IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 24-305

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CREDIT ACCEPTANCE CORPORATION,

Petitioner-Plaintiff/Counterclaim Defendant below,

v.

KENNETH E. STANLEY and
KERRY J. STANLEY,

Respondents-Defendants/Counterclaim Plaintiffs below.

RESPONDENTS' RESPONSE BRIEF

RESPECTFULLY SUBMITTED BY:

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RESPONDENTS' RESPONSE TO PETITIONER'S ASSIGNMENT OF ERROR

Respondent submits that the correctly framed question presented to this Court in Petitioner's appeal is as follows:

> Does a litigant waive its right to arbitrate when it substantially invokes the litigation machinery in circuit court for years by filing its lawsuit, actively litigating its claims, filing a motion seeking summary judgment, all while having notice of claims and defenses from an Answer.

The Answer to this properly framed question is 'Yes.' Under the standards for waiver set forth by this Court, a litigant that seeks dispositive motion relief from a circuit court while litigating for years substantially invokes the litigation machinery and intentionally acted inconsistent with a right to arbitrate.

STATEMENT OF THE CASE

CAC filed this action on February 20, 2020. During years of litigation it initiated, CAC sought judgment from the circuit court not once, but on multiple occasions. Only after the Stanleys obtained counsel did CAC shift positions and demand that the circuit court send the matter to arbitration. CAC sued Respondents Kenneth and Kerry Stanley after duping them into purchasing a vehicle with a fraudulent odometer and after concealing significant accidents and damage the 2008 Ford Escape. The Stanleys filed a counterclaim alleging fraud, unconscionable conduct, commercially unreasonable disposition, violation of both the federal Truth in Lending Act and the federal Odometer Act in connection with the sale and repossession of the 2008 Ford Escape. The Stanleys voluntarily surrendered the vehicle after they learned of the fraud and consumer violations. If CAC had its way, it would already have a judgment from the circuit court and CAC would be actively garnishing the Stanleys' wages for a vehicle with a fraudulent odometer. The record confirms how CAC sued the Stanleys in Jackson County, West Virginia, sought a judgment and now seeks to abandon CAC's chosen forum where it moved for dispositive relief.

A. Parties

Kenneth E. Stanley is a married man with three sons. He works as a car mechanic and has a ninth-grade education and his GED. He is unsophisticated in financial matters. He lives at 4074 Medina Road, Ravenswood, West Virginia, 26164. Kerry J. Stanley is married to Kenneth Stanley. She has a sixth-grade education and her GED. Kerry Stanley is permanently disabled with several physical and mental impairments. She is unsophisticated in financial matters. She lives with her husband of 39 years. (Credit Acceptance-Appx. [1] 8.)

CAC is a corporation registered to do business in West Virginia with its principal office at 25505 West Twelve Mile Road, Southfield, Michigan, 48034. CAC financed the purchase of the subject vehicle on April 17, 2018. CAC is regularly engaged in the business of providing subprime consumer financing for the purchase of used autos. Its business targets individuals with poor or no credit history who lack alternative ways to purchase the vehicles needed for daily transportation to work, medical appointments, school, etc. CAC operates a national enterprise to this end by establishing joint ventures with local auto dealers (whom CAC refers to as its "Dealer-Partners") to facilitate and accomplish the consumer credit sale of used motor vehicles, and the making, servicing, and securitization of auto financing contracts with such consumers. CAC has established such joint ventures with numerous auto dealerships doing business with West Virginia consumers across the geographical breadth of the state. The enterprise arises from and is controlled and directed by standardized and uniform written dealer agreements, drafted by CAC, which each Dealer-Partner is required to sign with CAC. Pursuant to these standardized agreements, each Dealer-Partner agrees to pay substantial sign-up and/or ongoing fees to CAC for the right to

[1] Petitioner cites to its own Appendix as 'A.R.' Respondents, however, for the sake of clarity, reference Petitioner's Appendix as "Credit Acceptance-Appx."

become a Dealer-Partner and use CAC's patented business systems, sales procedures, and financing practices. CAC oversees and enforces operation of these joint ventures to assure compliance and conformity with the terms of those standard agreements. (Credit Acceptance-Appx. 8-9.)

B. The Stanleys Purchase a 2008 Ford Escape

In mid-April 2018, the Stanleys visited a tent sale hosted by a dealership in the parking lot of the Ripley Wal-Mart with the intention of purchasing a new vehicle that would provide reliable transportation to take Kerry Stanley to her many out-of-town doctor appointments. The salesperson at the tent sale directed the Stanleys to the dealership in St. Albans. On April 18, 2018, the Stanleys visited the dealership, who took a credit application from them. After running the Stanleys' credit, the dealer represented that the only vehicle they could afford was a 2008 Ford Escape. Disclosures provided by the dealer and the actual odometer indicated the mileage for the vehicle was 87,549. This was false. The dealer represented it had conducted "110-point check" on the vehicle, and "everything was in great condition." This was also false. (Credit Acceptance-Appx. 9-10.)

The dealer ultimately disclosed the price of the vehicle would be $10,999.00. Unbeknownst to the Stanleys, the book value of the vehicle was approximately $5,500.00. Pursuant to CAC's proprietary software, the value of the vehicle was set at $10,999.00 for sales financed by CAC. Based upon the representations of Charleston Mitsubishi, the Stanleys agreed to purchase the vehicle for $10,999.00. (Credit Acceptance-Appx. 10.)

C. The Stanleys Finance the Vehicle

The Stanleys obtained financing through CAC for, unbeknownst to them, a defective vehicle. The Stanleys provided a trade-in vehicle, which served as a $2,000 down payment toward

the purchase of the vehicle. The Stanleys financed a total of $12,583.26, with a high annual percentage rate of 22.99%, for a term of 48 months, resulting in monthly payments of $403.24.

The Stanleys' signing process was extremely hurried and rushed. The dealer's employee quickly flipped through a stack of documents, which included a Retail Installment Contract and Security Agreement, then directed the Stanleys to sign electronically on a separate pad. Mr. Stanley asked for the employee to slow down so he could understand the transaction, but the employee refused. At no time prior to signing the pad did the Stanleys receive the material disclosures in a form they could keep. At no time were the Stanleys able to view the face of the title for the vehicle. Included in the transaction, without the Stanleys' knowledge, was an expensive extended warranty contract totaling $1,717.00. Also included, without the Stanleys' knowledge was a $905.00 charge for GAP protection. (Credit Acceptance-Appx. 10-11.)

