

No. _____

**In The
Supreme Court of the United States**

STOK & ASSOCIATES, P.A.,

Petitioner,

v.

CITIBANK, N.A.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite the prevalence of arbitration provisions, parties very frequently elect to waive their contractual right to arbitrate and instead seek to resolve their disputes in a court of law. Because this Court has yet to rule upon when such a waiver becomes binding, a broad and profound conflict has arisen in the Circuit courts as to whether a showing of prejudice is required to render such a waiver irrevocable. Therefore, it is necessary for this Court to answer the following inquiry:

Under the Federal Arbitration Act (“FAA”), should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable?

PARTIES

This case involves the following parties: Stok & Associates, P.A. (the “Petitioner”) and Citibank, N.A. (the “Respondent”).

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OPINIONS BELOW

The opinion of the panel of the Eleventh Circuit Court of Appeals (App. at 1) is not reported but is available on Westlaw at 2010 WL 2825491. The opinion of the District Court (App. at 11) is not reported.



JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on July 20, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).¹



¹ This is, at least, the third time that the issues raised in the instant Petition were brought to this Court for decision. See petitions of *Grumhaus v. Comerica Securities, Inc.*, 2000 WL 34000381 (U.S.) and *Rossi v. Joseph Chris Personnel Services, Inc.*, 2008 WL 140524 (U.S.). The issues presented are far from unique and have frequently created a quagmire ensnarling federal courts. See, e.g., *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1178 (11th Cir. 1980); overruled on other grounds by *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), cert. denied, 525 U.S. 841 (1998); see also Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U.Pa.L.Rev. 91 (1998).

STATUTORY PROVISIONS INVOLVED

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, which provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

**STATEMENT OF THE CASE**

The issue in this case is whether the Respondent waived its right to demand arbitration by participating in litigation instituted by the Petitioner in Miami-Dade County, Florida Circuit Court (the “State Court Action”). United States District Court Judge Patricia Seitz found that Respondent had waived its right to arbitrate because it had initially filed an answer in the State Court Action, without raising the right to arbitrate, which delay in demanding arbitration, together with the discovery propounded, offer of judgment served, and trial date set, ultimately

caused Petitioner to suffer sufficient prejudice. The Eleventh Circuit Court of Appeals reversed Judge Seitz's ruling finding that there was insufficient evidence in the record of the District Court proceedings to demonstrate that the Respondent's delay in demanding arbitration did not cause Petitioner to suffer prejudice sufficient to support a finding of waiver on the part of Respondent.

Petitioner is a small law firm located in Miami-Dade County, Florida. In October 2005, Petitioner transferred its bank accounts to Respondent including its various operating accounts and its trust account (the "Trust Account"). In November 2008, Petitioner was the recipient of a cashier's check in the amount of \$174,015.00 from a party who purported to be an obligor of one of Petitioner's clients (the "Check"). After receiving assurances from Respondent that the Check was a valid and collectable item, Petitioner deposited the Check into its Trust Account at which time Respondent granted Petitioner immediate credit and availability for the funds represented by the Check. At the direction of its client, Petitioner wired most of the funds in question to an account at the Bank of Tokyo in Japan. Five days after depositing the Check, Petitioner received a call from a Respondent representative that the Check may not be a valid item. On the following day, Respondent revoked its acceptance of the Check and charged back the funds in question from the Trust Account. Petitioner was then forced to replace the funds in the Trust

Account from funds on deposit in its Operating Account.

Petitioner filed suit against Respondent in the State Court Action on December 12, 2008. On or about January 30, 2009, Respondent filed an Answer raising one Affirmative Defense unrelated to arbitration. On or about February 2, 2009, Petitioner served an Offer of Judgment on Respondent under Rule 1.442, Florida Rules of Civil Procedure. On February 5, 2009, Petitioner filed its Notice of Readiness for Trial and, on February 12, 2009, the Court in the State Court Action entered its Uniform Order Setting Cause for Jury Trial.

On or about February 24, 2010, Respondent filed its Motion to Compel Arbitration raising Respondent's right to arbitrate for the first time. On or about March 9, 2009, Petitioner filed its Reply to Respondent's Motion to Compel Arbitration asserting that, under Florida State law, Respondent waived its right to arbitrate by filing its Answer in the State Court Action without reserving the right to elect arbitration. Recognizing that it had waived its right to compel arbitration under Florida State law, Respondent withdrew its Motion to Compel Arbitration and, on March 25, 2009, Respondent filed its Petition to Compel Arbitration in the District Court for the Southern District of Florida (the "Federal Court Action").

