

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion, United States Court of Appeals
for the Fifth Circuit, *Aptim Corp. v.*
McCall, No. 17-30772 (Apr. 17, 2018)..... App-1

Appendix B

Order, United States Court of Appeals for
the Fifth Circuit, *Aptim Corp. v. McCall*,
No. 17-30772 (May 31, 2018) App-36

Appendix C

Order & Reasons, United States District
Court for the Eastern District
of Louisiana, *Aptim Corp. v. McCall*,
No. 17-8081 (Sept. 19, 2017) App-38

App-1

Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-30772

APTIM CORPORATION,
Plaintiff-Appellee,
v.
DORSEY RON MCCALL,
Defendant-Appellant.

Filed: April 17, 2018

Before Reavley, Smith, and Owen,
Circuit Judges.

OPINION

Jerry E. Smith, Circuit Judge:

The Shaw Group (“Shaw”) sued Dorsey McCall, its former employee, in state court for allegedly violating noncompete and nonsolicitation agreements. After being acquired in part by Aptim Corporation (“Aptim”), Shaw sought to dismiss its state action while Aptim pursued a federal-court action to enforce the arbitration clause in McCall’s employment contract. The federal district court declined to abstain,

it compelled arbitration, and it stayed the state-court proceeding. We find no error and affirm.

I.

McCall resigned from Shaw in January 2016. He then began working for an affiliate of Bernhard Capital Partners Management LP and later became the CEO of Allied Power Management, LLC (“Allied”), a direct competitor of Shaw’s. Believing that McCall had violated the noncompete and nonsolicitation agreements in his employment contract, Shaw sued McCall in state court.¹ Those agreements state that arbitration will occur in New Orleans and that the employer may file for injunctive relief from a judicial authority without waiving the right to arbitrate the underlying dispute.

On June 15, 2017, Shaw sued in state court, requesting injunctive relief and damages. The state court issued a Joint Protective Order.² On June 30, Aptim acquired Shaw’s capital services segment, which included the rights to McCall’s employment agreement. Aptim and Shaw moved to substitute Aptim in the state-court action on July 6, which McCall opposed on July 10. On July 17, Aptim and Shaw withdrew their motion for substitution. That same day, Aptim filed a demand for arbitration with

¹ Allied intervened in the action as a joint party with McCall. For simplicity, the opinion refers to their joint motions and actions using McCall’s name.

² The order prohibited McCall from violating his employment contract, ordered Shaw not to threaten legal or other action against Allied employees, and ordered expedited discovery. It specified that nothing in the order should be deemed a waiver of any rights or defenses of either party.

App-3

the American Arbitration Association, and Shaw filed both an amended petition, deleting its request for damages, and a motion to dismiss the amended petition with prejudice. McCall filed an opposition to the motion for voluntary dismissal, an answer to Shaw's complaint, a reconventional demand, a petition for declaratory judgment, a motion to consolidate, and a motion for constructive contempt against Aptim for demanding arbitration in violation of the protective order, though Aptim was not then a party to the case.

On August 21, Aptim, without Shaw, sued in federal court to compel arbitration and to stay the state-court proceeding, seeking arbitration on the same contractual violations that Shaw had raised in state court: that McCall had breached his noncompete agreement by working for Allied and his nonsolicitation agreement by poaching fifteen of Shaw's senior employees. Before the federal court ruled, the state court on September 1 issued an order joining Aptim in the state-court action effective June 30 (the day the motion for substitution had been originally filed); finding that Aptim and Shaw had waived their arbitration rights by initiating the state-court action; and granting McCall's motion to stay arbitration.

On September 19, the federal district court ordered Aptim and McCall to arbitrate their dispute and stayed the state-court action as between Aptim and McCall. On September 25, the court clarified its order to state that all persons and entities in privity with Aptim and McCall must submit to arbitration, thus staying the state-court litigation by McCall

against Shaw. On appeal, McCall asserts the federal district court erred by declining to abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 816, 817 (1976), erred by compelling the parties to arbitrate, and violated the Anti-Injunction Act by enjoining the state-court proceedings.

II.

A *Colorado River* abstention analysis begins with a heavy thumb on the scale in favor of exercising federal jurisdiction, and that presumption is overcome only by “exceptional circumstances.” *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006). Federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colo. River*, 424 U.S. at 817. Even so, a court may choose to abstain, awaiting the conclusion of state-court proceedings in a parallel case, based on principles of “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.” *Id.* (quoting *Kerotest Mfg. Co. v. C-0-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

Whether to abstain is not a question answered by the recitation of “a mechanical checklist” but instead rests “on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). To determine whether exceptional circumstances are present, the court considers the following six factors:

App-5

(1) assumption by either court of jurisdiction over a res, (2) relative inconvenience of the forums, (3) avoidance of piecemeal litigation, (4) the order in which jurisdiction was obtained by the concurrent forums, (5) to what extent federal law provides the rules of decision on the merits, and (6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

Stewart, 438 F.3d at 491. We review for abuse of discretion the district court's decision whether to abstain, and we exercise *de novo* review to the extent that the decision turns on an interpretation of law. *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 649-50 (5th Cir. 2000).