D. The Stanleys Discover Material Fraud

In late summer 2019, the Stanleys were struggling with the large payment on such an old vehicle. Although they timely made payments on the vehicle to CAC, Kerry Stanley's medical bills were mounting, and the car payment was straining the couple's finances. The Stanleys decided to attempt to trade in the vehicle with another dealer in Ripley: I-77 Chrysler Dodge Jeep. I-77 Chrysler Dodge Jeep pulled the CARFAX report for the 2008 Ford Escape. At this point the Stanleys learned for the first time that the odometer displayed the incorrect mileage and that the vehicle had been involved in significant accidents affecting the value of the vehicle. I-77 Chrysler Dodge Jeep refused to accept the 2008 Ford Escape as a trade-in because of the damage and odometer issues. (Credit Acceptance-Appx. 11.)

After learning of the fraud, the Stanleys contacted the dealer, who at first misrepresented that the Stanleys had the benefit of the CARFAX report at the time of the purchase, and then

eventually refused to speak to the Stanleys about their complaints. The Stanleys next contacted CAC to notify the finance company about the fraud. CAC representatives disclaimed any responsibility and instructed the Stanleys to contact the dealer. Frustrated with the lack of any relief despite knowledge of the scam, the Stanleys agreed to voluntarily surrender the vehicle to CAC. (Credit Acceptance-Appx. 11-12.)

E. CAC Repossesses the Vehicle

CAC repossessed the vehicle on August 27, 2019. Pursuant to a commercially unreasonable sale, CAC sold the vehicle for $2,400,00. Whether the fraudulent odometer was ever disclosed to the new purchaser, is still unknown. (Credit Acceptance-Appx. 12.)

F. CAC Waives Its Right to Arbitrate Any Dispute Between the Parties

On February 20, 2020, CAC chose to sue the Stanleys for the alleged deficiency balance on the vehicle—a purported $8,172.98—by filing a Complaint in the Circuit Court of Jackson County, West Virginia. (*See* Stanley-Appx. 1-8)[2] CAC attached the Arbitration Clause as an exhibit to the Complaint. (*See* Stanley-Appx. 6.) The Stanleys timely filed a *pro se* Answer on March 3, 2020, in which the Stanleys denied liability for the deficiency balance because they were lied to about the mileage of the vehicle during the purchase. (*See* Stanley-Appx. 9.) Indeed, the Stanleys answered, "We feel [w]e do not owe the amount showing [$]8,172.98 due to the fact the Odometer reading was incorrect and was [sic] told by another dealer it was in a major accident[.] We have contacted Charleston Mitsubishi [and] Credit Acceptance and they totaly [sic] disregarded the calls." (*Id.*) Yet, CAC's brief alleges that the Stanleys acknowledged the debt was owed. (*See* Pet.'s Br. 4.) Not so. CAC failed to include the Stanleys' *pro se* Answer (or any of CAC's filings prior to its Motion to Dismiss and Compel Arbitration) in its preparation of the

[2] References to Respondent's Appendix are hereinafter referred to as "Stanley-Appx."

Appendix, requiring the Stanley's to submit their own Supplemental Appendix. CAC misleadingly cites to the Stanleys' Motion to Amend Answer and Assert Counterclaims for this dubious suggestion. (Pet.'s Br. 4 (citing to A.R. [sic] 2).) The Stanleys' *pro se* Answer put CAC on clear notice the Stanleys alleged they had been lied to and that the mileage was misrepresented. (*See* Stanley-Appx. 9.)

Despite this awareness, CAC then chose to litigate its deficiency claim against the *pro se* Stanleys in the circuit court for more than three years. On May 8, 2020, CAC propounded robust discovery requests aimed at obtaining judgment against the Stanleys. (*See* Stanley-Appx. 10, 38-43.) CAC followed up on the discovery requests by correspondence to the Stanleys dated June 30, 2020. (*See* Stanley-Appx. 45.) In the correspondence, CAC warned the Stanleys that if they did not respond to the discovery requests, it would seek summary judgment based on the Stanleys' failure to respond. (*See id.*)

CAC waited more than two years—until September 14, 2022—to move for summary judgment. (*See* Stanley-Appx. 11-46.) Again, CAC attached the Arbitration Clause as an exhibit to its Motion for Summary Judgment. (*See* Stanley-Appx. 31.) CAC then set the Motion for Summary Judgment for a hearing to be held on December 6, 2022. (*See* Stanley-Appx. 47.) The circuit court continued the hearing on CAC's Motion for Summary Judgment and reset the hearing on the Motion for January 31, 2023. (*See* Stanley-Appx. 48.) The circuit court again continued the January 31, 2023 hearing and directed CAC to obtain a new date for a hearing on its Motion for Summary Judgment. (*See* Stanley-Appx. 49.) On April 28, 2023, CAC filed a Notice of Hearing, setting its Motion for Summary Judgment for hearing on May 11, 2023. (*See* Stanley-Appx. 50-51.)

On May 11, 2023, CAC argued its Motion for Summary Judgment in front of the circuit court. (*See* Stanley-Appx. 52.) Presumably, the circuit court granted CAC judgment at this hearing because the Stanleys had not appeared. However, the circuit court recognized the Stanleys actually did appear, and subsequently struck the hearing from the record. (*See* Stanley-Appx. 52.) The circuit court then, without objection, entered a Scheduling Order setting the matter for a bench trial on December 6, 2023. (*See* Stanley-Appx. 55.) In June 2023, the Stanleys obtained counsel, and promptly filed their Amended Answer and Counterclaim Complaint and propounded written discovery requests. (*See* Credit Acceptance-Appx 12-103.) Years later and after seeking judgment on its claim, CAC filed its Motion to Dismiss and Compel Arbitration in August 2023. (*See* Credit Acceptance-Appx 104-07.)

