No. 07-929

IN THE
Supreme Court of the United States

DONNA ROSSI, *et al.*,

Petitioners,

v.

JOSEPH CHRIS PERSONNEL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent, Joseph Chris Personnel Services, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Cited Authorities

COUNTERSTATEMENT OF THE CASE

I. Background Facts

In its opinion below, the Fifth Circuit Court of Appeals detailed the background facts *relevant* to the legal determination whether Respondent Joseph Chris Personnel Services, Inc. ("Joseph Chris") waived the right to arbitrate by filing a state court petition *authorized by statute and contract* that sought to enforce its right to arbitrate and that further sought relief consistent with that right to arbitrate. Joseph Chris objects to the Statement of the Case submitted by Petitioners Donna Rossi ("Rossi") and Albert Marco ("Marco"). Neither Rossi nor Marco objected to these *relevant* background facts, yet they fail to follow these *relevant* background facts. Joseph Chris submits the following *legally relevant* background facts from the decision of the Fifth Circuit Court of Appeals.

Joseph Chris is a personnel recruitment firm that helps clients find employment in the national real estate market. In 1998, Marco signed an employment contract with Joseph Chris to work as a recruiter; in 2001, Rossi did the same. Both contracts contained a provision that granted the right to arbitration to all parties in disputes regarding the contract. The contracts also contained a safe-harbor provision that allowed a party the right to sue in court "for the purpose of obtaining injunctive relief without waiver of the right to arbitrate." A similar provision is found in the Texas Arbitration Act, which "allow[s] trial court[s] to grant injunctions before arbitration proceedings begin." (citations omitted).

In early 2003, Rossi and Marco left their jobs at Joseph Chris and started their own recruiting firm. In response, on June 4, 2003, Joseph Chris filed suit in Texas state court. The complaint alleged, among other things, that Rossi and Marco were violating a non-compete provision in their employment contracts and were breaching their fiduciary duties by using and/or disclosing Joseph Chris's confidential and proprietary information. Joseph Chris requested a temporary injunction prohibiting Rossi and Marco from taking advantage of that information and also requested damages. The complaint also requested an ex parte order requiring Rossi and Marco to each show up for a two-hour deposition "[to] facilitate the hearing on the temporary injunction." The court promptly granted Joseph Chris's ex parte request and set July 15 for both depositions.

On July 3, Rossi and Marco answered and four days later removed the case to federal court. Once in federal court, Rossi and Marco filed a motion for a protective order, asking the district court to quash their depositions. Shortly thereafter at a pre-trial conference, the district court wiped the discovery slate clean, quashing all formal discovery, and ordered the parties to exchange some pertinent information. Rossi, for example, was required to give Joseph Chris her customer lists.

On July 21, Joseph Chris's counsel again raised the issue of arbitration in an e-mail: "Turning next to failures to respond to prior correspondence, I asked you if you would like to use AAA rather than JAMS for the arbitration. If I do not get a decision from you by this afternoon I will start the procedure with JAMS." On the same day, Rossi and Marco's counsel responded that they "object[ed]" to moving the case to arbitration.

On August 19, the district court held another pre-trial conference, where, like during the previous two conferences, Joseph Chris did not bring up the subject of arbitration. Later that day, Joseph Chris's counsel sent the following e-mail to opposing counsel:

> You may receive a copy of an arbitration demand in the mail. Although we still intend to file an arbitration demand, we have not filed the arbitration demand with JAMS as reflected in the package you received. I prepared the arbitration demand to be filed today, as necessary, but we have not filed it.

Joseph Chris explains to this court that the "as necessary" language referenced its attempts to obtain a preliminary injunction hearing - if it believed it could not quickly obtain such a hearing, it would forgo the attempt at a preliminary injunction and move right to arbitration.

On August 29, Joseph Chris went ahead and filed its arbitration request with JAMS (the Judicial Arbitration and Mediation Services). That same day, Rossi and Marco filed an emergency motion in district court asking that Joseph Chris be enjoined from pursuing the arbitration. The district court eventually granted the motion, concluding that Joseph Chris had waived its right to arbitrate given its participation in this litigation. Rossi and Marco subsequently filed a counter-claim, alleging that Joseph Chris owed them unpaid commissions. They eventually filed motions for summary judgment on all of Joseph Chris's causes of action and on their back wages claims. The district court granted each motion and entered judgment against Joseph Chris.