McCall asserts that there are exceptional circumstances because the state court issued a ruling on the question of arbitrability before the federal court ruled. This case, however, is subject to the same discretionary balancing of the *Colorado River* factors as any other abstention inquiry.

A.

The first factor weighs against abstention. Because this is an *in personam* action, there is no *res*. An absence of property is not "a merely neutral item,

App-6

of no weight in the scales.”³ Instead, it “supports exercising federal jurisdiction.”⁴

B.

The second factor is neutral. The relative convenience of the forums “primarily involves the physical proximity of the federal forum to the evidence and witnesses.” *Evanston*, 844 F.2d at 1191. The question requires finding not that the state court is a “better” or “more convenient” forum but that the “inconvenience of the federal forum is so great” as to warrant abstention. *Id.* at 1192. “When courts are in the same geographic location, the inconvenience factor

³ *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988); see also *Saucier v. Aviva Life & Annuity Co.*, 701 F.3d 458, 463 (5th Cir. 2012).

⁴ *Stewart*, 438 F.3d at 492. McCall points out that this circuit has inconsistently treated the first factor as either neutral or weighing against abstention. McCall cites *Signad, Inc. v. City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir. 1985), as authority that the rule of orderliness constrains the court to consider the absence of property as neutral. *Signad* does not address all six *Colorado River* factors but instead lists only the three that it considers relevant to *in personam* actions. *Id.*

Evanston controls. The *Colorado River* factors as presently defined were not distilled until the Supreme Court added the final two in *Moses H. Cone* in 1983. Although *Signad* post-dates *Moses H. Cone*, it and other *pre-Evanston* abstention opinions do not systematically analyze each factor independently. *Evanston* is the first Fifth Circuit case to grapple with the role of the first factor and to lay out the full six factors in their present form. The *Evanston* court, 844 F.2d at 1191, held that *Moses H. Cone* found the “absence of this first *Colorado River* factor to speak against abstention.” Because this is an interpretation of a Supreme Court precedent that refines the *Colorado River* factors, which *Signad* did not consider, *Evanston* controls. This is borne out in our circuit’s caselaw.

weighs against abstention.” *Stewart*, 438 F.3d at 492. The state courthouse is in Baton Rouge, and the federal district court is in New Orleans. Both Allied and Shaw are headquartered in Baton Rouge, and McCall resides closer to Baton Rouge than to New Orleans. The 80-mile distance does not compare to the 300-mile distance in *Colorado River*.⁵ The two courthouses are within the same geographic location for all practical purposes. Because nothing in this case demonstrates that the inconvenience of the federal forum is “so great,” *Evanston*, 844 F.2d at 1191, this factor is neutral at best.

C.

The third factor weighs against abstention. Given the strong federal policy favoring arbitration, the concern about piecemeal litigation “is *not* applicable in the FAA context.” *Safety Nat’l Cas. Corp. v. Bristol-Myers Squibb Co.*, 214 F.3d 562, 565 (5th Cir. 2000). Piecemeal litigation is a different concern from the worry of obtaining conflicting judgments in parallel actions involving the same parties and the same questions. The remedy for conflicting judgments is not abstention, but the application of *res judicata*. *Kelly*

⁵ In *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 800 (5th Cir. 2014), we did find that a half-hour distance weighed slightly in favor of abstention. That case, however, involved a property that was closer to the state courthouse. The presence of property weighed heavily in the court’s analysis of the factors. Other cases use the general language of “geographic location,” which is satisfied here. Even if the 80-mile distance weighed in favor of abstention, it would not alter the ultimate balance of the factors in this case.

Inv., Inc. v. Cont'l Common Corp., 315 F.3d 494, 498 (5th Cir. 2002).

D.

The fourth factor, regarding the order in which jurisdiction was obtained, slightly favors abstention. The inquiry centers more on the progress made in the relative forums, not on the date of initial filing. *Moses H. Cone*, 460 U.S. at 21. If the progress made is just “jurisdictional posturing” with little progress on the merits, the factor “weighs against abstention.” *Black Sea Inv.*, 204 F.3d at 651. This factor is difficult to weigh, as the parties characterize the timeline and progress quite differently. And it is unusual in our abstention jurisprudence to confront a case in which the same side filed both the state and federal actions, though Aptim was not a party to the state suit when it filed in federal court.

