IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-305

Credit Acceptance Corporation,

Plaintiff-Petitioner,

v.

Kenneth E. Stanley and Kerry J. Stanley,

Defendants-Respondents.

On Appeal from Order Denying
Plaintiff's Motion to Dismiss and Compel Arbitration
Circuit Court of Jackson County, West Virginia
(The Honorable Lora A. Dyer)

PETITIONER'S REPLY BRIEF

Jason E. Manning (WV Bar No. 11277)
David M. Asbury (WV Bar No. 12952)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
222 Central Park Avenue, Suite 2000
Virginia Beach, Virginia 23462
Telephone: (757) 687-7577
Facsimile: (757) 687-7510
E-mail: jason.manning@troutman.com
E-mail: david.asbury@troutman.com

August 19, 2024

Counsel for Plaintiff-Petitioner

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ARGUMENT

I. Credit Acceptance Did Not Waive its Contractual Right to Arbitrate Respondents' Counterclaims.

Respondents' Brief goes to great lengths to distract from the most critical fact in the record: **The Arbitration Agreement expressly states that counterclaims brought later in a lawsuit may be compelled to arbitration.**

Indeed, the Agreement specifically provides: "Either You or We may require any Dispute to be arbitrated and may do so before or after a lawsuit has been started over the Dispute or with respect to other Disputes or **counterclaims** brought later in the lawsuit." (A.R. 211) (emphasis added). Under this provision, Credit Acceptance had the contractual right to initiate the collection action in the Circuit Court of Jackson County, and then seek arbitration when Respondents filed their Counterclaim. Indeed, Respondents first retained counsel in June 2023, three years after they filed their *Pro Se* Answer. In the same month, they filed a Motion for Leave to Submit an Amended Answer and Counterclaim Complaint and propounded written discovery. (A.R. 2-15). Respondents' late filing after the close of discovery substantially changed the complexion of this matter from a simple debt collection action to a complex consumer litigation. Credit Acceptance had already completed discovery and filed its Motion for Summary Judgment. Yet Plaintiffs' new filing would require Credit Acceptance to undertake a much broader and different discovery strategy and prepare a new litigation strategy complete with new dispositive motions. Such a new complexion substantially raises the costs of litigation. Accordingly, pursuant to its express contractual right to arbitrate "counterclaims brough later in the lawsuit" Credit Acceptance promptly filed its Motion to Dismiss and Compel Arbitration in August 2023. (A.R. 242). Credit Acceptance acted entirely consistently with the terms of the contract.

However, the Respondents' Brief requests this Court to ignore the plain terms of the contract and only pay attention to Credit Acceptance's "conduct" prior to the filed counterclaim. Respondents' brief goes to great lengths to distract from this provision in the hopes this Court will find Credit Acceptance waived its right to arbitration. Yet Respondents' argument and the circuit court's order directly contradicts this Court's binding precedent and federal law.

Although engaging in litigation activities *can* waive an otherwise valid arbitration agreement, it is a heavy burden to show such conduct was inconsistent with the contractual right to arbitration. *See Ampler Burgers Ohio LLC v. Bishop*, 2024 W. Va. LEXIS 294, at 21 (W. Va. 2024) ("the question in this matter turns on whether [Respondents] met [their] **heavy burden** of showing that [Petitioner] acted inconsistently with their right to arbitrate.") (emphasis added); *see also J&S Const. Co., Inc. v. Travelers Indem. Co.*, 520 F.2d 809, 809 (1975) (defendant did not waive its right to invoke arbitration after filing an answer, demanding a jury trial, answering interrogatories, participating in depositions, and waiting more than one year before demanding arbitration.) *see also Citibank, N.A. v. Perry*, 797 S.E.2d 803, 807 (W. Va. 2016) ("Less than two months after Mr. Perry filed his counterclaim, Citibank filed its motion to compel arbitration and to stay the court action. Under these particular circumstances, we do not find evidence that Citibank's conduct demonstrated an intent to relinquish a known right.")

Respondents' Brief requests this Court to apply the standard found in Justice Bunn's concurrence in the recent *Ampler Burgers Ohio* decision. (Resp.'s Brief at 13-14). There she wrote that to "determine whether Ms. Bishop met her burden, Ampler Burgers' conduct must be examined in light of the **totality of the circumstances**." *Ampler Burgers Ohio LLC*, 2024 W. Va. LEXIS 294, at *31 (W. Va. 2024) (emphasis added). Justice Bunn continued that Ms. Bishop "had to establish waiver by clear and convincing evidence. '[W]here the alleged waiver is implied, there

must be clear and convincing evidence of the party's **intent to relinquish the known right**.'" *Id*. (emphasis added). Under this standard the holding of the Court and the concurrence in Ampler Burgers found that there was no waiver of the right to arbitration even though the party participated in litigation. Respondents' heavy reliance on a decision that did not find a waiver of arbitration is misplaced.