II. The Decision Below by the Fifth Circuit Court of Appeals

Joseph Chris also objects to the incomplete, and thus inaccurate, statement by Rossi and Marco of the decision by the Fifth Circuit Court of Appeals. Joseph Chris submits a clarified summary of the decision of the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals reversed the District Court's finding that Joseph Chris had waived the right to arbitrate. In doing so, the Fifth Circuit Court of Appeals, based upon its prior statement of the *legally relevant* background facts, held that this case involves whether Joseph Chris waived the right to arbitrate when:

(1) Joseph Chris is authorized by statute and by the contract containing the right to arbitrate to file the state court petition it filed,

(2) Joseph Chris mentioned the right to arbitrate in the initial pleading and filed that initial pleading to enforce the right to arbitrate and to try to preserve the status quo to enhance the right to arbitrate,

(3) Joseph Chris initiated the arbitration shortly within three months of filing suit and only after its efforts in the District Court ancillary to the right to arbitrate had been frustrated,

(4) Joseph Chris served or initiated no substantial discovery or substantive motions on the merits before Joseph Chris initiated the arbitration, and

(5) Rossi and Marco incurred no substantial expense before Joseph Chris initiated the arbitration.

These *core critical* facts inform the decision by the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals applied its legal definition of waiver of the right to arbitrate:

> [w]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. Once a party "[s]ubstantially invok[es] the litigation machinery," that "qualifies as the kind of prejudice . . . that is the essence of waiver." Prejudice, in this context, "refers to the inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. (citations omitted)

It then stated,

> [u]nder the facts presented here, we hold that Joseph Chris did not waive its right to arbitrate. While typically the decision to file suit will indicate a 'disinclination' to arbitrate, Texas state law expressly permitted Joseph

> Chris to file suit to, among other things, obtain an injunction. More importantly, that protection was extended to this proceeding as these parties contracted for the right to be able to file suit to preserve the status quo with an injunction without waiving the right to arbitrate. Joseph Chris did just that. Indeed, in the complaint filed in state court, Joseph Chris explained that it was seeking to depose both Rossi and Marco for the purpose of facilitating a request for a preliminary injunction. Later, when the case was removed to federal court and the district court quashed those depositions, Joseph Chris promptly notified Marco and Rossi of its desire to arbitrate. Any prejudice Rossi and Marco suffered having to deal with Joseph Chris's attempt to obtain a preliminary injunction was prejudice they had contracted to assume. And while Joseph Chris included a paragraph for legal damages in its complaint and it later asked for a jury trial-actions that seem to exceed the scope of their contractual right to pursue a preliminary injunction-Rossi and Marco have made no showing that those requests required them to spend additional time or money or that they were otherwise prejudiced by those requests. (citations omitted).

Driven by the facts at bar, the Fifth Circuit Court of Appeals held that Joseph Chris did not waive its right to arbitrate under the application of the elements of the arbitration-waiver test.

The Fifth Circuit Court of Appeals next reviewed precedent from the Seventh Circuit Court of Appeals cited by Rossi and Marco. The Fifth Circuit Court of Appeals summarized the precedent from the Seventh Circuit Court of Appeals as follows:

> a party presumptively waives its right to arbitrate when it files suit;
>
> this presumption arises when a party files suit to test the waters, only to invoke the right to arbitrate if things did not go as planned in court;
>
> the presumption of waiver is rebuttable in cases where the decision to file suit does not signify an intention to proceed in court to the exclusion of arbitration.

(citations omitted).

The Fifth Circuit Court of Appeals then held:

> [h]ere, given Joseph Chris's right to file suit for injunctive relief, the decision to proceed in court did not necessarily signify that it intended to forgo arbitration-an intention it quickly expressed to Rossi and Marco. Finally, Rossi and Marco contend that Joseph Chris was testing the waters by filing suit and, . . . playing 'heads I win, tails you lose.' Rossi and Marco point to the fact that Joseph Chris not only filed suit in lieu of arbitration, but failed to tell the district court of its plan to arbitrate

> during the pre-trial conferences. But as explained above, Joseph Chris had the right to file suit, it quickly made its intention to arbitrate clear, and it did not wait until the district court had made a number of rulings to test the waters before filing for arbitration.

Significantly, and totally absent from the Petition filed by Rossi and Marco, the Fifth Circuit Court of Appeals held that there would be no waiver under the application of either its precedent or the precedent from the Seventh Circuit Court of Appeals (that when applied to the facts of this case is congruent to the precedent from the Fifth Circuit Court of Appeals).