Numerous motions were filed in state court before the federal case began. The state and federal action were filed on June 15 and August 21, respectively. Aptim was not joined in the state action until September 1, which was more than a week after it filed its federal action and was several weeks after it and Shaw had withdrawn the motion to substitute and Shaw had attempted to dismiss the suit entirely on July 17.

Despite the number of filings, the state action was not necessarily progressing. When the federal suit was filed at the end of August, the state court had not ruled on any of Shaw’s July 17 motions, none of which concerned the merits. Shaw sought to dismiss before any rulings had been issued and only one month after filing. In fact, Shaw even sought and was granted

mandamus from the state appellate court ordering the state trial court to rule on Shaw's motion to dismiss voluntarily by August 23. The state court denied the voluntary dismissal on August 24. It was not until September 1 that the state court made any progress.

Before the federal court compelled arbitration, the state court issued an order staying the arbitration Aptim had initiated. Thus, this factor favors arbitration, but only slightly, considering the complete set of circumstances. Aptim sought arbitration just weeks after acquiring Shaw, the state court had made minimal progress when the district court action was filed, and Aptim was a nonparty in the state-court proceeding until the state court simultaneously issued the stay and joined it in the suit.

McCall insists that the fact that the state trial court ruled on whether arbitration should proceed, and did so before the federal district court did, should be accorded almost decisive weight. McCall would be correct if the state trial court's ruling would be *res judicata* or would collaterally estop Aptim. If a state court's ruling would be given preclusive effect by another court of that state, then federal courts must also give preclusive effect to that ruling.⁶ If the preclusive ruling is dispositive of the federal action, then the federal court should abstain and dismiss because there is no point in proceeding further,

⁶ See, e.g., *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986).

irrespective of the other relevant factors in assessing abstention under *Colorado River*.⁷

McCall does not contend that the state court's determination that Shaw and Aptim waived their rights to arbitrate would be given preclusive effect by Louisiana courts. In fact, at the hearing, the federal district court stated "that there was no final judgment, so neither res judicata nor issue preclusion applies."⁸ McCall did not take issue with that statement and does not contend that preclusion applies. To the contrary, in his briefing in our court, McCall opines that the federal district court's stay of the state court proceedings "ensur[es] that the state court would never be able to enter a final judgment entitled to preclusive effect." Accordingly, the state court's ruling is not decisive regarding abstention because the state court's interlocutory ruling regarding arbitration is

⁷ See generally *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 448-49 (2d Cir. 1995) (concluding that because, under Alabama law, a state court's order had preclusive effect and should have been afforded full faith and credit, the district court erred in proceeding and on remand should dismiss the petition to compel arbitration).

⁸ The federal district court's statement, in full, was,

The Court further finds on my own—of course, we always have to consider jurisdiction, that the Rooker Feldman doctrine does not apply; that there was no final judgment, so neither res judicata or issue preclusion applies.

What appears to be before this Court today and what is the significant issue is whether or not the Colorado River abstention is appropriate. So I'm going to ask you to confine your remarks to that and we'll proceed from there.

not entitled to full faith and credit under the Full Faith and Credit Act.⁹

Greater progress alone “does not give rise to ‘exceptional circumstances’ capable of overcoming the strong presumption in favor of retaining jurisdiction.” *Saucier*, 701 F.3d at 465. Instead, the federal and state courts have concurrent jurisdiction, and the state court was not so far ahead as to counsel the federal court to stay its hand. Just as we concluded under the third factor, the solution to inconsistent judgments is through a plea of *res judicata* after one court enters a final judgment.

E.

The fifth factor weighs against abstention. “The presence of a federal law issue ‘must always be a major consideration weighing against surrender [of jurisdiction],’ but the presence of state law issues weighs in favor of surrender only in rare circumstances.” *Murphy v. Uncle Ben’s, Inc.*, 168 F.3d 734, 739 (5th Cir. 1999) (quoting *Evanston*, 844 F.2d at 1193).

The Federal Arbitration Act (“FAA”) is the underlying law and embodies “a liberal federal policy favoring arbitration agreements,” *Moses H. Cone*, 460 U.S. at 24, that serves as the backdrop for any FAA litigation. The FAA itself is an outlier: It created substantive federal law but not federal-question

⁹ See 28 U.S.C. § 1738 (providing that state judicial proceedings “shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken”).

jurisdiction. Thus its enforceability is left largely to state courts. *Id.* at 25 n.32 (“[A]lthough enforcement of the [FAA] is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.”). This factor, therefore, has less significance but still weighs against abstention. *Id.* at 25-26.

F.