On or about May 1, 2009, Petitioner filed its Motion to Dismiss Respondent's Petition on various

grounds including that Respondent had elected to litigate the dispute under the parties' arbitration contract and that, by doing so, the Respondent had waived its right to arbitrate by participating in the State Court Action. On or about May 27, 2009, after a non-evidentiary hearing, Judge Seitz entered her Order dismissing Respondent's Petition to Compel Arbitration, finding that Respondent waived its right to arbitrate due to the fact that Petitioner suffered prejudice as a result of Respondent's delay in demanding arbitration. *See App.* at 21. On or about June 22, 2010, Judge Seitz, in a separate order, denied Respondent's Motion for Reconsideration after which Respondent filed its appeal to the Eleventh Circuit Court of Appeal.

On or about July 20, 2010, the Eleventh Circuit issued its opinion reversing Judge Seitz and remanding for further proceedings. The Eleventh Circuit noted that under *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309 (11th Cir. 2002), the waiver analysis in the Eleventh Circuit is two pronged: first, whether the party acted inconsistently with its right to arbitrate; and, second, whether that party has prejudiced the other party. Analyzing the first prong of the *Ivax* analysis, The Eleventh Circuit assumed that Respondent's "participation in the state court litigation was sufficiently substantial so as to 'show [] that [Respondent] did not intend to avail [itself] of the arbitration provision.'" *See App.* at 6.

Examining the second prong of the *Ivax* analysis, the Eleventh Circuit found that, although Petitioner

may have suffered some prejudice when it expended time and resources preparing and filing an offer of judgment, reply, and notice of readiness for trial in state court, “courts have declined to find waiver in cases with similar or more extensive litigation activity.” *Id.* at 8. The Eleventh Circuit noted that Petitioner had “done little to demonstrate the amount of expenses incurred as a result of [Respondent’s] conduct.” *Id.* at 9. The Eleventh Circuit, in fact, lamented that Petitioner had apparently not incurred enough expenses below and, therefore, “could not point to any portion of the record that reveals either the amount of money it spent or the number of hours it dedicated to conducting litigation-specific discovery and preparing litigation-specific documents.” *Id.* This writ followed.



REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A PARTY MUST DEMONSTRATE PREJUDICE WHEN ASSERTING THAT THE OTHER PARTY WAIVED ITS RIGHT TO ARBITRATE BY PARTICIPATING IN THE LITIGATION.

It is all too common that parties, which have the right to enforce a contractual arbitration provision, actually refrain from exercising that right, engage in litigation and then, after varying lengths of time spent litigating, reverse course and demand arbitration. Although it may be counterintuitive, the law in

the majority of Circuits actually allows such parties to compel arbitration, even in a case where the parties have spent days, weeks, or even months litigating, unless the parties seeking to oppose arbitration are able to demonstrate that they have suffered substantial prejudice due to the adverse parties' delay in seeking arbitration. However, a minority of Circuits have held that, once a party participates in litigation, it is precluded from demanding arbitration, even if the adverse party has suffered no prejudice.

Regarding the requirement that a party demonstrate that it has suffered prejudice in order for the court to find that the adverse party has waived its right to arbitrate, the Circuits are split along the following lines:

- a. The First Circuit: Prejudice required. *In re Tyco International Ltd. Securities Litigation*, 422 F.2d 41, 46 (1st Cir. 2005).
- b. The Second Circuit: Prejudice required. *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2nd Cir. 2002).
- c. The Third Circuit: Prejudice required. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3rd Cir. 2007).
- d. The Fourth Circuit: Prejudice required. *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200, 206 (4th Cir. 2004).

- e. The Fifth Circuit: Prejudice required. *Cargill Ferrous International v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003).
- f. The Sixth Circuit: Prejudice required. *Manasher v. NECC Telecom*, 310 F.Appx. 804, 806 (6th Cir. 2009).
- g. The Seventh Circuit: No prejudice required. *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).
- h. The Eighth Circuit: Prejudice required. *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007).
- i. The Ninth Circuit: Prejudice required. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990).
- j. The Tenth Circuit: No prejudice required. *Reid Burton Construction, Inc. v. Carpenters District Council of So. Colo.*, 614 F.2d 698, 701-702 (10th Cir. 1980).
- k. The Eleventh Circuit: Prejudice required. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-1316 (11th Cir. 2002).
- l. The D.C. Circuit: No prejudice required. *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987).

A. The Majority Viewpoint Requiring a Showing of Prejudice.

Nose counting demonstrated that the majority of Circuits require, to a greater or lesser degree, a showing of prejudice before they will find a waiver of the right to arbitrate by a party that acted inconsistently with that right by participating in litigation. The Circuits holding the majority viewpoints are the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits.

Of the Circuits holding the majority viewpoint, certain Circuits require a greater showing of prejudice than others. For example, the burden required of a party seeking to establish waiver in the Fifth Circuit is particularly difficult to reach. In *Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999), the Fifth Circuit, citing well-established precedent from that Circuit stated:

There is a strong presumption against waiver of arbitration. *See, e.g., Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164 (5th Cir. 1987) (“Waiver of arbitration is not a favored finding and there is a presumption against it.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (“[A]s a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”). Accordingly, a party alleging waiver of arbitration must carry a heavy burden. *Associated*

Builders v. Ratcliff Constr. Co., 823 F.2d 904, 905 (5th Cir. 1987).

