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

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In accordance with Supreme Court Rule 15.8, petitioners submit this supplemental brief in order to direct the Court's attention to a new case that was decided on October 21, 2008, the same day that respondents filed their reply, and therefore not available to be referenced in the reply.

In their brief in opposition, respondents argued that the Second Circuit was not firmly entrenched in the circuit split involving the first question presented because *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007) ("*Ross I*"), was only the "inchoate" decision of a motions panel, and subject to further revision by a merits panel, which had not yet ruled. Br. Opp. 18-19. On October 21, 2008, the Second Circuit issued its merits decision in *Ross*. *See Ross v. Am. Express Co.*, Nos. 06-4598, 06-4759, --- F.3d ----, 2008 WL 4630314 (2d Cir. Oct. 21, 2008) ("*Ross II*"). This decision further supports petitioners' arguments in favor of certiorari for several reasons.

First, the merits panel's decision resolves any doubts about the Second Circuit's position within the circuit split concerning the first question presented. The *Ross II* court reaffirmed the motions' panel decision in *Ross I* that appellate jurisdiction existed to reach the merits of the non-signatory defendant's claim to arbitration, and expressly acknowledged its awareness of—and disagreement with—the Sixth Circuit's contrary decision below. *Ross II*, 2008 WL 4630314, at *4 & n.2 (citing *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597, 602

(6th Cir. 2008)). Thus, there can be no question that the Second and Sixth Circuits remain on opposite sides of a true circuit split—as each circuit admits. *See* Pet. App. 11a ("[W]e find the Second Circuit's analysis [in *Ross I*] unpersuasive.").

Second, *Ross II* emphasizes the magnitude of this circuit split concerning the first question presented. The *Ross II* court recognized that "a substantial split among the Circuits has now developed over this jurisdictional question." 2008 WL 4630314, at *4 n.2 (citing *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 n.6 (1st Cir. 2008)). As the petition noted, *Sourcing Unlimited* acknowledged the circuit split and the Sixth Circuit's place in that split. Pet. 10, 17; *see also Sourcing Unlimited*, 526 F.3d at 44 n.6 (citing *Carlisle*).

Third, *Ross II* underscores the important benefits that would follow a grant of certiorari in this case. By reformulating the first question presented to encompass jurisdiction over appeals from denials of both Section 3 motions for stays *and* Section 4 motions to compel arbitration, respondents tacitly admit that the same legal standard governs both issues. *See* Pet. Reply 9-10. *Ross II* reinforces this point by treating Section 3/Section 16(a)(1)(A) and Section 4/Section 16(a)(1)(B) interchangeably. *See* 2008 WL 4630314, at *4 n.2.[1] Given that every

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[1] *Ross II* only refers to the Section 4 motion in that case, *see* 2008 WL 4630314, at *4 n.2, but *Ross I* is clear that the case involved both Section 3 and Section 4 and their corresponding jurisdictional provisions, Sections 16(a)(1)(A) and16(a)(1)(B). *See Ross I*, 478 F.3d at 98.

court to examine the issue has done the same for purposes of the legal standard applicable to claims involving non-signatories, review of the decision below would effectively serve to stabilize the unsettled law under both sets of provisions.

Finally, *Ross II* illustrates the disparate treatment that similarly-situated litigants receive as a result of this substantial circuit split. In several circuits, including the Second, the courts of appeals would have considered the merits of petitioners' argument that equitable estoppel required arbitration of respondents' claims. But the Sixth Circuit would not even entertain the argument on the basis of its categorical rule that Section 3 does not apply to claims involving non-signatories, a rule that the Sixth Circuit has since extended to Section 4. *See* Pet. Reply 9 (citing *Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417, at *2-3 (6th Cir. Sept. 25, 2008)). This Court should therefore seize the present opportunity and put an end to the chaos in the courts of appeals over the applicability of Section 3/Section 16(a)(1)(A) and Section 4/Section 16(a)(1)(B) of the FAA to claims involving non-signatories.

CONCLUSION

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

Respectfully submitted,

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