The sixth factor, evaluating the adequacy of state proceedings to protect the rights of the party invoking federal jurisdiction, can only be neutral or weigh against abstention. *Stewart*, 438 F.3d at 493. Nothing has impugned the state court’s ability fairly to determine the legal questions at issue, so this factor is neutral.

G.

Reviewing the six factors, two are neutral, one weighs slightly in favor of abstention, and three weigh against abstention. To overcome the strong presumption in favor of federal jurisdiction, a party must show exceptional circumstances. The factors here do not demonstrate such circumstances, and the district court was correct to exercise jurisdiction.

H.

McCall points to three out-of-circuit decisions in which the state court ruled first and the appellate court found abstention proper. He contends those cases demonstrate that the state court’s issuance of a ruling should be a primary focus of the abstention inquiry, almost to the point of being conclusive. In addition to our treatment of this contention under the fourth factor, we address each of these cases in turn.

1.

In *Vulcan Chemical Technologies, Inc. v. Barker*, 297 F.3d 332 (4th Cir. 2002), suit was filed in the state court, which compelled arbitration. Arbitration concluded with a multi-million dollar judgment on the merits against Vulcan, which sued in federal court to vacate the award. The state court confirmed the award before the federal court ruled. *Id.* at 335. After the federal district court had vacated the award two months after the state court's confirmation of it, the Fourth Circuit reversed, finding that five of the six *Colorado River* factors favored abstention and one was neutral. *Id.* at 341-43.

In addition to undertaking the typical six-factor analysis, the Fourth Circuit noted that the motive for filing in federal court was critical. Up until the arbitrator entered its award, Vulcan had “gladly litigated” in state court and had “gladly arbitrated there before an agreed-upon arbitrator.” *Id.* at 343. Its federal filing was merely a “strategy to obtain a second opinion.” *Id.*

The same is not true here. In *Vulcan*, over two years of litigation and a complete disposition of the merits had occurred in state court before the federal filing. Aptim filed in federal court before the state court had done anything on the merits, so its motive could not have been to get a second opinion. Instead, Aptim asserted its arbitration rights on July 17, just weeks after acquiring Shaw.

2.

McCall points next to *Preferred Care of Delaware, Inc. v. VanArsdale*, 676 F. App'x 388 (6th Cir. 2017). Based on the particular facts of the case and the state-

law issue underlying the state-court decision on arbitrability, the Sixth Circuit affirmed the abstention. The opinion divided *Colorado River's* six-factor test into eight factors and found that the first two weighed slightly against abstention, five strongly favored abstention, and one was neutral. *Id.* at 394-97.

This is again far different from how the factors play out in the present case. The Sixth Circuit examined each factor in turn and did not base its ruling solely on the fact that the state court issued an order finding the arbitration clause invalid under state law before the federal court ruled. No state-law question is at issue here, and the weighing of the factors is inherently discretionary and cannot turn on the presence or absence of one fact.

3.

Finally, *D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223 (10th Cir. 2013), is readily distinguished. The state suit began in 2006. Numerous issues and parties were involved in a complex proceeding. “[T]he [state court] litigation has not so much developed as it has metastasized: parties have proliferated, claims have collided, and issues have become intimately entangled.” *Id.* at 1226. After five years and the issuance of multiple decisions that went all the way to the state supreme court, one of the losing parties filed in federal court to compel arbitration. *Id.* at 1227-29.

The Tenth Circuit affirmed the decision to abstain. It found four of the factors were neutral and two—the third and fourth—weighed heavily in favor of abstention. *Id.* at 1234-35. In examining the

progress made in the state court, the court of appeals found that the “realities of the case at hand” must guide a court’s factorial analysis. *Id.* at 1236 (quoting *Moses H. Cone*, 460 U.S. at 21). That years, not weeks, had passed in state court without objection, that the case was “interwoven” with the “trial and appellate levels” of the state-court system, and that “vexatious or reactive” motives were at play, were heavy considerations favoring abstention. *Id.* at 1235.

Conversely, in the present suit, weeks, not years, had passed in state court when the federal action was filed, and no vexatious motivation is discernible given the timeline of events. There is no comparison between the expansive litigation at issue in *D.A. Osguthorpe* and the mere months in the case at hand.

Colorado River presents an inherently discretionary balancing inquiry that shifts with the particular facts. Given our facts, the district court did not abuse its discretion in declining to abstain.

III.

Having found that the district court did not abuse its discretion in declining to abstain, we turn to its finding that Aptim did not waive its arbitration rights. This court reviews the issue of waiver *de nova*. *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991).

The right to arbitrate can be waived if a party “(1) ‘substantially invokes the judicial process’ and (2) thereby causes ‘detriment or prejudice’ to the other

party.”¹⁰ Given the strong federal policy in favor of arbitration, the party seeking to prove waiver must overcome the heavy presumption against such a finding.¹¹ There is not enough here to overcome that presumption.