The Fourth Circuit standard is similar to that of the Fifth Circuit placing a “heavy burden” of demonstrating prejudice on a party seeking to establish that an adverse party has waived its right to arbitrate by participating in litigation. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001) (“the party opposing arbitration ‘bears the heavy burden of proving waiver.’”).

By comparison, although the First Circuit requires a showing of prejudice, the burden is not nearly as high as that of the Fifth or Fourth Circuits. In fact, the First Circuit, when determining whether there has been a waiver of the right to arbitrate requires the demonstration by the adverse party of a “modicum of prejudice.” *Rankin v. Allstate Insurance Co.*, 336 F.3d 8, 12 (1st Cir. 2003); *In re Tyco Int’l Ltd. Sec. Litig.*, 422 F.3d 41, 44 (1st Cir. 2005). The Second Circuit, by contrast, has held that the existence of prejudice is a factor to be considered among other factors. *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002).

Uniquely, the Third Circuit has crafted the following six-part test to determine the presence of prejudice in *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir. 2007):

After surveying the case law of our court and other circuits, we compiled a nonexclusive list of factors relevant to the prejudice

inquiry: [1] the timeliness or lack thereof of a motion to arbitrate; [2] the degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the [trial] court's pretrial orders; and [6] the extent to which both parties have engaged in discovery.

B. The Minority Viewpoint Not Requiring a Showing of Prejudice.

The Seventh Circuit is the primary proponent of the minority view, that prejudice is normally irrelevant when determining whether a party has waived its right to arbitrate by participating in litigation. This viewpoint was first expressed in the case of *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F.2d 585, 588 (7th Cir. 1992) where the Court stated as follows:

The essential question is whether, based on the circumstances, the alleged defaulting party has acted inconsistently with the right to arbitrate. But where it is clear that a party has forgone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party.

The Court in *St. Mary's* noted that this position was consistent with the notion that “the federal policy embodied in the Arbitration Act is a policy favoring enforcement of contracts, not a preference for arbitration over litigation” and that, therefore, a waiver of a right to arbitrate should be treated as a waiver of any other contractual right.

Judge Richard Posner, a primary advocate of the notion that prejudice is irrelevant to a waiver analysis, reiterated the holding of *St. Mary's* in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d at 389. The Court in *Cabinetree* noted that “an election to proceed before a non-arbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate” and that a Court may find waiver of the right to arbitrate “without insisting on evidence of prejudice beyond what is inherent in an effort to change forums in the middle.” Judge Posner noted that the purpose behind contractual arbitration clauses is not to encourage parties to such clauses to proceed either simultaneously or sequentially in multiple forums. He notes that to allow parties to evaluate the progress and state of litigation before determining whether to pursue arbitration is to play “heads I win, tails you lose.” *Id.* at 391.

The viewpoint that prejudice is not a necessary requirement of a waiver analysis where a party has participated in litigation is shared by the District of Columbia Circuit and the Tenth Circuit. In the recent case of *Khan v. Parsons Global Services, Ltd.*, 521

F.3d 421, 425 (D.C. Cir. 2008), the D.C. Circuit reiterated the rule that “[a] finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived, although ‘a court may consider prejudice to the objecting party as a relevant factor’ in its waiver analysis.”).

In the recent case of *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 772 (10th Cir. 2010), the Tenth Circuit reiterated its adoption of a six-part test which the courts should generally apply to determine whether there has been a waiver of the right to arbitrate, which test was originally set out in *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464 (10th Cir. 1988). These factors include:

- (1) whether the party’s actions are inconsistent with the right to arbitrate;
- (2) whether “the litigation machinery has been substantially invoked” and the parties “were well into preparation of a lawsuit” before the party notified the opposing party of an intent to arbitrate;
- (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
- (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
- (5) “whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place”; and
- (6) whether the delay “affected, misled, or prejudiced” the opposing party.

Although the Tenth Circuit applies the six-part so-called “*Peterson* factors” when evaluating whether a party has waived its right to arbitrate, the Court in *Hill* has made clear that the application of those factors were:

not intended to suggest a mechanical process in which each factor is assessed and the side with the greater number of favorable factors prevails. Nor were we even suggesting that the list of factors is exclusive. Rather, these factors reflect certain principles that should guide courts in determining whether it is appropriate to deem that a party has waived its right to demand arbitration.

Id. at 773.

