbitrator. No depositions or other discovery shall be taken unless ordered by the arbitrator. Disputes submitted for resolution under this policy may be amended as provided by the AAA rules.

(Burns Decl., Ex. 1, Appx. 73-76.) Without analysis, the Circuit Court summarily concluded, "these limitations would have an overly harsh effect on Plaintiff and likely permit the Ampler Defendants to shield important Rule 404(b) evidence from discovery and use at an arbitration." (Order, ¶ 96, Appx. 467-477.) There are no findings to support this conclusion, leaving the Ampler Defendants questioning how a *mutual* discovery provision could favor solely the Ampler

Defendants and permit them to somehow shield relevant evidence, *particularly given that the arbitrator has control over the discovery process*.

Courts have held repeatedly held that limited discovery in front of an arbitrator is substantially the same as discovery in front of the trial court, so some limitations on discovery in the arbitral forum do not amount to substantive unconscionability. In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 366, 752 S.E.2d 372, 397 (2013), for example, this Court reversed the circuit court's determination that the arbitration agreement at issue was unconscionable because of discovery limitations. The Court cited eight other cases to support of the holding that, since "the United States Supreme Court already has acknowledged that the simplified procedures sought in arbitration necessarily limit the formalities of discovery, we find no difficulty in concluding that, under the facts herein presented, the circuit court erred in finding the arbitration agreement to be unconscionable on this ground." *Id*. at 398. *See also In re Cotton Yarn Antitrust Litig.,* 505 F.3d 274, 286-87 (4th Cir. 2007) ("While discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration that is inherent in every agreement to arbitrate. . . . [T]he plaintiffs bear the burden of showing that the terms of the arbitration agreement would preclude them from effectively vindicating their statutory rights. . . . The plaintiffs' arguments about the discovery limitations attendant to arbitration proceedings fall well short of satisfying their burden.") (quotation omitted); *Brown v. CMH Mfg., Inc*., No. CIV.A. 2:13-31404, 2014 WL 4298332, at *8 (S.D. W. Va. Aug. 29, 2014) ("The informal discovery afforded in arbitration is one of the reasons that parties seek to arbitrate in the first place. Limited discovery rights are the hallmark of arbitration. . . . The fact that an arbitration may limit a party's discovery rights is not substantive

unconscionability. If it were, every arbitration clause would be subject to an unconscionability challenge on that ground. . . . [T]he discovery limitations apply equally to plaintiffs and the defendants. The informal discovery in arbitration does not make the Arbitration Agreement unconscionable.") (citations and quotations omitted).

As to the next basis for the Circuit Court's substantive unconscionability finding, the exclusions and restrictions provision provides that the arbitration requirement "does not apply to claims by the Company for injunctive relief and/or other equitable relief for unfair competition and/or the use of unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court." (Burns Decl., Ex. 1, Appx. 73-76.) The Circuit Court held that this arbitration carve-out for equitable relief renders the Agreement substantively unconscionable. (Order, ¶¶ 97-98, Appx. at 468.) But this provision is not substantively unconscionable because it is limited to situations in which emergency relief is warranted to protect confidential or trade secret information or to cease unfair competition and for which the arbitrator would have no authority to issue such relief. Arbitration carve-outs for injunctive relief in such circumstances are common in industry, and the Ampler Defendants are unaware of any case law finding an arbitration agreement to be unconscionable on that basis.

Because the Agreement is neither procedurally nor substantively unconscionable – and certainly not both – the Circuit Court's decision should be reversed on this basis as well.

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

"Under West Virginia contract law . . . the waiver of a contract right is defined as the voluntary, intentional relinquishment of a known right. . . . Of course a waiver may be express or it may be inferred from actions or conduct, but all the attendant facts, taken together, must amount to an intentional relinquishment of a known right, in order that a waiver may exist." *Parsons*, 785

S.E.2d at 850 (quotations and citations omitted). For waiver to occur, there must be "proof of a voluntary act which implies a choice by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on." *Id*. (quotations omitted). "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed. A waiver of legal rights will not be implied, except clear and unmistakable proof of an intention to waive such rights." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) (citations and quotations omitted); *see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001) ("The party opposing arbitration bears the heavy burden of proving waiver.") (quotation omitted).