A.

Shaw’s initial complaint raising a claim for damages is enough for substantial invocation under *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009). In *Nicholas*, the court found that “filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process.” *Id.*

The purpose of the *Nicholas* rule is to divine a plaintiff’s intent regarding its choice of forum for litigating the merits of an arbitrable claim. Though a defendant may allow significant time to pass and may engage in some preliminaries of litigation without the court’s finding substantial invocation,¹² a plaintiff’s “disinclination to resort to arbitration” can be seen at the filing stage. *Id.* (quoting *Miller*, 781 F.2d at 497). The court laid out two exceptions to this assumption: filing suit to determine the presence of an enforceable

¹⁰ *Al Rushaid v. Nat’l Oilwell Varco, Inc.*, 757 F.3d 416, 421 (5th Cir. 2014) (quoting *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986)).

¹¹ *Id.* at 421-22; *Tenneco Resins, Inc. v. Davy Int’l, AG*, 770 F.2d 416, 420 (5th Cir. 1985).

¹² For example, in its opinion collecting cases, the court in *Tenneco Resins*, 770 F.2d at 420-21, found that a defendant’s delay of eight months and participation in limited discovery were insufficient to constitute substantial invocation of the judicial process.

arbitration agreement and filing to obtain injunctive relief pending arbitration. *Id.*

The facts of the present case, however, defy easy application of this seemingly straightforward rule. In *Nicholas*, the filing of a lawsuit on the merits was followed by actual merits litigation, and the court found especially troubling the plaintiffs decision to seek arbitration following an adverse ruling. *Id.* at 909. The present appeal does not implicate the feared second bite at the apple. Further, it is complicated by Aptim's delayed entrance into the litigation and McCall's contradictory postures in state and federal court regarding Aptim's status.

Shaw had the contractual right to seek injunctive relief in court without compromising its arbitration rights. Its initial filing, including a claim for damages, however, is enough under *Nicholas* to find substantial invocation of the judicial process, though still leaving open the question of prejudice to McCall. The dispute then arises whether Shaw's conduct in filing the initial complaint is imputed to Aptim.

In contending that Shaw's conduct should be attributable to Aptim, McCall tries to have his cake and eat it too. In state court, McCall opposed Aptim and Shaw's motion for substitution, stating that it was unclear which rights Shaw assigned to Aptim and whether Aptim was a successor such that substitution was proper. Then, in its federal filings, McCall treated Aptim and Shaw as one and the same party, using the very language of the motion it opposed to assert that Aptim stepped into the shoes of Shaw and thus inherited Shaw's substantial invocation of the judicial process.

The state court never ruled on the motion or the opposition before Aptim and Shaw withdrew the motion. The court later joined Aptim as a party and bound it to all prior rulings but neither substituted Aptim nor dismissed Shaw, making no apparent judgment about Aptim's status as a successor under the assignment agreement. The federal district court was rightly concerned about the appearance that McCall tried to keep Aptim out of the litigation but then sought to have Aptim bound by rulings made while it was actively denied the ability to defend itself.

Absent imputation, Aptim did not substantially invoke the judicial process. It did not file anything regarding the merits or ask for damages but filed only a motion for substitution and a motion withdrawing the request for substitution. A nonparty to the suit, Aptim demanded arbitration only one month after the state-court litigation had begun and only eleven days after it had sought unsuccessfully to be substituted into the action. If Shaw's filing the initial complaint is not imputed to Aptim, Aptim's actions alone are inadequate for substantial invocation. This inquiry is simplified by the absence of prejudice, thus obviating the need to interpret the assignment agreement and determine imputation.

B.

To support a finding of waiver, McCall must demonstrate prejudice. "Prejudice in the context of arbitration waiver refers to delay, expense, and damage to a party's legal position." *Nicholas*, 565 F.3d at 910. Courts considering prejudice look to things such as how much discovery has been conducted and

how much the litigation relates to the merits.¹³ Minimal discovery does not demonstrate prejudice. *Tenneco Resins*, 770 F.2d at 421.

McCall does not show prejudice. Before Aptim's acquisition of Shaw, the state court held a hearing on the TRO, and Shaw, McCall, and Allied entered into a protective order. All of those proceedings relate to the injunctive relief that Shaw was contractually permitted to seek without compromising its arbitration rights. Additionally, Shaw dropped the damages claim only one month after filing, with no proceedings that would have cost McCall time, money, or strategic advantage. The case was ongoing for just over two months before the federal filing and for only one month before the initial arbitration demand. During that time, around June 30 when Aptim acquired part of Shaw, discovery was stayed for the parties to sort out the consequences of the acquisition, and the preliminary-injunction hearing was cancelled. McCall cannot demonstrate the time, expense, or disadvantage in litigating position required to show prejudice.