The *Hill* Court further noted that “A court may look to several of the *Peterson* factors in finding waiver on the ground that ordering arbitration [once a party has participated in litigation] would permit a party to manipulate the judicial process – for example, by allowing it to take a mulligan if the court proceeding is progressing unfavorably or by allowing it to use the courts to obtain discovery unavailable in arbitration.” *Id.*

The notion that contracting parties should be able to rely on predictability and uniformity in achieving their bargained for expectations is completely lost in the context of the divergent waiver analyses among the Circuits.

II. THE CIRCUIT CONFLICT SHOULD BE RESOLVED BY ABOLISHING THE PREJUDICE INQUIRY ENTIRELY.

There are two (2) ways for this Court to resolve the aforementioned conflict amongst the Circuits: make the prejudice inquiry universal to some extent or remove the prejudice inquiry from arbitration's jurisprudence entirely. The latter is the best course of action. Only by eliminating the prejudice inquiry (A) will Federal-State forum shopping be discouraged and principles of comity upheld; (B) will the public policy benefits of employing arbitration be realized; and, (C) will arbitration's jurisprudence be consistent with the well-founded and longstanding principles of contract law embraced by this Court; instead, (D) a presumptive waiver of arbitration should control any time parties make the election to proceed before a nonarbitral tribunal to resolve their dispute.

A. Abolishing the Prejudice Requirement Will Discourage Federal-State Forum Shopping, Will Prevent Litigants From Seeking a Second Forum After Dissatisfaction With the First, and Will Promote Principles of Federal-State Comity.

In addition to the split of authority among the Circuit Courts discussed above, there is a substantial split of authority among the courts of the several states and their federal counterparts. The diversity of judicial viewpoints concerning waiver in the context of arbitration exalts happenstance and manipulation

over a principled inquiry into the intent and conduct of the parties. This case perfectly illustrates the ills caused by the split of authority and the forum shopping which such a split exacerbates and encourages. The Florida Supreme Court has specifically held that a party may waive its right to arbitrate even if the party opposing arbitration has suffered no prejudice. *Raymond James Financial Services, Inc. v. Saldukas*, 896 So.2d 707, 710-11 (Fla. 2005). The Eleventh Circuit Court of Appeal, by contrast, has held that a party that has participated in litigation has not waived its right to arbitrate unless the adverse party can demonstrate that it has suffered special prejudice. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309 (11th Cir. 2002).

After answering Petitioner's lawsuit in Florida state court, Respondent filed its Motion to Compel Arbitration (in Florida state court). However, once Petitioner asserted that Respondent had waived its right to arbitrate under the *Raymond James* standard, Respondent withdrew its Motion to Compel arbitration and filed a Petition to Compel Arbitration in the District Court for the Southern District of Florida. In its federal court Petition, Respondent candidly noted its motivation for switching fora:

There is a dramatic difference in the current law regarding "waiver" of the right to arbitrate between the U.S. Court of Appeals for the Eleventh Circuit and that of the Supreme Court of Florida. In *Ivax Corp v. B. Braun of America, Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002), the Eleventh Circuit confirmed the two-part test regarding whether a

party had waived its right to arbitrate: first, under the “totality of the circumstances” has the party acted inconsistently with the arbitration right, and second, has that party in some way prejudiced the other party. In dramatic contrast, the Florida Supreme Court in *Raymond James Financial Services, Inc. v. Saldukas*, 896 So.2d 707, 710-711 (Fla. 2005) declined to follow the Eleventh Circuit’s two-part test, expressly held there is no requirement of “prejudice,” and held that waiver occurs merely “by actually participating in a lawsuit or taking action inconsistent with that right.” Florida state district courts, subsequent to *Saldukas*, have held that the filing of an answer alone is enough to waive the right to arbitrate. *Estate of Williams v. Manor Care of Dunedin, Inc.*, 923 So.2d 615 (Fla. 2d DCA 2006); *Mora v. Abraham Chevrolet – Tampa, Inc.*, 913 So.2d 32 (Fla. 2d DCA 2005).

Thus, after clearly electing to litigate, pursuant to a permissive arbitration provision, Respondent engaged in blatant forum shopping to obtain a result in District Court which it clearly could no longer obtain in Florida state court. Such federal-state forum shopping has traditionally been strongly disfavored by the federal and state courts and is the fundamental underpinning of the seminal case of *Erie v. Tompkins*, 304 U.S. 64 (1938) and its progeny. The evils of federal-state forum shopping have long been echoed in the academic literature as well. See M. Jason Hale, *Federal Questions, State Courts, and the*

Lockstep Doctrine, 57 Case W.Res.L.Rev. 927, 937 (2007):

The Erie doctrine demonstrates that forum shopping is a practice to be discouraged. There is an innate sense of unfairness when the outcome of a trial turns on the choice of forum rather than on the merits of the law and facts in a given case. Further, not only does the inherent inconsistency in two independent bodies of law raise questions of equal protection because of its unfairness but it also creates other practical problems.