G. The Circuit Court Concludes CAC Impliedly Waived Its Right To Arbitrate the Dispute.

The court heard CAC's Motion to abandon its chosen forums on September 27, 2023. (*See* Credit Acceptance-Appx p.155, 301-318.) On January 18, 2024, the circuit court entered its Order denying CAC's Motion to Dismiss and Compel Arbitration based on the doctrine of waiver. (*See* Credit Acceptance-Appx 293-300.) The circuit court's relevant findings and conclusions are worth setting out at length:

> Applying the above facts and law, the Court **FINDS** as follows:
>
> 1. CAC exercised its right to file the lawsuit in this Court.
>
> 2. CAC litigated its lawsuit by serving discovery on the *pro se* Counterclaimants and moved this Court for summary judgment.
>
> 3. Only after Counterclaimants retained counsel did CAC move this Court to compel arbitration. More than three years passed before CAC attempted to exercise the arbitration provision.
>
> 4. The Supreme Court of Appeals has held that the right to arbitrate can be waived.

> 6.[sic] The Supreme Court of Appeals instructed the trial court to examine the totality of circumstances when determining whether a party waived the arbitration agreement or not.
>
> 7. CAC tries to circumvent the delay of more than three years by asserting that the arbitration agreement allows CAC to elect arbitration at any time.
>
> 8. With CAC's argument, this Court surmises that CAC believes that it could elect to arbitrate even after the conclusion of the litigation.
>
> 9. This Court also notes that CAC 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.
>
> 10. Here, approximately thirty-six months passed before CAC moved this Court to grant a motion for arbitration.
>
> 11. This Court also relied heavily on the following: "[a]rbitration agreements are as much enforceable as other contracts, but not more so." This Court may "infer[] from actions or conduct" that it had "intentionally relinquished its right to arbitrate." *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950).
>
> 13.[sic]When applying the totality of circumstances, this Court concluded that CAC waived its right to arbitrate due [to] the significant passage of time before moving this Court to compel arbitration. Instead of timely exercising that right, CAC only chose to exercise that right when Counterclaimants retained counsel. This Court further notes CAC had no qualms litigating this matter, including engaging in discovery and moving this Court for summary judgment when Counterclaimants were *pro se*.
>
> 14. This Court further agrees with Counterclaimants that discovery may further support their waiver argument, or in the alternative, it may support CAC's argument that arbitration is appropriate.

(Credit Acceptance-Appx 298-99.) CAC then appealed the circuit court's Order to this Court. The circuit court did not err in its application of the law and its findings and conclusions were not clearly erroneous.

SUMMARY OF ARGUMENT

After more than three and a half years of substantially invoking the litigation machinery in circuit court to pursue its deficiency claim against the Stanleys, CAC moved to compel arbitration. However, CAC waived its right to compel arbitration by consistently and repeatedly taking actions inconsistent with the contractual right to arbitration, including among other things, choosing to file the lawsuit in circuit court, moving for summary judgment, and setting the Motion for hearing multiple times, thereby seeking judgment on the merits from the circuit court.

This Court recently reaffirmed that the doctrine of waiver applies to arbitration, as it does to any other contract. *See* Syl. Pt. 7, *Ampler Burgers Ohio LLC v. Bishop*, No. 23-49, 2024 W. Va. LEXIS 294, at *2-3 (June 12, 2024). The Court reiterated the long-standing test for determining whether waiver applies:

> The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. There is no requirement that the party asserting waiver show prejudice or detrimental reliance.

Id. (quoting Syl. Pt. 6, *Parsons v. Halliburton Energy Servs.*, 237 W. Va. 138, 785 S.E.2d 844 (2016)). Under this well-established standard, considering the totality of the circumstances, CAC acted inconsistently with its right to arbitrate by choosing to file its claim in the circuit court and seeking judgment on its claim with knowledge of its right to arbitrate and the full nature of the Stanleys' defenses to the claim. The circuit court appropriately denied CAC's Motion to Dismiss and Compel Arbitration. Accordingly, this Court should deny the appeal.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument but at the same time claims it is unnecessary. (*See* Pet.'s Br. 8 (referencing W. Va. R. App. P. 18(a)). This is confusing. To be clear, Respondents believe

oral argument is appropriate because (1) this case involves "assignments of error in the application of settled law;" (2) Petitioner claims the circuit court exercised "unsustainable discretion where the law governing that discretion is settled;" and (3) Petitioner claims there was "insufficient evidence" for the circuit court's finding of waiver. W. Va. R. App. P. 19(a).

ARGUMENT

A. Standard of Review

This Court reviews "an appeal from an order denying a motion to dismiss and to compel arbitration . . . *de novo*." Syl. Pt. 1, *W. Va. CVS Pharm., LLC v. McDowell Pharm.*, 238 W. Va. 465, 467, 796 S.E.2d 574, 576 (2017); Syl. Pt. 1, *Ampler Burgers Ohio LLC*, 2024 W. Va. LEXIS 294, at *1. A party asserting implied waiver must establish the waiver by clear and convincing evidence. *See* Syl. Pt. 3, *Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 310, 504 S.E.2d 135, 137 (1998); *see also Ampler Burgers Ohio LLC*, 2024 W. Va. LEXIS 294, at *32-33 (Bunn, J., concurring). This Court has not set forth the standard of review for a circuit court's weighing of evidence in finding a waiver of arbitration rights. Ordinarily, the circuit court's interpretation of a contract, such as an arbitration agreement, is *de novo*, *see W. Va. CVS Pharm., LLC*, 238 W. Va. at 469, 796 S.E.2d at 578, while a review of a circuit court's evidentiary findings is for an abuse of discretion, *see*, *e.g.*, *State v. Jackson*, 248 W. Va. 504, 508, 889 S.E.2d 77, 81 (2023). Other courts view the review of a finding of waiver as a mixed question of law and fact:

> Whether a party's conduct constitutes a waiver of the right to arbitrate presents a mixed question of fact and law. We set aside the circuit court's findings of fact only if they are clearly erroneous. However, the application of the facts to a legal standard, such as waiver, is a question of law that we review independently of the [circuit] court.

Kirk v. Credit Acceptance Corp., 829 N.W.2d 522, 532 (Wisc. Ct. App. 2013) (alteration in original) (citation omitted); *see also, e.g.*, *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th

Cir. 2001); *Cain v. Midland Funding*, 452 Md. 141, 150, 156 A.3d 807, 812 (2017). Respondents submit that here too this Court is presented with mixed questions of law and fact. The circuit court's factual finding that the totality of the circumstances indicates CAC waived its right to arbitration should not be disturbed unless found to be clearly erroneous. The circuit court's interpretation of the arbitration clause and the legal standard for waiver should be reviewed *de novo*.