IV.

We must now determine whether the federal district court erred in enjoining the state-court proceedings under the relitigation exception to the Anti-Injunction Act. Because, under the Act, a federal

¹³ *Miller*, 781 F.2d at 498 (“A party may not invoke arbitration and yet seek pre-trial discovery going to the merits. . . . [A]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible.” (alterations in original) (quotation omitted)).

court is entitled to defend its own final judgment, we uphold the injunction.¹⁴

The Anti-Injunction Act states, “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283. The prohibition against interfering in state proceedings embodies a strong policy that, recognizing the “independence of the States and their courts, the exceptions should not be enlarged.” *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 287 (1970). A federal court cannot enjoin a state-court suit on the grounds that “the state court may have taken action which the federal court [is] certain [is] improper,” nor is it appropriate to avoid simultaneous pursuit of claims in courts with concurrent jurisdiction. *Id.* at 295-96.

Under the Act, an injunction is not appropriate just because it is “related” to the federal court’s jurisdiction. *Id.* at 295. If the state court takes an action the federal court or a party to the action finds incorrect, the proper course is typically the state appellate court. *Id.* at 296. Any doubts about the “propriety of a federal injunction . . . should be resolved in favor of permitting the state courts to

¹⁴ The district court initially enjoined the state-court litigation only as to Aptim but later expanded the injunction to apply to the litigation against Shaw as an entity “in privity with” Aptim. Because Shaw assigned all of its interest in the litigation to Aptim, it is not apparent what litigation there is to continue in state court. Given that Shaw’s interest is moot, we affirm the injunction without deciding whether the extension was proper.

proceed The explicit wording of § 2283 itself implies as much.” *Id.* at 297.

The federal district court invoked the relitigation exception, stating that the injunction was necessary to “protect or effectuate its judgment[].” This exception was “designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). McCall asserts that the Act prevents a federal court from enjoining an already issued state court ruling.

The application of the Act is not so temporally bound. Instead, the inquiry turns on the question of finality. A federal court that has entered a final judgment entitled to preclusive effect may, “to protect or effectuate its judgment[],” stay state-court proceedings when it is clear that the state court ruling that would interfere with the enforcement of the federal court’s judgment is not preclusive and is not entitled to full faith and credit.

For example, in *Atlantic Coast Line*, a federal court in 1967 refused to enjoin the BLE union from picketing at a railroad switching yard. The railroad then promptly obtained an injunction in state court that prohibited the picketing. Two years later, the Supreme Court reviewed a state-court injunction against picketing by the BLE and other unions in a nearby area and held that the unions had a federally protected right to picket. *Atl. Coast Line*, 398 U.S. at 283-84 (citing *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969)). The BLE then returned to state court seeking dissolution of the 1967 injunction, but “the state judge refused to dissolve the

injunction, holding that [the Supreme Court's] Jacksonville Terminal decision was not controlling." *Id.* at 284. The union did not appeal that decision but instead requested the federal court to issue an injunction against the enforcement of the 1967 state-court injunction. The federal court did so, and the Supreme Court reversed.

Were the timeline the sole deciding factor, the Court could have based its decision on the fact that the state injunction preceded the federal litigation. Instead, the Court found that the language "necessary in aid" of a federal court's jurisdiction in the Anti-Injunction Act "implies something similar to the concept of injunctions to 'protect or effectuate' judgments." *Id.* at 295. There was no federal-court judgment that needed to be defended against state litigation. Instead, the federal-court litigation involved claims under federal law, and the state-court litigation involved claims based on state law and the union's defense regarding the preclusive effect of federal law. *Id.* "In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Id.* "The state court's assumption of jurisdiction over state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction necessary to aid that jurisdiction." *Id.* at 296.

The Court used the same language of preclusion in *Parsons Steel*. Though the state-court ruling did not precede the federal court's final judgment, the Court's reasoning, which focused on the Full Faith and Credit

Act, applies regardless of the order of the state and federal decisions.

In *Parsons Steel*, a bank obtained a final judgment in its favor in federal district court that was affirmed on appeal. Parallel proceedings had been ongoing in state court, which rejected the bank's argument that the federal judgment was *res judicata*. The state-court case proceeded to trial, and a jury returned a verdict adverse to the bank. *Id.* The bank then returned to federal district court and obtained an injunction prohibiting plaintiffs from proceeding further in the state action. *Parsons Steel*, 474 U.S. at 520-21.