See also Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 Mercer L.Rev. 757, 782 (1995) (“Perhaps the dislike of forum shopping is based on an inchoate sense that it is wrong to have results turn on the choice of forum.”); see also *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 441 (2d Cir. 1995) (denying a party’s attempt to invoke the federal courts to compel arbitration after having already participated in state court litigation, noting that the case was just “about forum-shopping, by one and all”).

The disparity between Florida’s state and federal courts is not an isolated incident. A minority of states are of the opinion that they must apply mandatory federal standards in their determination of whether a litigant waived its right to arbitrate. *Zedot Constr., Inc. v. Red Sullivan’s Conditioned Air Services, Inc.*, 947 So.2d 396, 399 (Ala. 2006); *Century 21 Maselle and Assoc., Inc. v. Smith*, 965 So.2d 1031, 1036-37 (Miss. 2007) (under *Moses H. Cone* “parties claiming waiver must offer sufficient evidence . . . to overcome

the presumption in favor of arbitration”; “Procedurally, it shall be no different in state court.”); *Saga Communications of New England, Inc. v. Voornas*, 756 A.2d 954, 958-59 (Me. 2000) (“The Federal Arbitration Act . . . governs the current case.”; *citing Moses H. Cone Hospital*).

The majority of states, however, are of the opinion that state law, not federal, controls, and, among those states, there is a great disparity as to their respective requirements for a showing of prejudice in a waiver analysis. If the Supreme Court were to, once and for all, interpret the FAA in such a way as to eliminate the prejudice requirement, the state courts would be compelled to change the manner in which they interpret and apply the FAA with respect to the prejudice requirement. *See* M. Jason Hale, *supra* at 927 (“State courts have adopted the doctrine that if presented with a federal question, they are not bound by the decisions of any federal court interpreting the law except the United States Supreme Court.”). *See also* Steven H. Steinglass, *1 Section 1983 Litigation in State Courts* § 5:8 (2010) (“Lower federal courts do not have appellate jurisdiction over state courts, and both state and federal courts make independent judgments as to the meaning of federal law. The Supreme Court, however, has appellate jurisdiction over state and federal courts and is responsible for maintaining the uniformity of federal law.”). Such an action by the Supreme Court would drastically serve to eliminate forum shopping, the evils of which have long been established. This case represents forum shopping where, after the inception of litigation, if a

party is dissatisfied with their treatment in one forum, they can seek better treatment in another. This is not just forum shopping, but forum exchanging after buyer's remorse.

In addition, as a natural outgrowth of the variances in policy between the federal and state courts, there has been the proliferation of federal court injunctions of state court litigation where federal courts determine that a matter ought to be arbitrated on the rationale that such an order to arbitrate would be ineffective if the litigation proceeded in state court notwithstanding. *See, e.g., Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997) (affirming, as modified, the district court's injunction proscribing further actions by the state court, which had refused to stay the action pending arbitration); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 136-38 (2d Cir. 1997) (affirming a district court's grant of injunctions against state courts, despite arguments that they were improper given the *Rooker-Feldman* doctrine or abstention principles); *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (granting a motion to compel arbitration and staying Texas state court litigation although the Texas court previously refused to grant a temporary restraining order precluding litigation of the suit).

In this case, Respondent was most certainly barred from asserting its right to arbitrate in Florida state court once it participated in the State Court Action. Respondent, desiring to stop the State Court Action in its tracks, sought just such an anti-suit

injunction from the federal court. However, by definition, arbitral anti-suit injunctions necessarily violate the underlying principles of the Federal Anti-Injunction Act (28 U.S.C. § 2283) which prohibits federal injunctions of state court litigation as well as well-established notions of federal-state comity and federalism. Although it is not always possible to harmonize federal and state law so as to limit any friction between the two court systems, and the related need for extraordinary measures such as anti-suit injunctions, removing the prejudice requirement will have the effect, at least in this area, of reducing the need for such extraordinary measures. This Court should act accordingly.

B. The Prejudice Requirement Should Be Discarded As It Completely Undermines the Expediency and Other Public Policy Considerations Justifying the Enforcement of Arbitration Provisions in the First Instance.

In their zeal to apply this Court's jurisprudence faithfully, many lower courts have gone too far and astray. As this Court made clear, the purpose of the Federal Arbitration Act was "to reverse the long-standing judicial hostility to arbitration agreements and to place arbitration agreements **upon the same footing as other contracts.**" *Green Tree Fin. Corp. - Alabama v. Randolph*, 531 U.S. 79, 85-86 (2000) (emphasis supplied). Yet, many of the circuit courts below have distorted the scales of justice by placing a heavy "thumb on the scale in favor of . . . arbitration

over adjudication.” *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003). This practice should be prohibited. There is no precedent to support an intent of this Court to undermine a litigant’s fundamental right to access the courts of law.