REASONS FOR DENYING THE PETITION

I. Summary

Unremarkably, the Fifth Circuit Court of Appeals correctly applied its own precedent and the precedent of the Seventh Circuit Court of Appeals and held that Joseph Chris did not waive the right to arbitrate by filing a state court petition *authorized by statute and contract* that sought to enforce the right to arbitrate and that further sought relief consistent with that right to arbitrate. In the process and on balance, this decision by the Fifth Circuit Court of Appeals did not expose, and actually forecloses, the now suggested substantial conflict among the federal courts in applying the test for the waiver of the right to arbitrate.

Rossi and Marco ignore the *core critical* facts informing the decision by the Fifth Circuit Court of

Appeals, and rather rely upon their rejected version of the facts. They ignore the congruence of the application of the arbitration-waiver tests in the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals and the remaining Circuit Courts of Appeals to the core critical facts at bar. They engage in the putative analysis of a hypothetical case. They simply cannot explain how there is any substantial conflict in the decisions of the federal courts such that Joseph Chris could have waived the right to arbitrate by taking steps *consistent* with the right to arbitrate. They advocate an extreme, unsupportable theoretical position that ignores the substantive application of the elements of the tests for waiver of the right to arbitrate and that exalts form over substance. There is no alleged substantial conflict in precedents, alleged substantial confusion in the courts or any other alleged compelling reason to grant a petition for certiorari to review the decision of the Fifth Circuit Court of Appeals.

II. There is No Substantial Conflict Among the Precedents in the Fifth Circuit Court of Appeals and the Seventh Circuit Court of Appeals Utilized in this Case that Compels Discretionary Review by the United States Supreme Court.

Introduction

There is a congruence resulting from the application of the precedent from the Fifth and Seventh Circuit Courts of Appeals to determine whether Joseph Chris waived the right to arbitrate when it filed a state court petition *authorized by statute and contract* that sought to enforce the right to arbitrate and that further sought

relief consistent with that right to arbitrate. That congruence establishes that Joseph Chris did not waive the right to arbitrate and, moreover, precludes the non-existent conflict suggested by Rossi and Marco.

The Decision by the Fifth Circuit Court of Appeals Below is Dispositive

The decision by the Fifth Circuit Court of Appeals recognized this confluence when it held that Joseph Chris did not waive the right to arbitrate under the precedent from both the Fifth and Seventh Circuit Courts of Appeal. That decision, by itself, should end any further discussion of any suggested conflict. This is especially true, as Rossi and Marco simply fail to address this part of the decision by the Fifth Circuit Court of Appeals. A further review of the precedent from both the Fifth and Seventh Circuit Courts of Appeals, however (if necessary), concretizes the existence of this confluence and the correctness of the holding below by the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals Precedent

The Fifth Circuit Court of Appeals begins with this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*[1] and its instruction that any doubts whether a party has waived the right to arbitrate should be resolved in favor of arbitration. *Joseph Chris Personnel Services, Inc. v. Rossi*, 249 Fed. Appx. 988, 989 (5th Cir. 2007); *Miller Brewing Co. v. Fort*

1. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

Worth Distributing Co., Inc., 781 F.2d 494, 496-497 (5th Cir. 1986). It then indulges a presumption against waiver. *Id.*

The Fifth Circuit Court of Appeals holds that "[w]hen one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial." *Miller*, 781 F.2d at 497. It then holds that "[s]ubstantially invoking the litigation machinery qualifies as the kind of prejudice that is the essence of waiver." *Id.*; *Joseph Chris*, 249 Fed. Appx. at 991. It requires ". . . some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration." *Keytrade USA, Inc. v. AIN Temouchent M/V*, 404 F.3d 891, 897 (5th Cir. 2005). It eschews ". . . action inconsistent with the right [to arbitrate] . . . ," *Miller*, 781 F.2d at 497, and ". . . the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when a party's opponent forces it to litigate an issue and later seeks to arbitrate the same issue." *Joseph Chris*, 249 Fed. Appx. at 991.