In the succeeding challenge to the federal injunction, the Supreme Court first recognized that “under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give.” *Id.* at 523. The Court held that the federal district court had erred by failing to “consider the possible preclusive effect under Alabama law of the state-court judgment, and particularly of the state court’s resolution of the *res judicata* issue.” *Id.* The federal district court had concluded that “the relitigation exception to the Anti-Injunction Act limits the Full Faith and Credit Act.” *Id.* The Supreme Court disagreed: “We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the *res judicata* issue.” *Id.* at 524.

The Court once again confirmed that lower federal courts do not sit in review of state-court decisions and

that “[c]hallenges to the correctness of a state court’s determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.” *Id.* at 525. Even if the state court incorrectly resolved the *res judicata* claim, that would not justify a lower-federal-court injunction. *Id.*

Nevertheless, the federal district court was not foreclosed from enjoining state-court proceedings on other grounds if that court, upon considering the preclusive effect under state law, found that Alabama would not in fact consider the judgment preclusive. In that instance, the federal district court could then “decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism.” *Id.* at 526. This decision directs that in determining whether a stay of state-court proceedings was necessary under the Anti-Injunction Act, a federal district court’s and this court’s focus should be on the preclusive effect of a state-court ruling.

Chick Kam Choo further bolsters this conclusion, stating that the relitigation exception is “founded in the well-recognized concepts of *res judicata* and collateral estoppel.” *Chick Kam Choo*, 486 U.S. at 147. This does not permit a federal court to enjoin a state-court ruling out of disagreement. But when the federal court issues a final judgment, the relitigation exception employs the foundation laid in the Full Faith and Credit Act and permits the federal court to enjoin proceedings contrary to that judgment.

Our circuit has applied this reasoning several times, stating that the relitigation exception “allows an injunction where state proceedings threaten to

undermine a federal judgment having preclusive effect under the ‘well-recognized concept’ of collateral estoppel.”¹⁵ We do so again and determine that the injunction was proper to defend the federal district court’s final judgment in the face of a non-preclusive state-court order.

V.

In sum, the federal district court did not abuse its discretion in declining to abstain, Aptim did not waive its arbitration rights, and the district court properly invoked the relitigation exception to defend its final judgment. Therefore, its judgment is AFFIRMED.

¹⁵ *Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 828 (5th Cir. 2006) (quoting *Chick Kam Choo*, 486 U.S. at 147); see also *Vines v. Univ. of La. at Monroe*, 398 F.3d 700, 704 (5th Cir. 2005). *Regions Bank of La. v. Rivet*, 224 F.3d 483, 488-92 (5th Cir. 2000).

PRISCILLA R. OWEN, Circuit Judge, concurring and dissenting:

I agree with, and join, the court's thorough and thoughtful opinion, with the exception of footnote 14, and the court's affirmance of the district court's judgment in its entirety. I would reverse the district court's judgment to the extent that it purports to enjoin the state-court litigation as to The Shaw Group, Inc. (Shaw). I also write separately to address statements in Supreme Court opinions that, at least facially, lend support to McCall's contention that the federal district court was powerless under the Anti-Injunction Act to stay state-court proceedings because the state trial court ruled that arbitration had been waived before the federal district court addressed that issue and entered a final judgment. The state trial court's ruling, as McCall concedes, would not be given preclusive effect. Therefore, the state court's interlocutory ruling was not an impediment to the federal district court's ability to issue a stay to protect and effectuate its final judgment compelling arbitration between Aptim and McCall.

I.

With regard to the Anti-Injunction Act, first and foremost, nothing in the text of the Act suggests that a federal district court must defer to a prior, interlocutory, non-preclusive state-court ruling in an ongoing state proceeding once the federal district court enters a final judgment concerning the same issue and parties.¹ Second, as the Supreme Court has

¹ 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as

recognized, the final phrase in the Anti-Injunction Act, that permits federal courts to stay state-court proceedings “to protect or effectuate its judgments,”² “is founded in the well-recognized concepts of *res judicata* and collateral estoppel.”³

Well-recognized concepts of *res judicata* and collateral estoppel permit a final judgment to have preclusive effect when another court in concurrent or parallel proceedings has ruled to the contrary, if that prior ruling was not a final judgment or was not entitled to preclusive effect.⁴

expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

² *Id.*

³ *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

⁴ See generally RESTATEMENT (SECOND) OF JUDGMENTS § 14 (AM. LAW INST. 1982) (“[W]hen two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action (assuming any further prerequisites are met), regardless of which action was first brought.”); *id.* § 27 cmt. 1 (“If two actions which involve the same issue are pending between the same parties, it is the first final judgment rendered in one of the actions which becomes conclusive in the other action, regardless of which action was brought first.”); *id.* § 86 (“A valid and final judgment of a state court has the same effects under the rules of *res judicata* in a subsequent action in a federal court that the judgment has by the law of the state in which the judgment was rendered [with exceptions not material here].”); see also *Vines v. Univ. of La. at Monroe*, 398 F.3d 700, 712 (5th Cir. 2005) (“[W]hen two suits are pending based on the same claim or issue, the first final judgment rendered becomes conclusive in the other action.”) (citing *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir. 2000)).