B. CAC Waived Its Right to Arbitrate This Dispute.

1. The circuit court properly applied the law of waiver.

Section 2 of the Federal Arbitration Act (FAA) provides the contractual right to arbitrate a dispute is only as "enforceable as other contracts, but not more so." *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12).

Arbitration contracts are subject to the same defenses available to any contract, including waiver of rights. Thus, in examining the enforceability of any arbitration agreement, courts must apply general principles of state contract law: "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, **waiver**, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement." Syl. Pt. 2, *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808 (2012) (quoting Syl. Pt. 9, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011)) (emphasis added); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (reiterating that arbitration clauses are unenforceable if they are void under any state law or equitable principle applicable generally to contracts). Accordingly, courts should analyze a challenge to an arbitration agreement under the basic rules of state law

applicable to contracts generally—including the principle of waiver—or any other contract-based defenses or requirements and may do so without running afoul of the FAA.

Any right—contractual, constitutional, or other—is waived as a matter of law if the evidence demonstrates that a party with knowledge of its right intentionally acted so as to expressly or impliedly relinquish it. *See* Sy. Pt. 1, *Citibank, N.A. v. Perry*, 238 W. Va. 662, 797 S.E.2d 803 (2016); Syl. Pt. 1, *Potesta*, 202 W. Va. at 308, 504 S.E.2d at 135. Unlike the equitable doctrine of estoppel, the legal bar of waiver does not require proof of prejudice or detrimental reliance by the party asserting waiver. *See Potesta*, 202 W. Va. at 315-16, 504 S.E.2d at 142-43 ("The doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right. There is no requirement of prejudice or detrimental reliance by the party asserting waiver.").

CAC argues, contrary to West Virginia law and the law of the United States, that the Stanleys were required additionally to demonstrate prejudice:

> A party asserting waiver is required to shoulder a heavy burden and must demonstrate that the party invoking arbitration so substantially utilized the litigation process that to permit arbitration would prejudice the opposing party, including a showing of actual prejudice.

(Pet.'s Br. 7.) CAC misrepresents not only West Virginia law, but federal law as well. In a unanimous decision, the Supreme Court of the United States recently affirmed West Virginia's longstanding principle that a showing of waiver of arbitration rights does not require a showing of prejudice. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022). Shockingly, CAC does not cite the landmark *Morgan* decision in its brief at all.

More understandably, CAC also fails to discuss this Court's recent decision concerning waiver of arbitration rights. *See Ampler Burgers Ohio LLC*, 2024 W. Va. LEXIS 294, at *33.[3] In *Ampler Burgers Ohio LLC*, this Court examined whether a defendant's litigation activities constituted a waiver of its arbitration rights. *See id.*, 2024 W. Va. LEXIS 294, at **24-30. Borrowing from the Court of Appeals for the Tenth Circuit, this Court set forth the factors to consider whether a defendant's participation in litigation serves to waive its arbitration rights:

> In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right; **whether the litigation machinery has been substantially invoked** and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff; whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand.
>
> Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings [and] whether important intervening steps had taken place[.]

Id., 2024 W. Va. LEXIS 294, at *28 (quoting *Reid Burton Constr., Inc. v. Carpenters Dist. Council*, 614 F.2d 698, 702 (10th Cir. 1980)) (emphasis added). Where the defendant delayed filing a motion to compel arbitration for ten months and only participated in discovery, this Court concluded that the defendant's activities, when considered in their totality, were insufficient to establish waiver. *See Ampler Burgers Ohio LLC*, 2024 W. Va. LEXIS 294, at *30. The Court concluded that the consumer had not carried their heavy burden to establish waiver where the party asserting its arbitration rights was a defendant who had been drawn into the civil action and had only participated in discovery.

[3] This Court issued its decision in *Ambler Burgers Ohio LLC* five days after Petitioner filed its opening Brief. It is surprising that Petitioner failed to supplement such with reference to this Court's recent waiver decision. *See* W. Va. R. App. P. 10(i).

However, the case was apparently a close call. The decision was a product of a three to two majority, with Justice Bunn filing a concurrence in which she further elaborated on how the Court should evaluate a party's litigation activities in the waiver analysis. *See id.* at **30-31 (Bunn, J., concurring). Drawing again on decisions of federal courts, the concurrence explained what type of litigation activities might constitute a waiver of arbitration rights: "**Seeking dispositive rulings** or taking advantage of being in court are evidence of substantially invoking the litigation machinery." *Id.* at *34 (citing decisions from the United States Courts of Appeals for the Sixth, Eighth, and Ninth Circuits) (emphasis added). This Court has made clear that there are circumstances where a party's conduct constitutes a waiver of arbitration rights. *Id.* at *25 ("We have held that engagement in litigation activities *can* waive an otherwise valid arbitration agreement.); Syl. Pt. 6, *Parsons*, 237 W. Va. at 138, 785 S.E.2d at 844; *State ex rel. Barden & Robeson Corp.*, 208 W. Va. at 168-69, 539 S.E.2d at 111 (neglect or refusal to demand arbitration constituted waiver of right to compel arbitration). And seeking dispositive rulings, as CAC did here, is the type of conduct this Court has indicated would serve to waive arbitration rights. By availing itself of the litigation machinery and delaying the assertion of its right to arbitration, CAC has undermined the primary purpose for which arbitration is favored: efficiency. *See, e.g.*, *Meyer v. Classified Ins. Corp.*, 507 N.W.2d 149, 155 (Wisc. Ct. App. 1993) ("Conduct which allows an action to proceed to a point where the purpose of arbitration -- to obtain a speedy, inexpensive and final resolution of disputes -- is frustrated is conduct that estops a party from claiming a right to a stay of the proceedings and referral for contractual arbitration.").