Whenever efforts are made to remove bias against one evil, often times another rears its head. In this instance, this Court took consistent and great pains to weed out the judiciary’s proclivity to shy away from relinquishing its adjudicative function to arbitrators, by proclaiming, once and for all, that a provision requiring arbitration should be treated like any other contractual provision – and enforced accordingly. The purpose behind this Court’s dictate was simple. The arbitral process provides parties with an “efficient, inexpensive, and expeditious means for dispute resolution” and, therefore, the parties’ decision to elect it should be afforded the same dignity with which courts enforce any other contractual provision. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). Without such equality of enforcement, the parties’ desire and intent, to avoid the expense and delay of litigation, would be improperly frustrated.

However, the level playing field that this Court attempted to establish has yet to be achieved due to misapplication of the principle. By requiring a litigant to show prejudice before they are construed as having elected to waive their right to arbitrate, the lower courts have created a monster of over-compensation. This legal creature is also bent on fundamentally frustrating a party’s justified contractual expectations

and their right to quick and inexpensive resolution of their disputes. Put differently, now, with courts requiring evidence of special prejudice before enforcing the party's election of a judicial forum, parties are faced with unjustifiable and manifold litigation costs and delay: costs for the underlying dispute, costs and delay to adjudicate the prejudice inquiry, and then costs for the arbitration if, in the end, their adversary can find some court – federal or state – to compel a “do-over” notwithstanding. There is no use in this Court's learned vitalization of arbitration provisions to curtail expense and delay, if doing so just creates more ineconomy and inefficiency – *albeit*, of a different kind.

This case presents a perfect controversy that this Court can use to slay this dragon of unintended consequences – one illustrating the depths to which such frustration and expense can travel. While the parties in the Federal Court Action spend countless dollars prosecuting hearings, rehearings and an appeal, the State Court Action is still chugging along to and through extensive discovery, summary judgment hearings, and trial. And if the case is ultimately compelled to arbitration, the sums of money spent by the parties – likely in excess of the sums at issue – will be for naught. This should not be the law. *See Cabinetree*, 50 F.3d at 390 (the intention behind such arbitration “clauses, and the reason for judicial enforcement of them, are not to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums”).

To make it ineluctably certain, as this Court recently held, the national policy not to interfere with

an election to arbitrate only makes sense due to “arbitration’s essential virtue of resolving disputes straightaway.” *Cf. Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008); *see also Zirger v. General Accident Ins. Co.*, 676 A.2d 1065, 1074 (1996) (“the advantages of arbitration evaporate when arbitration is used not as a substitute for litigation, but as a supplement to litigation”). Accordingly, because requiring an extensive prejudice inquiry opens “the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a [finale] to a more cumbersome and time-consuming” litigation prelude, a bright-line rule must be drawn by this Court. *Cf. Hall Street*, 552 U.S. at 588 (quoting to *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (quotations omitted)). Only by eradicating the prejudice inquiry, and creating a simple standard for waiver of an arbitral forum *whenever one participates in litigation without reservation*, will the monumental waste of scarce judicial and party resources subside – the very goal the FAA was supposed to realize.

C. The Prejudice Requirement Runs Anathema to Fundamental Contract Jurisprudence, As It Amounts to a Requirement of Super-Consideration, Violative of the Parties’ Freedom of Contract Rights Guaranteed by the U.S. Constitution.

As this Court has repeatedly held, “arbitration is a creature of contract” and, therefore, this Court’s

decisions regarding same are “motivated, first and foremost, by a congressional desire to enforce agreements into which parties have entered.” *See, e.g., Hall Street*, 552 U.S. at 585; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Likewise, central to the courts’ general ability to effectively enforce parties’ agreements is the deference and weight given to the parties’ course of conduct during the performance of the contract. *See* 11 Williston on Contracts § 32:14 (4th ed.) (“Given that the purpose of judicial interpretation is to ascertain the parties’ intentions, the parties’ own practical interpretation of the contract – how they actually acted, thereby giving meaning to their contract during the course of performing it – can be an important aid to the court”).

An economy cannot function if contractual parties’ conduct throughout the performance of their duties is not allowed to be relied upon by the other party – without a showing of substantial detriment. *See Cabinetree of Wisconsin, Inc.*, 50 F.3d at 39 (“in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance” – i.e., prejudice); *citing to* E. Allan Farnsworth, *Contracts* § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, *Corbin on Contracts* § 753 (1960). For instance, if a party elects to make use of a specific buyout provision in a company’s operating agreement, executes the necessary paperwork, and then delivers the documents to the other members of the operating agreement, those other members need to be able to rely upon the party’s election. Indeed, once an election is made, and a specific course of conduct chosen,

providing the party with a do-over unless the other parties suffer some type of special prejudice, is anathema to well-settled contract jurisprudence. And for good reason – it eviscerates the enforceability and predictability of contractual relationships.