Applying these principles, the Fifth Circuit Court of Appeals follows a three-step test to evaluate whether the filing of a lawsuit and later litigation conduct comprises a waiver of the right to arbitrate. First, it asks whether the party seeking to arbitrate shows a disinclination to arbitrate or has engaged in overt acts inconsistent with the right to arbitrate such as filing a lawsuit without mentioning the right to arbitrate. *Joseph Chris*, 249 Fed. Appx. at 991 and fn 10; *Miller*, 781 F.2d at 497; *Keytrade*, 404 F.3d at 897. Second, it asks whether

the party filing such a lawsuit has any explanation for later trying to arbitrate issues already litigated in the lawsuit other than the mere reason that the party wants a new forum after unsuccessful results in the lawsuit. *Id.* Third, if the party filing such a law suit has a valid reason for changing the forum, it asks whether that party failed to act diligently and caused the opposing party to incur undue costs, impairment of a legal position or loss of rights. *Id.*

Consistently, with this three-part test, the Fifth Circuit Court of Appeals correctly held that Joseph Chris did not waive the right to arbitrate. First, Joseph Chris filed a lawsuit *authorized by statute and contract* that sought to enforce the right to arbitrate and that further sought relief consistent with that right to arbitrate. Second, Joseph Chris had a reason to initiate the arbitration other than simply to change the forum. Third, Joseph Chris acted diligently. Rossi and Marco did not incur any undue costs and they suffered no impairment of any legal position.

The Seventh Circuit Precedent

The Seventh Circuit Court of Appeals holds that "... an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate." *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995). In regard to this rebuttable presumption, it states that "... we have deemed an election to proceed in court a 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." *Id.* (emphasis added).

The Seventh Circuit continues,

> [f]or it is easy to imagine situations — they have arisen in previous cases — in which such invocation does not signify an intention to proceed in a court to the exclusion of arbitration. . . . It is enough to hold that while normally the decision to proceed in a judicial forum is a waiver of arbitration, a variety of circumstances [(e.g. a suit to determine arbitrability]) may make the case abnormal, and then the district court should find no waiver or should permit a previous waiver to be rescinded. In such case, *prejudice to the other party, the party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration*, as should the diligence or the lack thereof of the party seeking arbitration — did the party do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration?

Id. at 390-91 (emphasis added).

The Seventh Circuit Court of Appeals further confirms:

> [The party opposing arbitration] argues that by filing this lawsuit, [the party seeking arbitration] waived its right to arbitrate. We disagree. [The] right to seek injunctive relief in court and the right to arbitrate are not

> incompatible — [the party seeking arbitration] need not have abandoned one to pursue the other and [the party resisting arbitration] cannot in good faith claim that it was misled by [the filing of] this suit into believing that [the party seeking arbitration] intended to forego arbitration. (citations omitted). [The party seeking arbitration] alleged in his complaint that it intended to submit a request for arbitration of its claims and [the rules of arbitration] expressly authorize parties to seek the interim relief [the party seeking arbitration] sought in its complaint.

Sauer Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983).

> Courts must determine whether based on all of the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate. (citations omitted). Although a variety of factors may be considered, diligence or the lack thereof should weigh heavily in the court's determination of whether a party implicitly waived its right to arbitrate.

Halim v. Great Gatsby's Auction Gallery, Inc., __ F.3d __, 2008 WL 383284 * 3 (7th Cir. 2008).

Thus, the relevant inquiry becomes whether

> [t]here is [any] plausible interpretation of the reason for [filing the lawsuit and for the later] delay [in seeking arbitration] except that [the party seeking arbitration] initially decided to litigate its dispute with [the party resisting arbitration] in the federal district court, and that later, for reasons unknown and with no shadow of justification, [the party seeking arbitration] changed its mind and decided it would be better off in arbitration.

Cabinetree, 50 F.3d at 391. If there is a plausible interpretation, *then prejudice must be shown in order to find a waiver of the right to arbitrate. Id.* (emphasis added).

Applying these principles, the Seventh Circuit Court of Appeals follows a three-step test to evaluate whether the filing of a lawsuit and later litigation activities comprise a waiver of the right to arbitrate. First, it asks whether the party seeking to arbitrate show a disinclination to arbitrate or engage in overt acts inconsistent with the right to arbitrate. Second, it asks whether the party filing such a lawsuit has any explanation for later trying to arbitrate issues already litigated in the lawsuit other than the party wants a new forum after unsuccessful results in the lawsuit. *Id.* Third, if the party filing such a lawsuit has a valid reason for changing the forum from the courts to an arbitration, it asks whether that party failed to act diligently and caused the opposing party to incur undue costs, loss of position or loss of rights. *Id.*

Consistently, with this three-part test, the Fifth Circuit Court of Appeals correctly held that Joseph Chris did not waive the right to arbitrate under the precedent of the Seventh Circuit Court of Appeals. First, Joseph Chris filed a lawsuit *authorized by statute and contract* that sought to enforce the right to arbitrate and that further sought relief consistent with that right to arbitrate. Second, Joseph Chris had a reason to initiate the arbitration other than simply to change the forum. Third, Joseph Chris acted diligently. Rossi and Marco did not incur any undue costs and they suffered no impairment of any legal position.