Indeed, the most important circumstance the Respondents request this Court to disregard is that the contract expressly gave Credit Acceptance the right to arbitrate "counterclaims brought later in the lawsuit." (A.R. 211), a circumstance not found in *any* case cited in Respondents' Brief. Most of the cases, cited by Respondents are not even West Virginia cases let alone cases where the arbitration agreement contained the express right to arbitrate counterclaims. Here, the only way to affirm the findings and conclusions of the circuit court is to patently rewrite the Arbitration Agreement by deleting the words "after a lawsuit has been started" and "counterclaims brought later in the lawsuit." This language is clear and unambiguous and must be applied to the present circumstances.

Indeed, it is impossible to find that Credit Acceptance waived this provision—its express right to compel counterclaims—by the actions that took place *before* the Respondents filed their Counterclaim. Credit Acceptance had no knowledge that the Plaintiffs intended to file a Counterclaim prior to that time and therefore could not have waived a *known* right. Credit Acceptance acted consistently with its known right. It operated under the belief that it could file and litigate a collection matter in West Virginia circuit court and if or when the Respondents filed a counterclaim, it could move the circuit court to compel arbitration because that is what the contract says it may do.

Further, filing the initial litigation in circuit court is not contrary to its right to arbitrate because the American Arbitration Association's ("AAA") continued moratorium on debt collection arbitrations prevented Credit Acceptance from initiating arbitration with them when the only claims at issue were Credit Acceptance's debt collection claims.[1] The Respondents' Brief argues that it is not clear whether this debt collection action is subject to the moratorium and further that such disputes could be arbitrated before JAMS, which does not have any moratorium. However, the moratorium clearly includes, "individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute," which is the situation here. Further, Credit Acceptance has a right to arbitrate with *either* JAMS or AAA. Due to AAA's moratorium on such actions, Credit Acceptance did not act contrary to its known right to arbitrate claims, especially counterclaims, before AAA.

The circuit court erroneously found a waiver due to the "significant passage of time" and that Credit Acceptance "only chose to exercise that right when [Respondents] retained counsel." (A.R. 299, ¶ 13). However, this is not near enough to meet the heavy burden that Credit Acceptance waived its known right to arbitrate. The circuit court's analysis completely ignores that Credit Acceptance had the express ability to invoke arbitration "after lawsuit has been started" and with respect to "counterclaims brought later in the lawsuit." (A.R. 211). Indeed, the circuit court ignored the fact that Credit Acceptance filed its Motion to Dismiss and Compel Arbitration promptly after Respondents filed their counterclaim. This is the most important fact in determining waiver and proves no waiver occurred. Here, Credit Acceptance timely elected to pursue arbitration as expressly permitted under the terms of the Arbitration Agreement.

[1]Notice on Consumer Debt Collection Arbitrations, AAA (Feb. 15, 2024, 2:26 PM), https://www.adr.org/sites/default/files/document_repository/Notice%20on%20Consumer%20Debt%20Collection%20Arbitrations%20(1).pdf

II. ***Kirk v. Credit Acceptance*** **Has No Relevance to This Matter**.

The circuit court erred when it found that the Wisconsin case *Kirk v. Credit Acceptance* case gave Credit Acceptance notice that West Virginia circuit courts would find waiver if it filed collection matters before them. *Kirk v. Credit Acceptance Corp*., 829 N.W. 2d 522, 533 (Wis. Ct. App. 2013). Specifically, the circuit court "note[d] that [Credit Acceptance] had prior notice that it could potentially waive its right to arbitrate due to delay when the Wisconsin Court denied the motion to compel arbitration after the passage of 15 months." (A.R. 299, ¶ 9). However, this finding is severely flawed because: (1) a Wisconsin case cannot give Credit Acceptance notice for West Virginia case law; (2) the Wisconsin case had a substantially different arbitration agreement than the one at issue here; and (3) numerous other courts including a Wisconsin federal court and a West Virginia circuit court have upheld the right to arbitrate counterclaims under this exact contract provision.