1. The Ampler Defendants Did Not Waive Their Right to Arbitrate Based on Delay

The Circuit Court erred in holding that the Ampler Defendants waived their right to arbitrate based on the passage of time between the date of service of the Complaint and the date of filing the Motion. The Circuit Court found that delay was an "independent basis" in which to find waiver, because the "the Defendants waited more than a year to file their Motion." (Order, ¶¶ 50, 58, Appx. at 458, 460.)

As an initial matter, [a]lthough more than a year passed between service of the Complaint and the Ampler Defendants' filing of the Motion, it was less than eight months between when the Ampler Defendants timely filed their Answer (January 14, 2022), in which they expressly asserted the affirmative defense of arbitrability, and when they filed their Motion (November 9, 2022). As well, the Motion was filed just over two months after the Circuit Court entered an order substituting

Ampler Burgers Ohio LLC, the correct employer entity, as a defendant in place of the erroneously named "Ampler Restaurant Group" (August 31, 2022).[4]

During this same time frame, Ampler Burgers was attempting to determine if there was insurance coverage for Bishop's claims. As early as March 30, 2022, Ampler's counsel discussed with Bishop's counsel that Bishop's claims in this litigation might be covered by insurance. (Resp. in Opp. to Mot. to Comp., Exs. 27-28, Appx. 277-279.) On June 2, 2022, counsel for Bishop confirmed they had been informed that "there ***might*** be insurance available" and that there could be new counsel handling the defense "based on any insurance agreements/policies." (*Id*., Ex. 30, Appx. at 282.) (emphasis original).

This same communication also reflects that during this period the parties learned that Defendant Robert Falls, the alleged perpetrator of the unwanted touching described in the Complaint, would be participating in the case *pro se*. One of the attorneys for Bishop wrote to one of the attorneys for the Ampler Defendants confirming their telephone conversation that, "you are fine with our office trying to claw back the originally Agreed Scheduling Order . . . and setting up another scheduling conference to allow Bob Falls to participate.") (*Id*.) In other words, the parties were working through procedural issues relating to the case that had nothing to do with its substance and which explain the timing of the Motion.

In any event, as this Court stated in *Parsons*, "delay alone is meaningless; it is the circumstances surrounding the defendant's acts and language that determine whether the defendant implicitly intended to waive the right to arbitrate." 785 S.E.2d at 855. Stated another way, "[n]either delay nor the filing of pleadings by the party seeking a stay will suffice, without more,

[4] Counsel for Ampler Burgers first notified counsel for Bishop on November 21, 2021, that the correct employer defendant was Ampler Burgers Ohio LLC and that "Ampler Restaurant Group" was just a name used to describe several different companies that operate not only Burger King® franchised restaurants but also other franchised restaurant brands. (Reply in Support of Motion, Ex. A, ¶ 10, Ex. 1, Appx. at 422, 424.)

to establish waiver of arbitration." *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc*., 817 F.2d 250, 252 (4th Cir. 1987). "The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." *Parsons*, 785 S.E.2d at 853 (quotation omitted).

Under the totality of circumstances in this case, the Circuit Court's holding that delay in bringing the Motion was an independent ground on which to find waiver was erroneous. *Citibank, N.A. v. Perry*, 238 W. Va. 662, 666, 797 S.E.2d 803, 806-07 (2016) (reversing trial court's denial of motion to compel arbitration despite the passage of five years after action was commenced); *Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.*, No. 16-0904, 2017 WL 5192490 (W. Va. Nov. 9, 2017) (defendants did not waive the right to arbitrate even though they waited eight years after the action commenced to pursue arbitration.); *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 782 (D. S.C. 2008) (13-month delay from time of complaint to time of motion to compel arbitration did not suggest waiver of the right to arbitrate); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2nd Cir. 1991) (sole circumstance of delay for more than three years was held "an insufficient basis to support waiver"); *Carpenter v. Pomerantz*, 36 Mass. App. Ct. 627, 632, 634 N.E.2d 587, 590 (1994) (six-year delay did not warrant finding waiver of right to arbitrate, because "[o]ther than delay, there are no circumstances in the present case to support the judge's conclusion of a waiver"); *In re Generali COVID-19 Travel Ins. Litig*., 577 F. Supp. 3d 284, 294 (S.D. N.Y. 2021) (defendant did not waive right to compel arbitration despite waiting to file the motion 12 months after the complaint); *Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc*., 494 So. 2d 1, 3 (Ala. 1986) (no waiver where there was a 12-month delay in filing motion to compel).