From Comparison to Congruence

The Fifth and Seventh Circuit Courts of Appeals each utilize substantially the same three-step test to evaluate whether the filing of a lawsuit and later litigation conduct comprises a waiver of the right to arbitrate. Whether they start from facially different presumptions or if they chart a different course, they both use the same basic jurisprudential compass to lead them both to the same destination. The substance of the application of the elements of the tests in both the Fifth and Seventh Circuit Courts of Appeals is congruent. Rossi and Marco must show the existence of a compelling or substantial conflict in the application of the elements of these tests to the facts in this case and not to some hypothetical set of facts. They have not done so. They have not even tried to do so, and they cannot do so.

III. There is No Substantial Conflict Among the Precedents in the Courts of Appeals that Compels Discretionary Review by the United States Supreme Court.

The precedent from the Fifth and Seventh Circuit Courts of Appeal does not exist in a vacuum. Not surprisingly, there is also a congruence resulting from the application of the precedent from all of the Circuit Courts of Appeals to determine whether Joseph Chris waived the right to arbitrate when it filed a state court petition *authorized by statute and contract* that sought to enforce the right to arbitrate and that further sought relief consistent with the right to arbitrate. That congruence establishes that Joseph Chris did not waive its right to arbitrate, and moreover precludes the non-existent conflict suggested by Rossi and Marco.

The First Circuit Court of Appeals utilizes a three-part test. *In Re Citigroup, Inc.*, 376 F.3d 23 (1st Cir. 2004). First, it asks whether the party seeking arbitration has participated in litigation inconsistently with the right to arbitrate. *Id.* Second, it asks whether the litigation machinery has been substantially invoked before initiating an arbitration. *Id.* Third, it looks into the length of the delay in initiating an arbitration. *Id.* The test applies when a party files a suit or counterclaim without referencing the right to arbitrate. *Id.* In that case, it also looks to see whether the party seeking to arbitrate has tried to take advantage of litigation and whether the party opposing arbitration has been affected, misled or prejudiced. *Id.*

Similar to the First Court of Appeals, the Second Circuit Court of Appeal utilizes a three-step test. *Forrest v. Unifund Financial Group, Inc.*, 2007 WL 766297 *6 (S.D.N.Y. 2007). First, it asks how long the party seeking to arbitrate has been engaged in litigation before seeking to arbitrate. Second, it asks if that engagement is so protracted to yield inherent unfairness to the party opposing arbitration. *Id.*; *Brownstone Investment Group, LLC v. Levey*, 514 F. Supp. 2d 536, 544-45 (S.D.N.Y. 2007). Third, it asks if there has been prejudice from delay, costs or damage to the opposing party's positions. *Id.*

The Third Circuit Court of Appeals utilizes a two-step test that incorporates elements of the prior three-part tests. *Koken v. Morelli*, 2007 WL 2990681 (D. New Jersey 2007). It looks to the degree of participation in the litigation by the party seeking to arbitrate. The fundamental determination is whether either the legal posture of the party opposing arbitration has been impacted, or whether there is such an undue delay in initiating arbitration to cause the party opposing arbitration to incur undue delay, expense or other prejudice. *Id.*

The Fourth Circuit Court of Appeals utilizes a four-step test that incorporates the elements of the prior tests. *Spinks v. The Krystal Co.*, 2007 WL 4568992 (D. South Carolina 2007). It looks to whether the party seeking to arbitrate substantially utilized the litigation machinery such that, within the entire context of the proceedings, permitting a subsequent arbitration will result in an undue impact on the legal position of the party opposing arbitration, undue delay, or expense

incurred or suffered by the party opposing arbitration. *Id.* The four relevant factors are (a) the extent of the delay in initiating arbitration, (b) the degree of litigation that has preceded the initiation of arbitration, (c) the resulting burdens and expenses, and (d) any other surrounding circumstances. *Id.* The Fourth Circuit Court of Appeals looks to the inherent unfairness of delay, expense or damage to a legal position that may occur when a party seeking to arbitrate forces the party opposing arbitration to litigate and then later seeks to arbitrate. *Moye v. Duke University Health System, Inc.*, 2007 WL 1652542 * 9 (M.D. North Carolina 2007); *see also Forrester v. Penn Lyon Homes, Inc.*, 2007 WL 4207537 *2 (N.D. West Virginia 2007).