Moreover, the focus of the waiver inquiry is the conduct of the party seeking to compel arbitration. "The common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought . . . ." Syl. Pt. 2, *Parsons*, 237 W. Va. at 142, 785 S.E.2d at 848; *accord Ampler*

Burgers Ohio LLC, 2024 W. Va. LEXIS 294, at *25 ("[E]ngagement in litigation activities *can* waive an otherwise valid arbitration agreement."); Syl. Pt. 2, *Citibank, N.A.*, 238 W. Va. at 662, 797 S.E.2d at 803; *Hoffman*, 133 W. Va. at 713, 57 S.E.2d at 735. CAC argues that this Court should focus on the arbitration clause, rather than its own conduct, in determining whether it waived its right to arbitrate the dispute. But CAC's position is inconsistent with the standards for waiver set forth by this Court and the federal courts, which uniformly focus on the conduct of the party and its litigation activities.

> [T]he presence of [a] 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration. . . This makes sense because to allow the 'no waiver" clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort and hamper judges' authority to control the course of the proceedings and allow parties to test[ ] the water before taking the swim by delaying assertion of their right to arbitration until the litigation is nearly complete.

Citibank, N.A., 238 W. Va. at 666, 797 S.E.2d at 807 (alterations in original) (quoting *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012)).

A party ought not be permitted to contract away a court's duty to determine whether the rights under the same contract were waived. *See, e.g.*, *Concepcion*, 563 U.S. at 339 (observing that courts may invalidate agreements to arbitrate by generally applicable contract defenses); *State ex rel. Barden & Robeson Corp.*, 208 W. Va. at 168, 539 S.E.2d at 111 (finding that "[a]rbitration agreements are [as much] enforceable as other contracts, but not more so" (citation omitted)).

To be sure, the arbitration clause at issue in this case preserves the right to arbitrate counterclaims; but counterclaims are just one example of the claims subject to arbitration. The circuit court appropriately evaluated the conduct of CAC, in its totality, in deciding CAC waived its right to arbitrate. Were CAC's position accepted, it would not only completely upend the doctrine of waiver developed over decades and set an arbitration-specific rule, it would also permit

parties to impose one-sided, unconscionable arbitration agreements. CAC would then be permitted, and indeed perhaps required,[4] to file its claims in circuit court and pursue them to judgment, but the consumer would be required to arbitrate the claims arising out of the same dispute. It is simply of no moment that the arbitration clause includes counterclaims as a dispute subject to arbitration when CAC waived its right to arbitrate altogether, and the circuit court therefore properly did not consider it. (*See* Credit Acceptance-Appx. p.298-99 ("The Supreme Court of Appeals instructed the trial court to examine the totality of circumstances when determining whether a party waived the arbitration agreement or not.").)

CAC voluntarily chose Circuit Court of Jackson County as its preferred forum, and over a three-and-a-half-year period propounded discovery requests, moved for summary judgment, set its Motion for hearing multiple times and agreed to a Scheduling Order setting the case for trial. The repeated and voluntarily actions of CAC unequivocally constitute waiver because "[v]oluntary choice is of the very essence of waiver." *Hoffman*, 133 W. Va. at 713, 57 S.E.2d at 735. If this does not result in waiver, no litigation conduct could.

The circuit court below was not alone in finding waiver of arbitration rights in these circumstances. Numerous courts have found waivers of arbitration rights after a party avails itself of a judicial forum. *See*, *e.g.*, *Erdman Co. v. Phx. Land & Acq., L.L.C.*, 650 F.3d 1115 (8th Cir. 2011) (waiver when party initiated lawsuit); *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 160 (2d Cir. 2010) ("[B]y filing its lawsuit and

[4] CAC asserts that it was required to file its claim here in the circuit court because AAA instituted a moratorium on such collection actions. (*See* Pet.'s Br. 11.) Setting aside the fact that CAC raises this factual claim for the first time in its opening Brief, there is good reason to question the accuracy of the assertion. First, it is not clear from the link provided that CAC's claim for a deficiency judgment after a repossession is the type of collection action subject to the moratorium. Second, the arbitration agreement also provides that disputes may be arbitrated before JAMS, which does not have any moratorium.

litigating it at length, LSED acted inconsistently with its contractual right to arbitration.") (citation omitted); *Nicholas v. KBR, Inc.,* 565 F.3d 904, 908 (5th Cir. 2009) (internal citations omitted) ("[T]he decision to file suit typically indicates a 'disinclination' to arbitrate. . . . [T]he act of plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process . . . .").[5]

[5] *See also, e.g., Nokia Corp. v. InterDigital Inc.*, No. 08-1642-c, 2008 U.S. App. LEXIS 16328, at *3 (2d Cir. July 31, 2008) ("Nokia has waived its right to arbitrate through its repeated, intentional invocation of judicial process to resolve questions about the scope of the patents at issue and the applicability of the license established by the Agreement to these patents"); *United Comput. Sys. v. AT&T Info. Sys.*, 298 F.3d 756, 765 (9th Cir. 2002) (filing a state court complaint was inconsistent with right to arbitrate); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co.*, 956 F.2d 473, 477 (6th Cir. 1991) (Ill. Law) (finding a waiver of right to arbitrate based on moving party's filing of a state court action seeking preliminary and permanent injunctions and compensatory and punitive damages); *Kenyon Int'l Emerg. Servs., Inc. v. Malcom*, No. Civil Action H-09-3550, 2010 U.S. Dist. LEXIS 55283, at *11 (S.D. Tex. June 7, 2010) (waiver when party filed suit twice, opposed then equivocated about arbitration, then withdrew from arbitration when compelled); *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 790 (Ariz. 1970) (party had waived by its conduct the right to arbitrate by filing a lawsuit in which it requested the same kind of relief if could have gained from arbitration); *Multicare Physicians & Rehab. Grp., v. Wong*, No. 017005, 2006 Conn. Super. LEXIS 2509, at *4-5 (Conn. Super. Ct. Aug. 15, 2006) (party waived right to compel arbitration by filing complaint in a court asserting number of arbitrable claims); *Ill. Concrete-I.C.I., Inc. v. Storefitters, Inc.*, 922 N.E.2d 542, 547 (Ill. App. Ct. 2010) (waiver when party used procedure demanding that the other side file a lawsuit); *Getz Recycling v. Watts*, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) ("There was also no question that the [party wanting arbitration] acted inconsistently with its right to arbitrate, given that it initiated suit." "); *Framan Mech., Inc. v. Lakeland Reg'l High Sch. Bd. of Educ*., DOCKET No. A-4062-04T1, 2005 N.J. Super. Unpub. LEXIS 354, at *3 (N.J. Super. Ct. Nov. 3, 2005) (filing of complaint seeking "substantive resolution" of party's claims waived right to demand arbitration); *Blackburn v. Citifinancial*, Inc., No. 05AP-733, 2007 Ohio App. LEXIS 1310, at *14 (Ohio Ct. App. Mar. 29, 2007) ("by actively pursuing litigation in lieu of arbitration by filing a complaint to enforce its contractual rights under the note, Citifinancial has waived its own arbitration clause"); *Checksmart v. Morgan*, NO. 80856, CHECKSMART, 2003 Ohio App. LEXIS 111, at *4 (Ohio Ct. App. Jan. 16, 2003) ("We are guided by *Mills* [*v. Jaguar-Cleveland Motors, Inc.*, 69 Ohio App.2d 111, 430 N.E.2d 965 (1980)], wherein the institution of a lawsuit was an action inconsistent with the party's right to arbitrate"); *Otis Hous. Ass'n, Inc. v. Ha*, 201 P.3d 309, 312 (Wash. 2009); *KenAmerican Res., Inc. v. Potter Grandchildren, L.L.C.*, 916 F. Supp. 2d 799, 801 (E.D. Ky. 2013) ("There can be no question that KenAmerican's decision to file suit…flies in the face of the arbitration agreement provision."); *Barbagallo v. Niagara Credit Sols, Inc.*, No. DKC 12-1885, 2012 U.S. Dist. LEXIS 171908, at *3 (D. Md. Dec. 4, 2012) (creditor's filing of collection suit contributed to conclusion that creditor waived arbitration of debtor's subsequent unfair debt collections suit);

