No. 08-146

IN THE
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,
v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

JEFFREY E. STONE
DOUGLAS E. WHITNEY
JOCELYN D. FRANCOEUR
JEFFREY M. HAMMER
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

M. MILLER BAKER
Counsel of Record
PAUL M. THOMPSON
JEFFREY W. MIKONI
KELLY M. FALLS
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000

Attorneys for Petitioner Arthur Andersen, LLP
(Additional counsel listed on inside cover)

October 21, 2008

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
(415) 565-4669

EARLE JAY MAIMAN
THOMPSON HINE LLP
312 Walnut Street,
14th Floor
Cincinnati, OH 45202
(513) 352-6747

Attorneys for Petitioner Arthur Andersen, LLP

RUSSELL S. SAYRE
TAFT, STETTINIUS & HOLLISTER, LLP
425 Walnut Street
Suite 1800 Firstar Tower
Cincinnati, OH 45202
(513) 357-9304

ROBERT B. CRAIG
TAFT, STETTINIUS & HOLLISTER, LLP
1717 Dixie Highway,
Suite 340
Covington, KY 41001
(859) 331-2838

Attorneys for Petitioners Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr.

RICHARD J. IDELL
IDELL & SEITEL LLP
465 California Street,
Suite 300
San Francisco, CA 94101
(415) 986-2400

DONALD L. STEPNER
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
40 W. Pike Street
P.O. Box 861
Covington, KY 41011
(859) 394-6200

Attorneys for Petitioners Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., and Prism Connectivity Ventures, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY TO BRIEF IN OPPOSITION

1. Respondents challenge the scope of the first question presented (whether Section 16(a)(1)(A) of the Federal Arbitration Act confers appellate jurisdiction over an appeal from a denial of a Section 3 motion to stay claims involving non-signatories), the breadth of the circuit split involving that question, and whether this case is a proper vehicle for reaching the first question presented. Each of these arguments fails.

a. Respondents argue that the first question presented should be limited to whether Section 16(a)(1)(A) of the FAA permits appeals from denials of Section 3 motions made by non-signatories on the basis of *equitable estoppel*. Br. Opp. 10. Respondents note, correctly, that petitioners sought below to enforce the arbitration agreement on the basis of equitable estoppel. *Id.*

The particular legal theory under which Section 3 is invoked, however, is irrelevant to the Sixth Circuit decision below, which—like the Tenth and D.C. Circuit decisions it followed—rests solely on the bright-line principle that Section 3 does not apply to claims involving non-signatories. *See* Pet. App. 2a-3a ("In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action and consequently, that we are without jurisdiction to hear this appeal on an interlocutory basis. We agree."); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 428 F.3d 940, 942 (10th Cir. 2005) ("Therefore, whether Defendants are appealing from the district court's

denial of a stay [under Section 3] or its refusal to compel arbitration [under Section 4], the plain language of the jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction." (emphasis by the court)); *DSMC Inc. v. Convera Corp.,* 349 F.3d 679, 685 (D.C. Cir. 2003) ("Section 3 does not apply to litigation involving parties not subject to a written agreement.").

The holdings of these decisions clearly are not limited to Section 3 motions made on the basis of equitable estoppel. Indeed, the bright-line principle enunciated in *DSMC* and later followed by the Tenth Circuit and the Sixth Circuit below could not turn on equitable estoppel because in *DSMC*, Section 3 was *not* invoked on the basis of equitable estoppel. Instead, a signatory defendant sought to stay the plaintiff's claim against a non-signatory co-defendant because of the effect of the litigation on an ongoing arbitration between the plaintiff and movant. *See* 349 F.3d at 684. Because the claim that was the subject of the Section 3 motion involved a non-signatory, the D.C. Circuit held that Section 3 did not apply as a matter of law, thus precluding appellate jurisdiction under Section 16(a)(1)(A). *Id.*[1]

---

[1] *DSMC* also involved a non-signatory's Section 4 motion to compel arbitration on the basis of equitable estoppel. *See* 349 F.3d at 682-84. The D.C. Circuit held that it lacked appellate jurisdiction over denial of the Section 4 motion for the same reason that it lacked jurisdiction over denial of the Section 3 motion: the motion sought

Accordingly, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits is not limited to equitable estoppel cases, as the particular legal theory upon which Section 3 is invoked to stay a claim involving a non-signatory is irrelevant under that rule. The first question presented properly corresponds to the broad holding below by asking whether Section 16(a)(1)(A) of the Federal Arbitration Act confers appellate jurisdiction over an appeal from a denial of a Section 3 motion to stay claims involving non-signatories.

b. Respondents argue that the circuit split involving the first question presented is limited to the Second Circuit's decision in *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007), which respondents admit conflicts with the rule of the Sixth, Tenth, and D.C. Circuits. According to respondents, the resulting split does not encompass the First, Third, Fourth, Fifth, Eighth, or Eleventh Circuits.

