No. 10-514

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Citibank, N.A. is an indirect wholly owned subsidiary of Citigroup Inc. Citigroup Inc. is a publicly traded company, trading on the New York Stock Exchange.

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REASON FOR DENYING THE WRIT

There is no true 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 litigation.

Petitioner, Stok & Associates, P.A. ("Stok"), asserts that there is a conflict among the circuits regarding the requirement that a party demonstrate that it has suffered prejudice in order for the trial court to find that the adverse party has waived its right to arbitrate. Stok is incorrect. No conflict has been declared by any circuit court, nor does any true or substantive conflict exist.

Stok correctly asserts that prejudice is expressly required in the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits. However, Stok mistakenly asserts that there is no prejudice factor in the Seventh, Tenth, and D.C. Circuits. In support of its erroneous assertion, Stok cites a 1995 Seventh Circuit case, *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995); a 1980 Tenth Circuit case, *Reid Burton Construction, Inc. v. Carpenters District Council of So. Colo.*, 614 F.2d 698 (10th Cir. 1980); and a 1987 D.C. Circuit case, *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C. Cir. 1987). An examination of these three cases, and relevant progeny, shows Stok's assertion of conflict in the circuits to be inaccurate.

The Seventh Circuit, in *Cabinetree*, *supra* at 390-91, held:

> We have said that invoking judicial process is *presumptive* waiver. For 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 juridical forum is a waiver of arbitration, a variety of circumstances 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 a case prejudice to the other party, the party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration** . . . (bold emphasis added).

Thus, although the Seventh Circuit has not expressly held prejudice to be an "element," clearly it is, at least, an important factor in that prejudice and "should weigh heavily in the decision whether to send the case to arbitration," *i.e.,* to determine whether a waiver has occurred. Thus, in the Seventh Circuit, the import of prejudice is patent. Whether it is an element is just a matter of semantics.

As to the Tenth Circuit, in the recent case of *Hill v. Ricoh Americas Corp.,* 603 F.3d 766, 774-76 (10th Cir. 2010), in the context of a four-month delay in demanding arbitration after answering the

complaint, the court discussed prejudice in the context of waiver:

> **The final consideration in waiver analysis is prejudice to the party opposing arbitration** – the sixth *Peterson* factor [*Peterson v. Shearson/American/Express, Inc.*, 849 F.2d 464, 467-68 (10th Cir. 1988)]. Other circuits agree on the importance of showing prejudice as an element of waiver. (bold emphasis added).

Although the Tenth Circuit has not expressly held prejudice to be an "element," the *Hill* court noted that failure to show any "substantial prejudice" was fatal to the waiver argument. *Hill, supra* at 775-76. Clearly, in the Tenth Circuit, the "substantial prejudice" factor is now just a synonym for a required element.

The D.C. Circuit comes closest to declining to include prejudice within the waiver decision. Yet, even that court, in the 23-year-old decision in *National Foundation for Cancer Research, supra* at 777-78, held:

> This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration. (citation omitted). We decline to adopt such a rule today. **Of course, a court may consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether**

> **the moving party has taken action inconsistent with the agreement to arbitrate.** (citations omitted). But waiver may be found absent a showing of prejudice. In any event, we cannot accept appellant's claim that its conduct did not prejudice NFCR. We agree that mere delay will rarely constitute prejudice. **Substantial invocation of the litigation process, however, may cause prejudice and detriment to the opposing party.** (bold emphasis added).

More recently, in *Khan v. Parsons Global Services, Ltd.*, 521 F.3d 421 (D.C. Cir. 2008), the D.C. Circuit reiterated that although "a finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived," "a court may consider prejudice to the objecting party as a relevant factor" in its waiver analysis. *Khan, supra* at 425. In *Khan*, where there was a three-year litigation delay, the D.C. Circuit found pursuit of summary judgment inconsistent with the intent to arbitrate and noted that, without relying on same, "being compelled to bear the expense of this proceeding constitutes prejudice." *Khan, supra* at 428. In short, although declining to then make prejudice a required element, it is clear that the D.C. Circuit has adopted a "totality of the circumstances" test, holding prejudice to the party opposing arbitration to be a "relevant factor" in whether waiver has arisen. *Khan, supra* at 425. Again, the showing of prejudice is a matter of degree, not a true or substantial conflict with holdings in the other circuits.

In sum, nine circuits have expressly held prejudice to be a required element. The other three circuits, without naming prejudice as an element, in varying degrees, do hold it to be a significant part of the waiver decision. This is a semantic, not a substantive, difference. As there is no true conflict between the circuits, this issue is not certworthy.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should not issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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