The Sixth and Eleventh Circuit Courts of Appeals closely track the Third and Fourth Circuit Courts of Appeals. They, however, conflate elements of the other tests into a unitary criterion that "an agreement to arbitrate may be waived by actions of a party which are *completely* inconsistent with any reliance thereon." (emphasis added). *O. J. Distributing, Inc. v. Hornell Brewing Co., Inc.*, 340 F.3d 345, 356 (6th Cir. 2003); *see also Prude v. McBride Research Laboratories, Inc.*, 2008 WL 360636 **6-7 (E.D. Michigan 2008); *Francis v. Nami Resources Co., LLC*, 2007 WL 3046061 *5 (E.D. Kentucky 2007); *S&H Contractors, Inc. v. A. J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990). The question then becomes whether there has been prejudice in the form of delay, costs or loss of position. *Id.*

The Eighth and Ninth Circuit Courts of Appeal utilize a three-step test. *Lewallen v. Green Tree Servicing, LLC,* 487 F.3d 1085, 1090 (8th Cir. 2007); *Brown*

v. Dillard's, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005); *Hoffman v. Swift Transportation Co., Inc.*, 2007 WL 4268769 * 1 (D. Oregon 2007). First, they ask when the party seeking to enforce arbitration knew about the right to arbitrate. *Id.* Second, they ask whether the party acted inconsistently with the right to arbitrate after knowing about the right to arbitrate (e.g., filing suit without reference to the right to arbitrate). *Id.*; *United Computer Systems, Inc. v. AT & T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002). Third, they ask whether the party opposing arbitration has been prejudiced by the litigation conduct inconsistent with the right to arbitrate. *Id.*

Finally, the Tenth and the D.C. Circuit Courts of Appeal expand the traditional three-step test. *Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489-1490 (10th Cir. 1994); *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987). They look to the totality of the circumstances and the following factors:

1. has the party seeking arbitration acted inconsistently with that right;

2. has the party seeking arbitration substantially invoked the litigation process;

3. how long did the party seeking arbitration wait to raise the right to arbitrate;

4. did the party seeking the right to arbitrate file suit or a counterclaim;

5. did the party utilize processes or rights in litigation not available in arbitration; and

6. did any conduct inconsistent with the right to arbitrate prejudice, mislead or affect the party opposing arbitration.

Id. These extra elements are not new concepts. Rather, they are merely examples of the elements in the waiver test of the other Circuit Courts of Appeal. The expanded elements distill down to the basic proposition that a party seeking to arbitrate cannot immerse the parties into litigation and later use the policy of arbitration as a strategy to manipulate the legal processes to the prejudice of the party opposing arbitration. *Khan v. Parsons Global Services, Ltd.*, 480 F. Supp. 2d 327, 332-335 (D. District of Columbia 2007); *Hughes v. CACI, Inc.-Commercial*, 384 F. Supp. 2d 89, 99-100 (D. District of Columbia 2005).

The First, Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits Court of Appeal, based upon the analysis of the respective above-cited cases from these courts, start any discussion based upon a disfavor of the waiver of the right to arbitrate. The Seventh, Tenth and DC Circuit Courts of Appeal, based upon the analysis of the respective above-cited cases from these courts, profess a more neutral starting point. These starting points, however, do not supply the substantive analysis. Rather, the application of the prior congruent series of tests supplies the substantive analysis. Under those tests, a party seeking to arbitrate (1) that files a lawsuit without mentioning the right to arbitrate, (2) that then engages in substantial litigation conduct inconsistent

with the right to arbitrate, and (3) that creates undue costs, expenses, delay or that tries to take advantage of the litigation or the arbitration without an independent basis to do so will be found to have waived the right to arbitrate. Conversely, as Joseph Chris did not engage in such conduct, it has not waived its right to arbitrate. Rather, Joseph Chris acted consistently with its right to arbitrate. It seeks to arbitrate after filing a lawsuit that the arbitration provision and Texas arbitration law authorized to be filed. It initiated arbitration shortly after filing suit and after the use of the litigation to support the right to arbitrate failed.