2. The Ampler Defendants Did Not Waive Their Right to Arbitrate by "Actively Litigating" This Case

The Circuit Court also found that the Ampler Defendants waived the right to arbitrate because they "Actively Litigated This Case." (Order at §II, Appx. at 453.) In support of that holding, the Circuit Court simply adopted Bishop's proposed Order setting out 31 separate activities in the case that purportedly represented "active litigation" by the Ampler Defendants. (Order, ¶¶ 11-41, Appx. 453-456.) Of these 31 listed activities, 14 were activities undertaken *by Bishop herself*, not the Ampler Defendants. (Order, ¶¶ 11, 12, 18, 21-24, 30, 32-36, 39, Appx. 453-456.) In addition, three were activities of the Circuit Court, not the Ampler Defendants. (Order, ¶¶ 26, 28, 31, Appx. 454-455.)

The Circuit Court clearly erred in relying upon activities undertaken by Bishop or the court itself to support the holding that the Ampler Defendants "actively litigated" this case. As a matter of law, actions taken by another party are not a valid basis upon which to base a finding of waiver. *See Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc*., 380 F.3d 200, 206 (4th Cir. 2004) ("We are unwilling to include activity that the moving party did not initiate in assessing that party's" waiver of the right to arbitrate); *Coleman-Reed v. Ocwen Loan Servicing LLC*, No. CV 2:15-13687, 2016 WL 6469329, at *6 (S.D. W. Va. Oct. 28, 2016) ("Because Coleman-Reed, not Ocwen, instituted the motion for sanctions to which Ocwen responded, the court need not consider it in assessing Ocwen's" waiver of the right to arbitrate.)

The remaining 14 items identified by the Circuit Court as evidence that the Ampler Defendants "actively litigated" this case fall into seven categories: (1) (purportedly) demanding a jury trial (Order, ¶ 14, Appx. at 453); (2) cooperating with Plaintiff's counsel to substitute Ampler Burgers for the erroneously identified "Ampler Restaurant Group" as the correct corporate defendant (*id*., ¶¶ 15, 19, 25, 29, Appx. 453-455); (3) responding to written discovery served by

Bishop (*id.*, ¶¶ 17, 37, 38, 40, Appx. at 453, 455-456); (4) Ampler Burgers serving an initial set of written discovery on Bishop (*id.*, ¶ 20, Appx. at 454); (5) submitting a proposed stipulated protective order (*id.*, ¶ 27, Appx. at 454); (6) complying with procedural or court-ordered deadlines (*id.*, ¶¶ 13, 34, Appx. at 453, 455); and (7) affirmatively raising the defense of arbitration, first in their Answer and then in their motion to compel arbitration. (*id.*, ¶¶ 16, 19, 41, Appx 453-454, 456.)

Quite simply, these activities do not establish "clear and unmistakable proof of an intention to waive" the Ampler Defendants' right to arbitration. Indeed, the first of these alleged activities, upon which the Circuit Court apparently relied heavily – never happened. Contrary to the court's "factual finding," the Ampler Defendants *never* demanded a trial by jury. Instead, *Bishop* demanded a trial by jury in her initial Complaint. (Complaint at end, Appx. at 23.) Then, in the *civil cover sheet* accompanying their Answer, counsel for the Ampler Defendants simply marked the "Yes" box indicating that a jury trial had been demanded in the case, as is appropriate practice. (Civil Cover Sheet, Appx. at 59.) The Ampler Defendants did not, however, make a jury demand in the pleading itself. Pursuant to West Virginia Rule of Civil Procedure 38(b), a jury demand must be made in a pleading, and checking a box on a civil cover sheet does not qualify as a pleading. *See Litigation Handbook on West Virginia Rules of Civil Procedure, Fifth Edition* ("A party may demand a trial by jury in his/her pleading" but courts hold, as a general matter, "that marking the jury box on a civil cover sheet does not satisfy the rule.") (Litigation Handbook, Reply in Supp. of Mot. to Comp., Ex. B, Appx. 427-428.)