First, Respondents' Brief argues that Wisconsin's waiver law is nearly identical to West Virginia's. (Resp.'s Brief at 19). However, there is no dispute that this Wisconsin court applied Wisconsin contract law which is not binding on West Virginia courts. Credit Acceptance has the right to rely on the binding precedent in West Virginia such as *CitiBank, N.A. v. Perry,* when determining whether filing such an action could waive its right to arbitrate. 797 S.E.2d 803 (W. Va. 2016). Credit Acceptance should not be shackled with the excessive burden of monitoring dockets nationwide for adverse decisions when preparing its litigation strategies in the state of West Virginia. West Virginia law and the binding precedent of this Court should be enough.

Next, Respondents' Brief argues that the two arbitration agreements are "nearly identical in substance." *Id*. at 19. They are not. This again ignores the most important fact in this matter, that the Arbitration Agreement here contains an express right to arbitrate, "counterclaims brought later in the lawsuit." (A.R. 211). The arbitration agreement in *Kirk* did not have this provision.

See Kirk, 829 N. W. 2d at 532. As argued above, this is the most important circumstance when analyzing the "totality of the circumstances" and proves that Credit Acceptance did not waive its contractual right to arbitrate counterclaims brought later in the lawsuit.

Finally, to the extent Wisconsin courts or other out-of-state courts are relevant to this matter, they have all consistently upheld Credit Acceptance's express contractual right to arbitrate counterclaims in this version of the contract. *See Cantu v. Credit Acceptance Corp*., 2023 U.S. Dist. LEXIS 149843, 2023 WL 5508800 (E. D. Wis. Aug. 25, 2023) (upholding Credit Acceptance's arbitration agreement and compelling to arbitration after counterclaims had been filed); *see also Credit Acceptance Corp. v. Hinton*, 2018 Conn. Super. LEXIS 114, *14, 2018 WL 793934 (CT 2018) (same). The Supreme Court of Connecticut in *Hinton* specifically speaks to this provision and upholds it when it found Credit Acceptance did not waive its right to arbitrate counterclaims:

> In the present case, the court cannot make a finding of waiver. With regard to the Hintons' argument that Credit Acceptance has waived its right to compel arbitration by initiating this ligation, this argument is unavailing. Although, the arbitration clause notes that a complaining party shall give a dispute notice prior to initiating arbitration, the very next paragraph provides that "[e]ither You or We may require any Dispute to be arbitrated and may do so before or after a lawsuit has been started over the Dispute or with respect to other Disputes or counterclaims brought later in the lawsuit." Interpreting the contract as a whole and giving effect to every provision; *United Illuminating Co. v. Wisvest-Connecticut, LLC*, supra, 259 Conn. 671; the arbitration clause clearly encompasses a situation, such as the one here, where arbitration is requested while suit is pending. **That arbitration was requested in response to a counterclaim is of no import; it was anticipated by the plain language of the contract**.

Id. at 13-14 (emphasis added). Indeed, even one West Virginia circuit court has upheld this specific provision and permitted a plaintiff to compel arbitration when the defendant Credit Acceptance filed a counterclaim. *See Adkins v. Credit Acceptance Corp*., 2015 W.V. Cir. LEXIS 87, ¶ 4 (Kanawha Cnty, Nov. 10, 2015) ("The Plaintiff did not waive his right to compel arbitration **under this specific contract** drafted by the Defendant by conducting some discovery, allowing

his client to be deposed, or by requesting depositions from the Defendant.") (emphasis added). Accordingly, it is clear that the Wisconsin *Kirk* case could not provide Credit Acceptance with any notice that West Virginia courts would find a waiver under the present circumstances. The circuit court erred.

III. The Circuit Court Ignored the Binding Precedent in *Perry v. CitiBank*.

Although, the *CitiBank, N.A. v. Perry*, decision is strikingly similar to the matter at hand, was argued extensively in briefs and at oral arguments, and even cited by the circuit court in its order, the circuit court ignored its reasoning in its ruling. 797 S.E.2d 803 (W. Va. 2016). The circuit court's order directly contradicts the precedent found in *Perry*. The circuit court should not be permitted to ignore such binding precedent.

Resp.'s Brief largely focuses on out-of-state decisions regarding a different arbitration agreement. The Brief gives very little attention to the most valuable precedent for this Court. When Resp.'s Brief does address *Perry* it argues that Credit Acceptance's heavy reliance on *CitiBank v. Perry* is misplaced even though it admits that "this case are admittedly similar." (Resp.'s Brief at 20). Respondents argue that this Court disregarded the non-waiver clause and focused on CitiBank's conduct where it found no waiver. Here, the Court cannot simply "disregard" the non-waiver clause as it is much stronger than the vague provision found in *Perry*. Here, the clause expressly provides a right to arbitrate "counterclaims brought later in a lawsuit." But even if it did not, there are no substantive distinctions from CitiBank's conduct in *Perry* and Credit Acceptance's conduct here. The cases are nearly identical, in that both cases were started as simple debt collection actions in state court, answered by pro se defendants, litigated for a number of years, dispositive motions were filed, then defendants retained counsel and filed a counterclaim alleging claims under the WVCCPA. Under these circumstances, this Court correctly found that CitiBank did not waive its right to arbitrate the untimely counterclaim. The

same result is warranted here. Any differences in the cases are not relevant to whether Credit Acceptance waived a known right to arbitrate a counterclaim brought later in the lawsuit.