To be sure, CAC tried this similar strategic tactic over a decade ago and the Court of Appeals of Wisconsin ruled that by initiating the lawsuit and delaying fifteen months before moving to compel arbitration, CAC waived its right to arbitration. *See Kirk*, 829 N.W.2d at 533 ("Applying those facts to the law, we agree with the circuit court that Credit Acceptance waived its right to arbitrate the claims raised by Kirk. Credit Acceptance chose the judiciary as the forum in which to attempt to obtain the deficiency. . . ."). In *Kirk*, CAC also filed dispositive motions and had them heard by the circuit court. *See id*. at 525 (noting that CAC filed a motion to dismiss seeking dismissal of the consumer's claims based on statute of limitations and failure to state a claim upon which relief may be granted). The circuit court concluded that Kirk put CAC on notice that if it availed itself of circuit court to pursue its deficiency claims, courts may find its litigation activities constitute waiver of its arbitration rights. (Credit Acceptance-Appx. p.299.)

CAC tries to distinguish *Kirk* in two ways: (1) *Kirk* applied Wisconsin law and (2) the arbitration clause in *Kirk* was different from the clause at issue in this case. (Pet.'s Br. 16.) Neither

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Pearson v. Peoples Nat'l Bank, 116 So. 3d 1283, 1284-85 (Fla. 1st DCA 2013) ("Initiating a lawsuit… constitutes an affirmative selection of a course of action which runs counter to the purpose of arbitration.") (citation omitted); *Levonas v. Regency Heritage Nursing & Rehab. Ctr., L.L.C.*, DOCKET NO. A-495-11T4, 2013 N.J. Super. Unpub. LEXIS 2155, at *14 (N.J. Super. Ct. Appt. Div. Aug. 29, 2013) (nursing home's filing of suit on its arbitrable collection claims contributed to conclusion that nursing home waived arbitration of wrongful death suit subsequently filed against it); *Am. Gen. Fin. v. Griffin*, No. 99088, 2013 Ohio App. LEXIS 2954, at *7 (Ohio Ct. App. July 3, 2013) (lender's filing of suit on its arbitrable collection claims contributed to the conclusion that lender waived arbitration of class counterclaims); *Liberty Credit Servs. Assignee of or Successor in Interest to Capital One v. Yonker*, CASE NO. 2012-P-0096, 2013 Ohio App. LEXIS 4158, at *5 (Ohio Ct. App. Sept. 16, 2013) (fact that party seeking arbitration initially filed suit supported waiver ruling); *EMCC Inv. Ventures, L.L.C. v. Rowe*, CASE NO. 2011-P-0053, 2012 Ohio App. LEXIS 3972, at *6 (Ohio Ct. App. Sept. 28, 2012) (fact that party seeking arbitration initially filed lawsuit supported waiver ruling); *Green Tree Servicing, L.L.C. v. Hill*, 307 P.3d 347, 350 (Okla. Civ. App. 2013) (by suing and obtaining judgment on note, creditor waiver arbitration of later-filed claims and counterclaims relating to the note); *River House Dev., Inc. v. Integrus Architecture*, *PS*, 272 P.3d 289, 298 (Wash. Ct. App. 2012) (finding waiver when plaintiff file suit in superior court instead of filing for arbitration and parties engaged in discovery); *Kirk*, 829 N.W.2d at 533.

argument has merit. First, a review of the *Kirk* case reveals that Wisconsin's waiver law is nearly identical to West Virginia's. In *Kirk*, the court recognized that the mere filing of a lawsuit or engaging in limited discovery does not constitute waiver, but when the totality of the circumstances indicated an intention to avail itself of the courts and a waiver of arbitration. *See Kirk*, 829 N.W.2d at 532.

Second, CAC cannot point to a material distinction between its arbitration clause here and that in *Kirk*, which is the following:

> A "Dispute" is any dispute, controversy or claim between You or us arising out of or in any way related to this Contract, or any default under this Contract, or the collection of amounts due under this Contract, or the purchase, sale, delivery, set-up, quality of the Vehicle, or any product or service included in this Contract. "Dispute" includes contract claims, and claims based on tort or any other legal theories. *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 brought later in the lawsuit*.

Id. at 532 (emphasis added). The last sentence of the quoted passage is nearly identical in substance to CAC's arbitration provision here:

> *Either You or We may require any Dispute to be arbitrated and may so do before or after a lawsuit has been started over the Dispute or with respect to other Disputes or counterclaims brought later in the lawsuit*. If You or We elect to arbitrate a Dispute, this Arbitration Clause applies. A Dispute shall be fully resolved by binding arbitration.