This fundamental error was a significant factor in the Circuit Court's finding of waiver. In her Conclusions of Law, the Circuit Court wrote:

> 51. Ampler Burgers Ohio . . . filed its Answer on January 5, 2022, in which it raised the Affirmative Defense of 'Bishop's purported claims against

> Defendants are or may be governed by a mandatory arbitration provision.' In their civil cover sheet, the Defendants checked a box indicated [sic] they wanted a jury trial.
>
> 52. As a result, Ampler Burgers Ohio clearly knew of the Arbitration Agreement, but chose not to seek to compel arbitration at that time and indicated an interest in pursuing a jury trial. . . .

(Order, ¶¶ 51-52, Appx. at 459.) The Judge disregarded the Ampler Defendants' citation to applicable West Virginia law on this issue:

> Defendants have argued that because they did not demand a jury trial in their answer that the checking of the 'jury trial' box on the civil cover sheet is irrelevant. The Court makes no determination regarding this issue. *The Court, however, observes that noting on the Civil Cover Sheet that a jury trial is desired is an act that is contrary to an intent to arbitrate this matter.*

(Order, ¶ 52, n.2, Appx. at 459) (emphasis added). Yet despite the statement that the court made "no determination regarding this issue," the Circuit Court *did* make an erroneous fact finding that the Ampler Defendants "demanded a jury trial." (Order, ¶ 14, Appx. at 453.) They did not.

Similarly, working with counsel to identify the correct corporate entity defendant demonstrates good faith on the part of the Ampler Defendants to ensure that the proper parties were included in the litigation. Because it was not yet a party to the litigation, Ampler Burgers could not have sought to compel arbitration before that was accomplished, which, as previously noted, occurred just over two months before the Ampler Defendants' Motion was filed.

Likewise, responding to written discovery served upon them by Bishop, rather than stonewalling her and waiting until the case had been transferred to arbitration, is not evidence that the Ampler Defendants were voluntarily relinquishing their right to seek arbitration. Whether in the judicial forum or the arbitral forum, the Ampler Defendants would respond to written discovery served upon them. In fact, in responding to a discovery dispute letter from Bishop's counsel on October 12, 2022, shortly before filing the Motion, Ampler Burgers' counsel specifically identified

the Arbitration Agreement in its discovery production by Bates label as the basis for its affirmative defense of arbitrability, making it abundantly clear that the Ampler Defendants were not waiving that right. (Resp. in Opp. to Mot. to Comp., Exs. 20, 23, Appx. 190-197, 202-206.)

Moreover, when Ampler Burgers served a single set of written discovery on Bishop and signed the agreed protective order, one objective was to secure production of the *Yoxtheimer* litigation materials that Bishop's counsel had offered to provide at the outset of the litigation, but subsequently stated could not be produced without a formal request and a protective order. (Resp. in Opp. to Mot. to Comp., Ex. 26 at Request No. 14, Appx. at 270-271.) Again, this discovery would have proceeded in an arbitral forum as well. Notably, neither party noticed or took any depositions or filed any dispositive motions before the Ampler Defendants filed their Motion.

Under West Virginia law, such minimal participation in judicial proceedings does not amount to the intentional relinquishment of a known right to arbitrate. In *Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.*, No. 16-0904, 2017 WL 5192490, W. Va. Nov. 9, 2017), for example, this Court analyzed whether the defendant waived its right to arbitrate after it removed the action to federal court, fully briefed a motion to dismiss based on *res judicata*, had the case remanded back to state court, participated in oral argument on the motion, submitted a proposed order on the motion, filed a motion for clarification and relief from judgment, participated in a hearing on the motion, answered the complaint, and subsequently filed, briefed, and argued a motion for summary judgment (which was not ruled upon). *Id*. at 3-4. Only then, eight years after the complaint was filed, did the defendant pursue arbitration, and the trial court ordered the dispute to arbitration. *Id*. The plaintiff appealed, arguing that the defendant waived its right to arbitrate by acting inconsistently with that right when it substantively participated in the suit. *Id*. This Court rejected this argument, finding it material that the defendant placed the parties on notice of its right to