Despite the numerous similarities, Respondents argue that there are differences between to the two cases. Specifically, they argue that the "Stanleys did not admit they owed a debt in their *pro se* Answer." (Resp.'s Brief at 20). This is a distinction without a difference because the Respondents *did* admit they owed the debt by failing to deny Credit Acceptance's Requests for Admission. (Resp. Appx. at 13-14) ("As a matter of law by failing to respond to the requests for admission, Defendant has admitted to the debt.").

Next, Respondents argue that their filed counterclaim presented no "significant[] change" to the proceeding, whereas the *Perry* matter contained a counterclaim which changed a simple debt collection matter into a complex class action suit. (Resp.'s Brief at 21). However, the Respondents *admit* that their counterclaim brought new claims which were not subject to previous action and were presented for the very first time. This includes Count V for unreasonable disposition of the vehicle which was not asserted in any other filing including their *Pro Se* Answer. Moreover, the very action of filing a counterclaim substantially changes the complexion of the case. Credit Acceptance's entire role in the matter changes, its entire litigation strategy must change. Discovery had already closed and dispositive motions were already filed, yet the counterclaim would produce much broader and different discovery and dispositive motions. At bottom, the entire litigation has substantially changed to an entirely new lawsuit. Accordingly, just as in *CitiBank v. Perry*, the Respondents' counterclaim, "significantly changed the character of the proceeding from a simple debt collection action…" *Id.* at 21. Respondents' Brief simply fails to articulate exactly why the Court should reach a different conclusion here as it did in *Perry*.

Both this case and *Perry* were initiated as "a simple debt collection action in the circuit court" where the borrowers filed a pro-se response. *Perry*, 797 S.E.2d at 807. Both creditors filed a dispositive motion which "never was ruled upon by the circuit court." *Id*. Then "[a]fter a long period of about three and one-half years of inactivity in the case, [both borrowers] ultimately obtained counsel" with whom both borrowers filed a counterclaim. *Id*. Indeed, the borrower in *Perry* filed his counterclaims "more than four and one-half years after Citibank initiated its debt collection action against him." *Id*. In addition, both cases even have counterclaims alleging claims under the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Then both creditors promptly filed their motions to compel arbitration within two months of the filing of the counterclaims. The circuit court in *Perry*, much like the circuit court here, erroneously found that the creditor waived its right to arbitration due to the significant time that had passed from the initiation of the litigation. However, this Court correctly overturned the circuit court's ruling, finding CitiBank had not waived a known right.

Here, the exact same ruling is warranted. The only significant factual difference between the two matters is that this Arbitration Agreement's non-waiver clause is even more precise to the current circumstances. In *Perry*, the non-waiver clause did not expressly provide that counterclaims brought later were an express basis to compel arbitration. Yet here Credit Acceptance has the express ability to invoke arbitration "after a lawsuit has been started" and with respect to "counterclaims brought later in the lawsuit." (A.R. 211). The language in this Arbitration Agreement is even stronger in favor of compelling arbitration than the language found in *Perry*.

Accordingly, the *Perry* case is on point, binding against the circuit court, and instructive in this case. The circuit court failed to apply this Court's binding precedent. In considering this

matter, the facts and law are so strikingly similar to be nearly undistinguishable. It would be impossible to affirm the circuit court's ruling without overruling *Perry* as well. Accordingly, this Court should reverse the circuit court's order which was in error.

IV. The Circuit Court Made No Ruling on Discovery and Correctly Determined the Respondents Did Sign the Arbitration Agreement.