Respondents first argue that *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007) and *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004), both of which expressly upheld jurisdiction over appeals from denials of Section 3 motions involving non-signatories, are not part of the split because they did not involve equitable estoppel. Br. Opp. 13-15. But as demonstrated above, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits

---

relief with respect to claims involving a non-signatory. *Id.*

operates without regard to the legal theories upon which Section 3 is invoked in cases involving non-signatories. Had the Third and Fifth Circuits followed that bright-line rule in *Ehleiter* and *Waste Management*, they would have dismissed, rather than expressly found jurisdiction over, appeals from denials of Section 3 motions to stay claims involving non-signatories. *Ehleiter* and *Waste Management* therefore necessarily conflict with the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits.

In any event, respondents do not dispute that the Fifth Circuit's earlier decision in *Hill v. GE Power Systems*, 282 F.3d 343 (5th Cir. 2002) (cited in Pet. 14-15), in which the Fifth Circuit expressly found appellate jurisdiction over an appeal from a denial of a non-signatory's motion to stay under Section 3, *see* 282 F.3d at 348, and which *did* involve equitable estoppel, *id.*, conflicts with the bright-line rule of the Sixth, Tenth, and D.C. Circuits.

Respondents also argue that the decisions of the First, Fourth, Eighth, and Eleventh Circuits (*see* Pet. 17) are not part of the circuit split involving the first question presented because they did not expressly address appellate jurisdiction, even though they exercised it in appeals from denials of Section 3 motions to stay claims involving non-signatories. *See* Br. Opp. 16-17 n.5.

The decisions of the First, Fourth, Eighth, and Eleventh Circuits exercising (but not expressly addressing) appellate jurisdiction under Section 16(a)(1)(A) would indeed be irrelevant to the circuit split concerning the first question presented *if* the

Sixth, Tenth, and D.C. Circuits had (correctly) maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3. *See* Pet. 27-30 (explaining distinction); *see also Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) ("Appellate jurisdiction under § 16(a)(1)(A) depends on the existence (and denial) of a motion for stay pending arbitration, *not on the movant being correct.* If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper." (emphasis added)) (Easterbrook, J.).

Respondents concede, however, that the Sixth Circuit in this case, like the Tenth and D.C. Circuits before it, collapsed appellate jurisdiction and the merits together by holding that appellate jurisdiction does not exist under Section 16(a)(1)(A) *because Section 3 does not apply as a matter of law to claims involving non-signatories. See* Br. Opp. 13-14; *see also* Pet. 8-9 (explaining how the Sixth Circuit collapsed appellate jurisdiction into the merits). Precisely because the Sixth, Tenth, and D.C. Circuits (erroneously) view appellate jurisdiction through the prism of a *merits-based* construction of Section 3, the circuit split over appellate jurisdiction necessarily encompasses the First, Fourth, Eighth, and Eleventh Circuits, which construe Section 3 to apply to claims involving non-signatories when non-signatories can otherwise enforce—as petitioners sought to do in this case—the relevant arbitration agreement under principles of contract and agency law, including equitable estoppel. *See* Pet. 18, 22-23.

c. Respondents also characterize the Second Circuit's decision in *Ross*, which they admit conflicts with the Sixth Circuit's decision below, as "inchoate." Br. Opp. 19. *Ross* involved a precedential decision by a motions panel in a case still pending before a merits panel as of this writing. Nevertheless, it remains the law of the Second Circuit unless and until it is overturned. Thus, it is as "inchoate" as any other published, precedential decision. In any event, even if *Ross* is not taken into account, the bright-line rule followed by the Sixth, Tenth, and D.C. Circuits rejecting appellate jurisdiction over denials of Section 3 motions involving non-signatories conflicts with decisions of the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits.

d. Finally, respondents challenge whether this case is a proper vehicle for reaching the first question presented. Respondents argue that because Bricolage (the signatory co-defendant) is in bankruptcy, petitioners "have been pursuing a stay pending an arbitration that everyone acknowledges will never happen and have been seeking to compel an arbitration of their own with plaintiffs, whose only commitment was to arbitrate with a party no longer before the district court." Br. Opp. 20.

As respondents admit, however, petitioners moved in the district court for a Section 3 stay on the basis that "equitable estoppel prevented plaintiffs from avoiding arbitration of all claims *against the nonsignatory defendants* [i.e., petitioners]." Br. Opp. 2 (emphasis added). Alternatively, petitioners also moved for a Section 3 stay on the basis that even if equitable estoppel did not require arbitration of

respondents' claims against them, "the court should stay the claims against [petitioners], pending the arbitration they anticipated between plaintiffs and Bricolage, the lone statutory defendant." *Id.*

Bricolage's bankruptcy filing plainly mooted the alternative ground for petitioners' motion—that respondents' claims against petitioners should be stayed pending arbitration of respondents' claims against *Bricolage*—because no arbitration involving Bricolage would ever take place. For that reason, petitioners did not raise that issue in the Sixth Circuit, and do not raise it in their petition.