arbitrate, such as by mentioning arbitration during hearings and status conferences with the court and asserting it as a defense in its answer. *Id*. at 6-7. This, together with "the strong federal and state public policy favoring arbitration," established that there was not "an intentional relinquishment of a known right" to arbitrate. *Id*. at 7 (quotation omitted).

Similarly, in *Citibank, N.A. v. Perry*, 238 W. Va. 662, 664, 797 S.E.2d 803 (2016), the plaintiff commenced the action, filed a motion for judgment on the pleadings, served discovery, filed an agreed scheduling order, entered fact witness disclosures, and five years later filed a motion to compel arbitration. *Id*. at 805-06. On appeal, this Court concluded that the plaintiff's actions did not "demonstrate[] an intent to relinquish a known right." *Id*. at 807. *See also Parsons*, 785 S.E.2d at 850 (defendant volunteering to produce class-wide discovery and repeatedly seeking extensions of time to plead did not amount to waiver); *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 252, 692 S.E.2d 293, 295 (2010) (compelling arbitration after parties engaged in discovery, filed a motion for protective order, and filed a motion for summary judgment).

This same result has occurred in numerous other cases:

- *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 206 (4th Cir. 2004) ("Patten notes that Skanska filed an answer containing affirmative defenses, engaged in discovery, and responded to motions. However, we have previously held that a party's filing of minimal responsive pleadings, such as an answer or compulsory counter-claim, are not necessarily inconsistent with an intent to pursue arbitration. . . . Patten fails to demonstrate that Skanska availed itself of discovery procedures unavailable in arbitration, or gained a strategic advantage through its discovery requests.")

- *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc*., 96 F.3d 88, 96 (4th Cir. 1996) ("a party seeking arbitration does not lose its contractual right by prudently pursuing discovery in the face of a court-ordered deadline") (quotation omitted).

- *Blumenthal-Kahn Elec. Ltd. v. Am. Home Assur. Co.*, 236 F. Supp. 2d 575, 579 (E.D. Va. 2002) (granting motion to compel even though defendants had "filed a third-party claim," "filed two motions to dismiss," and then filed a third "motion to dismiss for failure to join an indispensable party" and "discovery is largely completed, with the parties having

exchanged documents and taken depositions of the various party representatives . . . [and] additional depositions are scheduled for the near future").

- *U.S. ex rel. Harbor Constr. Co., Inc. v. T.H.R. Enter's., Inc*., 311 F. Supp. 3d 797, 804 (E.D. Va. 2018) ("Harbor highlights the fact that the defendants have actively participated in litigation and filed responsive pleadings, including THR's recently filed Alternative Answer and Counterclaim. However, THR's Alternative Answer and Counterclaim were filed pursuant to court order and thus are not relevant to the waiver issue.") (citation omitted).

- *David v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 440 N.W.2d 269, 274 (N.D. 1989) ("David asserts that Merrill Lynch is estopped from relying on the arbitration agreement because it answered his complaint, counterclaimed, and participated in discovery before moving to compel arbitration. We disagree. Under the Federal policy favoring arbitration, a party does not automatically waive arbitration merely by engaging in pleading and discovery activities.").

In another employment case, *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001), an employee entered into an arbitration agreement with her employer and later filed a claim of sex discrimination with the Equal Employment Opportunity Commission ("EEOC") and a Fair Labor Standards Act ("FLSA") wage claim with the Department of Labor. *Id*. at 246. The *employer* then filed a suit against the employee seeking a declaration that it did not violate the FLSA and a claim for theft of trade secrets, which the court dismissed for lack of jurisdiction. *Id*. at 247. The employer then filed a second suit against the plaintiff asserting the same claims, served discovery, and obtained documents from the plaintiff. *Id*. The plaintiff then filed a second charge with the EEOC for retaliation and filed suit. *Id*. The employer then filed a *third* action against the employee seeking a declaration that it did not violate any laws. *Id*. The cases were consolidated, one of the employer's claims was dismissed, and the employer obtained non-party discovery from the employee's prior employers. *Id*. at 247-48. Only then – after deposing the plaintiff, filing three lawsuits against the plaintiff, filing an appeal, and engaging in party and non-party discovery – did the employer move for arbitration *Id*. at 248. The court denied the motion, claiming that the

employer's participation in the lawsuits was inconsistent with its right to arbitrate so the employer waived that right. *Id*.