Respondents' Brief argues that the circuit court "permitted limited discovery on the enforceability of the agreement to arbitration." (Resp.'s Brief at 24). However, the circuit court's order did not order "limited" discovery on arbitrability. It did not render any discovery ruling other than to state that "discovery may further support 'Respondents' waiver argument, or in the alternative, it may support CAC's argument that arbitration is appropriate." (A. R. 269, ¶ 14). Yet this paragraph is not a legal conclusion and is inapposite to her erroneous finding that Credit Acceptance already waived its right to arbitration. If anything, the Court is ordering broad discovery, and not "limited" discovery which defeats the entire purpose of arbitration. Requiring Petitioner to bear the full costs of discovery for the purpose of arbitration frustrates the entire purpose of entering into an arbitration agreement. As one federal court argued:

> Applying these principles, discovery requests should be **limited** to uncovering relevant evidence only for claims that specifically challenge the agreement to arbitrate. *See* FED. R. CIV. P. 26(b). **Discovery requests seeking evidence that may support claims challenging the contract as a whole are inappropriate** because, when a motion to compel arbitration is pending, the court has not yet determined what issues, if any, are proper for court consideration. Moreover, if the agreement to arbitrate is enforced, **but broad discovery is permitted, the intention of the parties at the time of contract is frustrate**d given that arbitration is usually sought to avoid expensive, time-consuming litigation.

L & R Farms P'ship v. Cargill, Inc., 2011 U.S. Dist. LEXIS 172916, *8 (emphasis added).

Moreover, the circuit court's order never addressed the Respondents' argument directly but found that they *did* sign the Declaration Acknowledging Electronic Signature Process "where they agreed to sign the remaining documents with an electronic signature." (A.R. 269, ¶ 3). This

correct finding is consistent with the record. *Id*. Indeed, by failing to answer Credit Acceptance's Requests for Admission, Respondents admitted that they had consented to the contract. (Resp.'s Appx at 39-41). The Court should reject Respondents' new arguments which have no basis or evidence in the record at all.

In West Virginia, when a party makes a *prima facie* case for arbitration, the burden of persuasion then shifts to the party opposing arbitration. *See Ford Motor Credit Co. v. Miller*, 248 W. Va. 231, 235, 888 S.E.2d 257, 261, 2023 W. Va. LEXIS 195, *10 (W. Va. 2023 (citing *State ex rel. Troy Grp., Inc. v. Sims*, 244 W. Va. 203, 852 S.E.2d 270, 2020 W. Va. LEXIS 814, 2020 WL 7223173 (W. Va. 2020). Here, Respondents have provided no evidence in support of the self-serving allegations which contradict the clear record that they signed the Arbitration Agreement. They have failed to meet their burden as they provided no evidentiary support that warrants limited discovery, and the circuit court improperly failed to limit discovery to the issue of arbitrability. Broad discovery is entirely inappropriate because the record is clear that Respondents willingly signed the Arbitration Agreement on their own accord. There is a binding arbitration agreement. Pursuant to the terms of the arbitration agreement, Credit Acceptance timely filed its Motion to Compel Arbitration which the circuit court erroneously denied. Accordingly, this Court should reject Respondents' argument that limited discovery is necessary and instruct the circuit court to submit this matter to arbitration before AAA.

CONCLUSION

This Arbitration Agreement is a binding contract that must be enforced. Under the FAA, this Court must interpret the agreement within the framework of traditional contract rules, including the requirement to enforce clear and unambiguous contract terms. The agreement gave Credit Acceptance the right to file its collection action, and then later seek arbitration as soon as a counterclaim was filed. To deny Credit Acceptance that right requires the Court to effectively

rewrite the contract between Respondents and Credit Acceptance, overrule its own precedent, and, most importantly, it would be at odds with this Court's constitutional duty to apply arbitration clauses which involve interstate transactions. Credit Acceptance requests that this Court reverse the circuit court's order denying the Motion to Compel Arbitration and remand the matter with instructions to permit the action to proceed to arbitration with a corresponding stay of proceedings pending its outcome or in the alternative dismiss the matter without prejudice while arbitration is pending.

Dated this 19th day of August 2024.

/s/ *David M. Asbury*
David M. Asbury (WV Bar No. 12952)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
222 Central Park Avenue, Suite 2000
Virginia Beach, Virginia 23462
Telephone: (757) 687-7537
Facsimile: (757) 687-1546
E-mail: david.asbury@troutman.com

Counsel for Plaintiff-Petitioner

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CERTIFICATE OF SERVICE

I certify that on this 19th day of August 2024, a true and correct copy of the foregoing *Reply Brief of Petitioner Credit Acceptance Corporation* was filed using the West Virginia File & ServeXpress system which will automatically send email notification of such filing to all counsel of record.

/s/ David M. Asbury

David M. Asbury (WV Bar No. 12952)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
222 Central Park Avenue, Suite 2000
Virginia Beach, Virginia 23462
Telephone: (757) 687-7757
Facsimile: (757) 687-7510
E-mail: david.asbury@troutman.com

Counsel for Plaintiff-Petitioner