IV. The Courts Have Not Experienced any Compelling Confusion in Deciding Whether a Party Filing Suit Has Waived the Right to Arbitrate.

The prior analysis cites to a series of recent federal district court and appellate decisions. While this is not an exhaustive list, the cited cases demonstrate that the lower courts are considering arbitration-waiver issues and deciding those issues without the jurisprudential angst suggested by Rossi and Marco.

The state courts will be guided by the above consistent analyses when federal law applies. *E.g.*, *Saint Agnes Medical Center v. PacifiCare of California*, 82 P.3d 727, 732-38 and n.4 (Cal. 2003). These same courts will look to their respective state law to answer the arbitration-waiver issue under each respective state law. *Id.*

V. Petitioners Rossi and Marco Advocate a Legal Test for Waiver of the Right to Arbitrate Adopted by No Circuit Court of Appeals.

Rossi and Marco present an assault on the "prejudice" requirement adopted by the Fifth Circuit Court of Appeals and, as discussed above, even as adopted by the Seventh Circuit Court of Appeals under the facts at bar. They fail to address the true state of the law as analyzed above. They advocate a position that no Circuit Court of Appeals has advocated or adopted.

Rossi and Marci overlook that there is even a "prejudice" element in the *Cabinetree* test as set forth in the text of *Cabinetree* itself. As stated above, the *Cabinetree* test holds that waiver of the right to arbitrate may occur if the party seeking to arbitrate files a lawsuit *and* then later seeks to change forums *without any plausible explanation for that change other than the party seeking to arbitrate wants a change.* As also stated above, the *Cabinetree* test finds *inherent* prejudice in such an unsupported decision to change forums after the parties have expended time, effort and costs in the litigation such that there is no need to insist "... *on evidence of prejudice beyond what is inherent in an effort to change forums....*" *Cabinetree*, 50 F.3d at 390-91. As further stated above, the *Cabinetree* test requires a showing of prejudice for any waiver of the right to arbitrate when, as in this case, the party seeking to arbitrate has a plausible reason for filing suit and later seeking to arbitrate. As stated above, this application of the *Cabinetree* test yields a congruent result of the arbitration-waiver tests of the Fifth Circuit Court of Appeals and the remaining Circuit Courts of Appeal.

Nevertheless, if Rossi and Marco succeed in their assault, then they, in essence, seek to change the law in all of the Circuit Courts of Appeal. They surmise that the filing of a lawsuit by a party later seeking to arbitrate is a *per se* waiver of the right to arbitrate. No Circuit Court of Appeals has adopted such a *per se* surmise. It is a functional impermissible irrebuttable presumption. It also means that, as in this case, that party seeking to arbitrate may waive the right to arbitrate even though that party acted diligently, consistently with the right to arbitrate, and as permitted by statute and the very arbitration provision at issue. The unilateral request by Rossi and Marco to undermine and upset the current congruent caselaw is not a compelling reason to grant a writ of certiorari.

VI. Petitioners Rossi and Marco Advocate a Legal Test for Waiver that Merely Substitutes One Fact-Intensive Inquiry for Another Fact-Intensive Inquiry Thereby Compounding Rather than Solving Their Perceived, Yet Non-Existent Jurisprudential Question.

Rossi and Marco argue that the current consistent case law fails to yield a "bright-line" test to determine what *specific* conduct inconsistent with the right to arbitrate will comprise a waiver of the right to arbitrate. This argument is misplaced. It seeks an impossible result.

Waiver is a fact-intensive inquiry. *Levey*, 514 F. Supp. 2d at 544. Even the most waiver-friendly tests, that according to Rossi and Marco have been adopted by the Seventh, Tenth and DC Circuit Courts of Appeal, are

fact-intensive tests. T. Ochmke, 2 COMMERCIAL ARBITRATION § 50-38 (Thomson/West 2008). There is no bright-line for these tests. *Id.* That is the nature of any waiver analysis. As long as the facts drive any analysis of the waiver of the right to arbitrate, there will never be any bright-line results.

CONCLUSION

Justice Cardozo presciently warned about the slavish reliance on metaphors and labels in lieu of reliance upon the substance of the law.[2] The substance of the law, as analyzed above, belies any suggested compelling reason to issue a writ of certiorari and to review the decision and judgment below of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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2. *Berkey v Third Avenue Railway Co.*, 155 N.E. 58, 61 (1926).