The Fourth Circuit reversed. *Id*. at 251. Although the employer engaged in as many as 50 "motions, responses, and other procedural maneuvers," the Fourth Circuit did not find that this amounted to an intentional relinquishment of the right to arbitrate. *Id*. at 251. The Court was unpersuaded by the employee's argument that it was unfair that the employer obtained discovery during the litigation because that discovery would have been available during arbitration as well. *Id*. at 251.

> While we agree that MicroStrategy would not have been automatically entitled to discovery in an arbitration proceeding, it is incorrect to say that discovery is completely unavailable in an arbitration proceeding. Under the rules by which the parties agreed to arbitrate, the arbitrator may order such discovery as the arbitrator considers "necessary to a full and fair exploration of the issues in dispute." Because discovery is available, albeit under standards different from those governing discovery in federal court, the relevant question is not whether MicroStrategy would have been *entitled* to such discovery in an arbitration proceeding, but whether MicroStrategy *likely* could have obtained the same information in an arbitration proceeding. . . .
>
> Lauricia, however, has made no effort to establish what discovery would or would not be available to MicroStrategy in an arbitration proceeding. . . . In our view, such an approach is insufficient to establish waiver of the right to arbitrate. As noted above, the party opposing arbitration bears a heavy burden of proving waiver. And, as demonstrated by the Supreme Court's recent decision in *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), that proof must be concrete, not merely speculative.

Id. at 251-52 (citations and quotations omitted) (emphasis original).

From the inception of the litigation, the Ampler Defendants have asserted the defense of arbitrability, and their actions were not inconsistent with their right to demand arbitration. Their limited participation in the lawsuit does not establish an "intentional relinquishment" of their right to demand arbitration.

3. The Circuit Court Erred in Finding that Bishop Was Prejudiced by the Ampler Defendants' Actions

Although initially recognizing that a party asserting waiver of another party's right to arbitrate need not show prejudice or detrimental reliance (Order, ¶ 49, Appx. at 458), the Circuit Court nonetheless entered findings of prejudice to Bishop. (Order, ¶¶ 54-55, Appx. 459-460.) Those findings were in error.

In signing Bishop's proposed Order, the Circuit Court found that "Bishop relied on Ampler Burgers Ohio's extensive litigation in this matter," that Ampler Burgers "permitted Plaintiff to engage in the fact witness development and other discovery without seeking to compel arbitration," and that the Ampler Defendants acted inconsistently with an intent to arbitrate by permitting Bishop to litigate the case. (Order, ¶¶ 54-55, Appx. 459-460.) These findings are refuted by the record of proceedings.

Bishop chose to initiate written discovery from the inception of this case by serving her first set of written discovery requests on Ampler Burgers concurrently with the Complaint. (Order, ¶¶ 12-13, Appx. at 453.) Bishop also served written discovery on Spaulding concurrently with the Complaint. (Order, ¶ 18, Appx. at 453.) After the Ampler Defendants filed their Answer in January 2022 asserting the affirmative defense of arbitrability, Bishop then served written discovery on McLaughlin and Stephens (April 8, 2022). (Order, ¶ 22, Appx. at 454.) There is nothing to suggest that Ampler Burgers somehow induced Bishop to engage in discovery or that Ampler Burgers' actions somehow prejudiced her by "permitting" her to engage in discovery.

The Circuit Court's Order also suggests that Bishop was somehow wrongfully induced to produce deposition transcripts and exhibits from the *Yoxtheimer* litigation because the Ampler Defendants did not file their Motion sooner. (*See* Order, ¶¶ 27, 37, 39, 54, Appx. 454-456, 459.)