Nevertheless, in the context of electing whether or not to make use of an arbitral forum – even if both parties elect to litigate the dispute, execute the necessary paperwork, and deliver it to their respective opponents – courts require a showing of “substantial prejudice” – a sort of super-consideration – in order for this election to be binding. Nowhere else in contract law can one find such an impediment to the justifiable contractual expectations of the parties. *Cf.* David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U.Chi.L.Rev. 1299, 1309 (2006) (one of the main rationales behind consideration is to make sure that the parties’ agreement to be bound by the contract’s terms was real and chosen after sufficient deliberation – not to impose a requirement that one party suffer prejudice so that, at that point, do-overs are no longer allowed). Therefore, because “contracts . . . are made of sterner doctrine, to interpret th[e arbitration provision] so as to sanction the conduct of [Respondent] in this case would empty the agreement of all meaning.” *Cf. Gray v. Am. Exp. Co.*, 743 F.2d 10, 20 (D.C. Cir. 1984) (emphasis supplied).

On the other hand, if parties had no agreement to arbitrate, but one serves a demand on another to participate in arbitration, the other accepts jurisdiction by answering the demand, and an arbitration date is set, the parties can unquestionably rely upon the judicial enforcement of that decision. One party may not then run to the courts arguing that, because no special prejudice has been levied against its opponent, the parties' election to arbitrate is not yet binding. A contract has already been formed by the parties' conduct. Yet, here, Petitioner served a complaint in the State Court Action on Respondent, the Respondent Answered the complaint without any mention of arbitration, and discovery commenced, an offer of judgment was served, and a trial date was set. Nevertheless, the prejudice inquiry invented by the lower courts allows the Respondent to run to the Federal courts to revoke its binding election. This dichotomy lacks any logical foundation and must be corrected by this Court. Just as parties are entitled to feel secure that their dispute-resolution which begins in arbitration will end there, so, too, they are entitled to feel secure that if they both participate in litigation, the rug will not be pulled out from under them mid-stride and they will be able to make full use of all of their efforts and expenses incurred therein.

What is more, in sharp contrast to principles of equity – a posture courts do not sit in when ruling upon arbitration provisions in a contract – parties' contractual elections at law require no showing of prejudice to be enforced; parties can and do enter into

disadvantageous agreements which they wish they could take back all the time. Contracts would mean nothing if the courts would allow them to press “reset” upon remorse. Arbitration elections should be no different. *See* Restatement (Second) of Contracts, § 79 comment c; *see also Am. Exp. Co.*, 743 F.2d at 17 (“the very essence of freedom of contract is the right of the parties to strike good bargains and bad bargains”); *see also Russell v. Shell Petroleum Corp.*, 66 F.2d 864, 868 (10th Cir. 1933) (and even “[e]quity will not, under the guise of reforming a contract, make a new contract not in contemplation of either party” – which is precisely what the prejudice requirement does through the judicially-imposed prejudice inquiry).

And it is this case, again, which presents a prime example of just how far astray this prejudice doctrine has taken the law. Here, the arbitration provision is permissive, not mandatory, meaning the parties “may” arbitrate a dispute between them *if they elect to do so*. *See* App. at 32. Therefore, requiring a showing of substantial prejudice in this case – in addition to the normal prejudice incident to switching forums such as the Petitioner’s substantial preparation for trial including its preparation of discovery, the factual investigation conducted, and the legal research performed – amounts to the courts foisting arbitration upon parties, who have both elected another route. *Cf. Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001) (holding that a party “cannot be forced to arbitrate against its will

because the arbitration clause **permits, but does not require, arbitration**) (emphasis supplied); *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986).

At bottom, a court's officious decision to impose a contractual term into every contract's arbitration provision – i.e., that prejudice is required in order for a party to elect a judicial forum – finds no support in the FAA, no support in this Court's arbitration jurisprudence and, in fact, violates the freedom of contract rights repeatedly guaranteed by the U.S. Constitution. See U.S. Const. art. 1, § 10, cl. 1.; see also *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 2 (1977) (“an impairment of contract such as is involved in this case can only be upheld if it is both reasonable and necessary to serve an important public purpose”); U.S. Const. amend. 14; see also *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932) (the Freedom to Contract “right is a part of the liberty protected by the due process clause, [and although] it is subject to such restraints as the state in the exertion of its police power reasonably may put upon it . . . freedom of contract is the general rule and restraint the exception”).