Petitioners did appeal, however, the district court's denial of the primary grounds of their Section 3 motion: that equitable estoppel required arbitration of respondents' claims against *petitioners*, and those claims should be stayed pending such an arbitration between respondents and *petitioners*. The district court denied that motion on the merits, holding that equitable estoppel does not require arbitration of respondents' claims against petitioners. Pet. App. 15a. On appeal to the Sixth Circuit, petitioners argued that equitable estoppel required arbitration of respondents' claims against them, and therefore the district court erred in denying a Section 3 stay pending such an arbitration. The Sixth Circuit never reached the merits of that equitable estoppel argument, however, because it determined that Section 3 does not apply as a matter of law to respondents' claims against petitioners (as non-signatories). Pet. App. 2a-3a, 12a.

Thus, contrary to respondents' assertion, petitioners are *not* "pursuing a stay pending an arbitration that everyone acknowledges will never happen." Br. Opp. 20. Rather, petitioners seek a stay pending arbitration of respondents' claims against them under equitable estoppel principles. Although Bricolage's bankruptcy may be relevant to whether petitioners can succeed *on the merits* in enforcing the arbitration agreement, that fact is immaterial to the holding of the Sixth Circuit and the questions presented by this petition: whether, as a non-signatory, petitioners' motion was properly brought under Section 3 of the FAA, and whether appellate jurisdiction exists under Section 16(a)(1)(A) to review its denial.

2. Respondents do not even acknowledge the second question presented (whether Section 3 allows a district court to stay claims against non-signatories when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel), and thus do not dispute that a circuit split exists regarding this question, with the Sixth, Tenth, and D.C. Circuits conflicting with the First, Fourth, Eighth, Ninth, and Eleventh Circuits. *See* Pet. 21-24. Indeed, a recent district court decision cited by respondents, *see* Br. Opp. 18 n.6, recognizes that split. *See Toledano v. O'Connor*, 501 F. Supp. 2d 127, 153 (D.D.C. 2007) (noting conflict between D.C. Circuit in *DSMC* and Second, Eighth, and Eleventh Circuits on whether Section 3 applies to claims involving non-signatories and following *DSMC*). Respondents have offered no argument suggesting

why the second question is unworthy of this Court's review or why this case is an inappropriate vehicle for reaching that question.

3. Furthermore, respondents highlight an additional point that *supports* granting review. In restructuring the first question presented to encompass appellate jurisdiction conferred by Section 16(a)(1)(B) over denials of *Section 4* motions to compel arbitration, *see* Br. Opp. i, respondents tacitly acknowledge that, even though this case only involves a Section 3 motion to stay, as a practical matter review in this case will also resolve identical questions concerning the rights of non-signatories to compel arbitration under Section 4 of the FAA and its parallel provision for interlocutory appellate review, Section 16(a)(1)(B). *See* Pet. 3 nn.1, 3 (noting that courts interpret Sections 3 and 4 in tandem); *see also DSMC*, 349 F.3d at 682-85 (applying same jurisdictional and merits analysis to Section 3 motion to stay and Section 4 motion to compel); *Universal Serv. Fund*, 428 F.3d at 942 (same); *Ross*, 478 F.3d at 98-100 & n.2 (disagreeing with *DSMC* and *Universal Service Fund* but interpreting Section 3 and Section 4 in tandem); *Ehleiter*, 482 F.3d at 213 (noting the identical analysis for appellate jurisdiction under Section 16(a)(1)(A) for denials of Section 3 motions and under Section 16(a)(1)(B) for denials of Section 4 motions); *Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417, at *2-3 (6th Cir. Sept. 25, 2008) (applying analysis of Sixth Circuit below to Section 4 and dismissing appeal of non-signatory for lack of appellate jurisdiction). Thus, as respondents tacitly acknowledge, a merits

decision by this Court in this case will effectively stabilize the law under Section 4 of the FAA as well as Section 3.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

JEFFREY E. STONE
DOUGLAS E. WHITNEY
JOCELYN D. FRANCOEUR
JEFFREY M. HAMMER
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

M. MILLER BAKER
Counsel of Record
PAUL M. THOMPSON
JEFFREY W. MIKONI
KELLY M. FALLS
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005
(202) 756-8000

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
(415) 565-4669

EARLE JAY MAIMAN
THOMPSON HINE LLP
312 Walnut Street,
14th Floor
Cincinnati, OH 45202
(513) 352-6747

Attorneys for Petitioner Arthur Andersen, LLP

RUSSELL S. SAYRE
TAFT, STETTINIUS & HOLLISTER, LLP
425 Walnut Street
Suite 1800 Firstar Tower
Cincinnati, OH 45202
(513) 357-9304

ROBERT B. CRAIG
TAFT, STETTINIUS & HOLLISTER, LLP
1717 Dixie Highway,
Suite 340
Covington, KY 41001
(859) 331-2838

Attorneys for Petitioners Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr.

RICHARD J. IDELL
IDELL & SEITEL LLP
465 California Street,
Suite 300
San Francisco, CA 94101
(415) 986-2400

DONALD L. STEPNER
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
40 W. Pike Street
P.O. Box 861
Covington, KY 41011
(859) 394-6200

Attorneys for Petitioners Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., and Prism Connectivity Ventures, LLC

Dated: October 21, 2008