It was *Bishop*, however, who first promoted these materials as being highly supportive of her claims and volunteered to produce the materials to the Ampler Defendants.

Following service of the Complaint in October 2021, Bishop's counsel told the Ampler Defendants' counsel that he was in possession of "explosive" discovery materials relevant to Bishop's claims that were obtained in the *Yoxtheimer* litigation, a different sexual harassment case filed against a former employer of both Bishop and Falls – RMS, Inc., an affiliate of the entity from which Ampler Burgers purchased the Restaurant assets. (Reply in Supp. of Mot. to Comp., Ex. A., ¶ 8, Appx. at 422.) Bishop's counsel stated that he wanted the Ampler Defendants to review these materials because he believed they supported Bishop's claims in this case. (*Id*.)

Over a month later, Bishop had not yet provided these materials so, on November 23, 2021, the Ampler Defendants' counsel sent an email message to Bishop's counsel reminding him to forward the materials. (*Id*., Ex. A, ¶ 11, Ex. A2, Appx. at 422, 425-426.) In response, counsel for Bishop advised that he had to determine if the materials could be produced under the terms of a protective order entered in the *Yoxtheimer* case. Then, as of February 2022, Bishop still had not produced the materials, so Ampler Burgers issued a formal request for production of the "deposition transcripts (including exhibits thereto) for Teresa Stephens, Sheila Spaulding, Lesley McLaughlin, and any other current or former employee of Ampler Burgers taken or obtained" in the *Yoxtheimer* litigation. (Resp. in Opp. to Mot. to Comp., Ex. 25, RFP No. 14, Appx. at 234.)

In response, Bishop stated that the *Yoxtheimer* materials were subject to a protective order in that case and the materials would not be produced absent the entry of an appropriate protective order in this case. (*Id*.) Ultimately, on June 1, 2022, an agreed protective order was entered by the Circuit Court. (Resp. in Opp. to Mot. to Comp., Appx at 82). Bishop then produced the *Yoxthemier* materials in November 2022. (Resp. in Opp. to Mot. to Comp., Ex. 37, Appx. at 83, 348-349.)

Based on the foregoing, Bishop was not wrongfully induced into producing the *Yoxtheimer* materials, by delay or otherwise. Bishop initially volunteered to share those materials, and later conditioned production of the materials on the entry of a protective order, which the parties secured by agreement. The Circuit Court's findings of prejudice to Bishop are unsupported by the record.

VI. CONCLUSION

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

Respectfully submitted this 18th day of May, 2023.

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

By Counsel,

/s/ *Gregory W. Guevara*
Gregory W. Guevara, *Pro Hac Vice*
Tyler J. Moorhead, *Pro Hac Vice*
BOSE McKINNEY & EVANS, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000; (317) 684-5173 (Fax)
gguevara@boselaw.com
tmoorhead@boselaw.com

/s/ *Larry J. Rector*
Larry J. Rector (6418)
Amy M. Smith (6454)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
(304) 933-8000 – Main
larry.rector@steptoe-johnson.com
amy.smith@steptoe-johnson.com

Attorneys for Ampler Burgers Ohio LLC, Lesley McLaughlin, Sheila Spaulding, and Teresa Stephens

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2023, a copy of the foregoing "***Brief of the Petitioner***" was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Rodney A. Smith
M. Alex Urban
Rod Smith Law PLLC
108½ Capitol Street, Suite 300
Charleston, West Virginia 25301
rod@lawwv.com
aurban@lawwv.com

Counsel for Kenna Bishop

I further certify that on May 18, 2023, the foregoing "***Brief of the Petitioner***" was served by first-class, United States mail, postage prepaid, on the following:

Rodney A. Smith
M. Alex Urban
Rod Smith Law PLLC
108½ Capitol Street, Suite 300
Charleston, West Virginia 25301
rod@lawwv.com
aurban@lawwv.com

Counsel for Kenna Bishop

Robert Falls
70 Derby Drive
Elkview, WV 25071

Pro Se

/s/ *Larry J. Rector*
Larry J. Rector