(Credit Acceptance-Appx. 211 (emphasis added).) The only difference in the two clauses is the addition of "counterclaims" in the latter clause. However, the addition of counterclaims is superfluous given that counterclaims are already considered a "Dispute." CAC's attempts to distinguish *Kirk* are unavailing.

On the other hand, CAC's heavy reliance on *Citibank, N.A. v. Perry* is also misplaced. 238 W. Va. 662, 797 S.E.2d 803. Careful consideration of the *Citibank* case and this Court's more recent cases reveals that *Citibank* is distinguishable from this case. CAC argues that *Citibank* is

instructive for two reasons. First, CAC argues, "The language in this Arbitration Agreement is even *stronger* in favor of compelling arbitration than the language found in *Perry*." (Pet.'s Br. 16.) However, the so-called non-waiver provision was disregarded by the Court in *Citibank*: "Despite the no waiver clause in the subject arbitration agreement, this Court is entitled to apply standard contract law pertaining to waiver." *Id.*, 238 W. Va. at 665-66, 797 S.E.2d at 806-07. As previously discussed, this Court has long held, "[T]he common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought." Syl. Pt. 2, *Citibank, N.A.*, 238 W. Va. at 662, 797 S.E.2d at 803. Because the waiver analysis focuses on the conduct of CAC, Citibank expressly disregarded the non-waiver clause. *See Citibank, N.A.*, 238 W. Va. at 665-66, 797 S.E.2d at 806-07. The circuit court accordingly was correct when it focused on CAC's litigation conduct rather than the so-called non-waiver provisions of the arbitration agreement.

Second, CAC argues the facts of *Citibank* are similar to the facts of this case and therefore commands a similar result. However, although the facts in *Citibank* and this case are admittedly similar, they differ in two important aspects, and these distinctions were the very basis for the Court's decision in *Citibank*. In *Citibank*, Mr. Perry filed a *pro se* Answer in which he *admitted* he owed the debt to *Citibank*. *See id.*, 238 W. Va. at 666, 797 S.E.2d at 807. Here, the Stanleys did not admit they owed the debt in their *pro se* Answer. Rather, the Stanleys denied they owed the debt and notified CAC of the reason why:

> We feel [w]e do not owe the amount showing 8,172.98 due to the fact the Odometer reading was incorrect and was [sic] told by another dealer it was in a major accident. We have contacted Charleston Mitsubishi Credit Acceptance [sic] and they totaly [sic] disregarded the calls.

(Stanley-Appx. p.9.)

Additionally, the counterclaims asserted in *Citibank* were class claims alleging debt collection violations unrelated to the validity of the debt, which Mr. Perry admitted he owed. *See id.*, 238 W. Va. at 666, 797 S.E.2d at 807. Accordingly, the *Citibank* Court concluded:

> Markedly, Mr. Perry's counterclaim, which asserted a putative class action claiming, *inter alia*, violations of the West Virginia Consumer Credit and Protection Act, significantly changed the character of the proceeding from a simple debt collection action to a potential class action lawsuit.

Id. In this case, the Stanleys' counterclaims presented no "significant[] change" but are rather individual claims arising from the same transaction upon which CAC claims the Stanleys owe the deficiency. Moreover, the only claims raised by way of counterclaim that could not have been reasonably anticipated by the Stanleys' *pro se* Answer is Count V, which alleges a commercially unreasonable disposition of the vehicle after the Stanleys voluntarily surrendered the vehicle. CAC would have reasonably expected that the Stanleys might assert a defense of commercially unreasonable disposition in response to its deficiency claim when CAC sold the vehicle the Stanleys purchased for over $14,500.00 a little over one year later for $2,400,00. Finally, the class action claims in *Citibank* implicated class action waiver contractual issues, again demonstrating an important difference.

To the contrary, *Citibank* stands for the proposition that, considering the totality of circumstances, the creditor's conduct did not exhibit an intention to waive the right to arbitrate claims unrelated to the validity of the debt that formed the basis of the Complaint, particularly when the claims are presented as a class action and a consumer does not contest liability for years. Where an arbitration agreement contains a class action waiver, as does the arbitration agreement in this case, it is likely going to require compelling and convincing evidence that a party impliedly waived the class action waiver of claims ancillary, but not arising out of the debt upon which the creditor has filed suit. Notably, *Citibank*'s syllabus points are both statements of established West

Virginia law, and the Court did not create a syllabus point relating to the holding that the counterclaims "significantly changed the character of the proceeding." Syl. Pts. 1, 2, *id.*, 238 W. Va. at 662, 666, 797 S.E.2d at 803, 807. Accordingly, the circuit court properly rejected CAC's argument that *Citibank* controlled this case.

In conclusion, CAC cannot point to any misstatement or misapplication of law or misinterpretation of the arbitration agreement. Because a *de novo* review of the circuit court Order reveals no errors of law, CAC's appeal should be denied, and the Order of the circuit court affirmed.

2. The circuit court properly evaluated the facts when it concluded that CAC's litigation activities established waiver of its arbitration rights.

The circuit court made the following findings in considering the totality of the circumstances regarding CAC's conduct:

> 1. CAC exercised its right to file the lawsuit in this Court.
>
> 2. CAC litigated its lawsuit by serving discovery on the *pro se* Counterclaimants and moved this Court for summary judgment.
>
> 3. Only after Counterclaimants retained counsel did CAC move this Court to compel arbitration. More than three years passed before CAC attempted to exercise the arbitration provision.
>
> . . .
>
> 7. CAC tries to circumvent the delay of more than three years by asserting that the arbitration agreement allows CAC to elect arbitration at any time.
>
> 8. With CAC's argument, this Court surmises that CAC believes that it could elect to arbitrate even after the conclusion of the litigation.
>
> 9. This Court also notes that CAC 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.
>
> 10. Here, approximately thirty-six months passed before CAC moved this Court to grant a motion for arbitration.

. . .