Indeed, it is well-settled that “[a] basic principle of contract law is the concept of freedom of contract – the right of the contracting parties to structure their transactions in accordance with their wishes.” *Hodge v. Evans Fin. Corp.*, 707 F.2d 1566, 1568 (D.C. Cir. 1983). This Court wisely eliminated barriers to elections to arbitrate long ago. Conversely, because the

prejudice inquiry impermissibly imposes a high hurdle which a contracting party must jump over – i.e., a contractual term requiring an evidentiary showing of prejudice *inserted by the judiciary* into every arbitration provision – this requirement must be uprooted and abolished by this Court. Only by doing so will the principles espoused by this Court in *Green Tree Fin. Corp.-Alabama v. Randolph* – that arbitration provisions be enforced *in the same manner* as any other contractual provision – be consistently applied and realized by and in the lower courts.

D. This Court Should Require the Circuit Courts to Enforce a Bright-Line Rule and Find a Presumptive Waiver to Arbitration Whenever a Party Makes the Election to Proceed Before a Non-arbitral Tribunal to Resolve Their Dispute.

As Judge Posner wisely held, no showing of special prejudice – beyond that which is ever present when one switches forums – should be required when a party seeks to enforce an election to litigate as opposed to arbitrate. *See Cabinetree of Wisconsin, Inc.*, 50 F.3d at 391 (election to proceed in court should be construed as a presumptive “waiver of a contractual right to arbitrate, without insisting on evidence of prejudice beyond what is inherent in an effort to change forums in the middle (and it needn’t be the exact middle) of a litigation”). A bright-line rule removes the pall of uncertainty over precisely when

the parties' election to litigate rather than arbitrate becomes binding – an uncertainty which is otherwise present, and causing the parties to needlessly incur litigation time, effort and expense until the issue of prejudice dissipates.

This rule is inline with longstanding contract law. As summarized by Farnsworth in his classic treatise of this subject, an “election” may not be revoked once it is made:

The word election signifies a choice, one that is often binding on the party who makes it. When the time for occurrence of a condition has expired, the party whose duty is conditional has a choice. He can take advantage of the nonoccurrence of the condition and treat his duty as discharged, or he can disregard the nonoccurrence of the condition and tread his duty as unconditional. Courts often hold that a party who chooses to disregard the nonoccurrence of a condition is bound by his election to treat his duty as unconditional; he cannot reinstate the condition even if the other party has not relied on this choice.

E. Allan Farnsworth, *Contracts*, § 8.5 at 564.

In the instant case, however, the Respondent made an election to proceed with litigation in a state court, despite its later change of heart – without a shadow of justification – to then pursue arbitration in a federal court. This initial election of a forum in

state court should be irrevocable and binding on Respondent as well as on Petitioner. This must be so because the “question here is not a choice between remedies in the usual sense (recession versus damages, damages versus injunction, and so forth), but the selection of the forum.” See *Cabinetree of Wisconsin, Inc.*, 50 F.3d at 39. And because this choice of a forum “was made in an arm’s-length negotiation by experienced and sophisticated businessmen [and lawyers] . . . absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.” Cf. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (emphasis added); *Rodriguez De Quijas v. Shearson*, 490 U.S. 477, 482 (1989) (“arbitration agreements . . . are, in effect, a specialized kind of forum-selection clause”) (citations omitted).

Indeed, if forum shopping is discouraged at the outset of litigation, *a fortiori* it should be forbidden once litigation has already commenced. See *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) (“The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result”). Any other law will inevitably lead to gross injustice and debilitating wastes of public and private resources.

Although it is currently the minority opinion, the Seventh Circuit Court of Appeals has been a guiding light with its well-reasoned and persuasive holdings on this very issue:

Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution. This policy is reflected not only in the thirty-day deadline for removing a suit from state to federal court but also in the provision waiving objections to venue if not raised at the earliest opportunity. Fed.R.Civ.P. 12(h)(1). Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election – against arbitration. Except in extraordinary circumstances not here presented, they should be bound by their election.

Cabinetree of Wisconsin, Inc., 50 F.3d at 391. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 273-74 (7th Cir. 1983); *Midwest Window Systems, Inc. v. Amcor Industries, Inc.*, 630 F.2d 535, 537 (7th Cir. 1980); see also 2 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 21.3.3 (1994) (cited to by Judge Posner noting that although the 7th Circuit’s “may be the minority position . . . it is supported by th[is] principal treatise on arbitration”).

Based on the foregoing, this Court should abolish the prejudice inquiry, replacing it with a presumptive waiver of one’s contractual right to arbitrate any time

they elect to litigate in a nonarbitral forum. To do otherwise creates the mirror image of the perverse result denounced by Justice Stevens in *Hall Street*, 552 U.S. at 588. The mischief addressed in *Hall Street*, post-arbitration litigation at the other end of the looking glass, is equally, if not more applicable to the pre-arbitration litigation which aggrieves the Petitioner. Elections, whether to arbitrate or litigate must be afforded equal dignity to avoid such evil. This Court's abolition of the prejudice inquiry is required as a result.

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CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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