> 13. When applying the totality of circumstances, this Court concluded that CAC waived its right to arbitrate due to the significant passage of time before moving this Court to compel arbitration. Instead of timely exercising that right, CAC only chose to exercise that right when Counterclaimants retained counsel. This Court further notes CAC had no qualms litigating this matter, including engaging in discovery and moving this Court for summary judgment when Counterclaimants were *pro se*.

(Credit Acceptance-Appx. 298-99.) CAC filed its claim in the Circuit Court of Jackson County. (*See* Stanley-Appx. 1-8.) CAC issued a Summons and served process on the Stanleys, compelling them to assert their defenses and counterclaims in the civil action rather than arbitration. (*See id.* 7-8.) This was evidence of CAC knowingly and voluntarily availing itself of the circuit court, which was inconsistent with its arbitration rights. CAC then continued to engage the litigation machinery by moving for summary judgment, seeking for the circuit court to enter judgment on its claim despite being aware the Stanleys contested liability in their *pro se* Answer. CAC set its Motion for hearing multiple times and presumably had the Motion granted before the circuit court struck the hearing and set the case for trial on the merits. (*See* Stanley-Appx. 46-55.) The circuit court concluded that the passage of time and moving for summary judgment were two important factors in determining whether CAC intentionally relinquished its right to arbitrate the claims. Notably, CAC attached the Arbitration Clause to its Complaint and Motion for Summary Judgment, further evidencing its knowledge of its right to arbitrate these very claims.

Although the circuit court did not have the benefit of the concurrence or majority opinions in *Ampler Burgers Ohio LLC*, its factual findings are wholly consistent with the decision. 2024 W. Va. LEXIS 294, at *28, *34. Accordingly, the circuit court's findings were not clearly erroneous and, to the contrary, the circuit court's ruling was *consistent* with this Court's recent analysis regarding waiver.

C. Strategic Invocation of Arbitration Rights Is Highly Disfavored and Arbitration Should Not Be Used to Avoid Liability.

CAC's three-and-a-half-year delay in this case is completely contrary to the entire point of arbitration. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 22 (1983) (holding that "Congress' clear intent, in the [FAA], [was] to move the parties in an arbitrable dispute out of court and into arbitration as quickly and easily as possible."); *Meyer*, 507 N.W.2d at 155. CAC's strategy in this case—affirmatively indicating its desire to litigate in state court, engaging in dilatory tactics for three and a half years, requesting summary judgment and setting its motion for hearing multiple times, propounding discovery requests, and seeking a trial date for the ultimate resolution of its claim and the Stanleys' defenses—and then strategically invoking arbitration flies in the face of efficiency and fairness.

CAC clearly finds the West Virginia court system perfectly suitable to sue *pro se* consumers, but strategically prefers arbitration for any potential consumer claims arising out of the same transaction**.** Courts have rejected late-filed motions to compel arbitration when it is clear that the option is being strategically exercised "as a backup plan." *See, e.g*., *MC Asset Recovery, L.L.C. v. Castex Energy, Inc.*, 613 F.3d 584, 590 (5th Cir. 2010). The goal of efficiency noted by Congress emphasizes the need to enforce established waiver rules, which are perfectly consistent with the Federal Arbitration Act. CAC's extreme delay in asserting its contractual right to arbitration and its strategic invocation of arbitration rights now, reveals the true intent behind its desire to arbitrate: not speed nor efficiency, but instead to defeat the claims of consumers and escape liability.

D. The Circuit Court Properly Provided the Parties the Opportunity to Conduct Discovery and Present Evidence Regarding the Enforceability of the Arbitration Agreement.

CAC's arbitration agreement specifically provides that this Court should decide any issues that relate to the enforceability of the arbitration agreement: "'Dispute' does not include disputes about the validity, enforceability, coverage or scope of this Arbitration Clause or any part thereof . . . ." (Credit Acceptance-Appx. 211.) Faced with questions about the enforceability of the arbitration agreement, the circuit court permitted limited discovery on the enforceability of the agreement to arbitrate. (*See* Credit Acceptance-Appx. 299 ¶ 14.; *see*, *e.g.*, *Blankenship v. Seventeenth St. Assocs., L.L.C.*, CIVIL ACTION NO. 3:11-0627, 2012 U.S. Dist. LEXIS 28056, at *2 (S.D.W. Va. Feb. 1, 2012). Here, the Stanleys allege meritorious defenses to the enforceability of the arbitration clause. The arbitration clause purports to contain the electronic signatures for the Stanleys. However, the Stanleys dispute they ever agreed to the arbitration agreement. The Stanleys were not provided a copy of the disclosures prior to their electronic signatures being affixed, the affixing of their signatures was rushed and the Stanleys were denied a request that the process be slowed to give them time to understand the terms of the transaction. (*See* Credit Acceptance-Appx. 10-11 ¶¶ 17-18.) The Stanleys understood they were financing the purchase of a vehicle but had no understanding their signatures were being affixed to an arbitration clause. Because the Stanleys claim they never agreed to the arbitration agreement specifically, the circuit court was correct when it permitted the Parties to conduct limited discovery regarding the validity and enforceability of the arbitration agreement.

CONCLUSION

CAC actively and willfully invoked the litigation machinery in the circuit court, including filing its claim in the Circuit Court of Jackson County, moving for summary judgment, setting the Motion for hearing multiple times and setting the case for trial to fully adjudicate its claim and the Stanleys stated defenses as appeared in their handwritten *pro se* Answer. CAC acted inconsistently

with its right to arbitrate the dispute for more than three years. A contract to arbitrate, once waived, cannot be unfairly and untimely invoked. "Credit Acceptance chose the judiciary as the forum in which to attempt to obtain the deficiency it alleged [the Stanleys] owe[], ... Both Credit Acceptance's actions and inaction constitute conduct inconsistent with wanting arbitration." 829 N.W.2d at 533. CAC can point to no error in the circuit court's application of the law. Moreover, the circuit court's findings, after considering the totality of the circumstances, that CAC impliedly waived its right to arbitrate the dispute was not clearly erroneous. This Court should deny CAC's appeal.

Dated this 22nd day of July 2024 **RESPECTFULLY SUBMITTED BY:**

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CERTIFICATE OF SERVICE

I, Bren J. Pomponio, certify that on July 22, 2024, I filed the foregoing ***Respondent's Response Brief*** by filing the same with the Court's e-filing system, which will transmit electronic service to the following:

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