The Supreme Court reviewed the history of the development of the Anti-Injunction Act in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*.⁵ Our country, it explained, has “two essentially separate legal systems,” and “[e]ach system proceeds independently of the other with ultimate review in [the Supreme Court] of the federal questions raised in either system.”⁶ The Supreme Court explained that “[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.”⁷ But “this dual court system was bound to lead to conflicts and frictions,” and “[t]he 1793 anti-injunction Act was at least in part a response to these pressures.”⁸ There are “three specifically defined exceptions” in the present-day Anti-Injunction Act to its otherwise “absolute prohibition against enjoining state court proceedings.”⁹ The Supreme Court has never held that to come within one of these exceptions, the federal court’s final judgment must precede any state ruling on the issue resolved by the federal court’s judgment.

In *Chick Kam Choo v. Exxon Corp.*, the Supreme Court described the final phrase in the Anti-Injunction Act, “to protect or effectuate its

⁵ 398 U.S. 281, 285-87 (1970).

⁶ *Id.* at 286.

⁷ *Id.* at 287.

⁸ *Id.* at 286.

⁹ *Id.*

judgments,”¹⁰ as a “relitigation exception” that “was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court.”¹¹ The word “previously” cannot bear the weight that McCall, in the present case, places upon it. It is only after an issue has been presented to and decided by a federal court and a final judgment has issued that a question can arise as to whether, in order to protect the federal court’s final judgment, it is necessary to enjoin state litigation of the issue “previously” decided by the federal court. In *Chick Kam Choo*, the Court was not called upon to decide whether a federal district court could enjoin ongoing state-court proceedings in which a state court had already issued an interlocutory ruling.

The description in *Chick Kam Choo* of what § 2283 permits and does not permit was not intended to be all-encompassing. It is also important to recognize that in the very next sentence, the Supreme Court said that § 2283 “is founded in the well-recognized concepts of *res judicata* and collateral estoppel,”¹² as already noted.

The Supreme Court also said in *Chick Kam Choo* that “[t]he proper scope of the exception is perhaps best illustrated by this Court’s decision in *Atlantic Coast Line*.”¹³ The panel’s opinion in the present case discusses that, in *Atlantic Coast Line*, a state-court

¹⁰ 28 U.S.C. § 2283.

¹¹ 486 U.S. 140, 147 (1988).

¹² *Id.*

¹³ *Id.*

injunction had been in effect for two years when the federal district court entered an order staying the state-court litigation. If a federal court has no authority under the Anti-Injunction Act to stay state-court proceedings once a state trial court has issued a ruling on the issue that is also presented to a federal court, then the Supreme Court could easily have vacated the federal injunction on that basis. It did not.

In *Smith v. Bayer Corp.*, the Supreme Court said, “[t]he Act’s relitigation exception authorizes injunctions only when a former federal adjudication clearly precludes a state-court decision.”¹⁴ The *Bayer* decision, however, did not focus on whether the federal court’s judgment had preceded the commencement of a state-court action or a ruling by a state court. The Court held that the federal court’s stay was improper because “the issue presented in the state court was not identical to the one decided in the federal tribunal,” and “the plaintiff in the state court did not have the requisite connection to the federal suit to be bound by the [federal court’s] judgment.”¹⁵ The decision in *Bayer* recognized that “the Anti-Injunction Act’s relitigation exception . . . involves the requirement of preclusion law that a subsequent suit raise the ‘same issue’ as a previous case.”¹⁶ But here again, the relative points in time in which a federal court issued a decision and a state-court action was commenced were not at issue in *Bayer*, and the Court’s general statement regarding the law of preclusion was imprecise. Preclusion law

¹⁴ 564 U.S. 299, 318 (2011).

¹⁵ *Id.* at 302.

¹⁶ *Id.* at 305.

generally permits a final judgment to have preclusive effect when another court's ruling, even if prior in time, was not entitled to preclusive effect.¹⁷

The Supreme Court has long recognized that state- and federal-court proceedings involving the same parties and issues may proceed, and often should proceed, on parallel tracks.¹⁸ The Court's decision in *Atlantic Coast Line* said at one point that "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."¹⁹ But these are not holdings that when there are concurrent state- and federal-court proceedings, the federal court is powerless to protect or effectuate its final judgment by staying further state-court proceedings. One of the decisions the Court cited in *Atlantic Coast Line* recognized that "Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances," citing the Anti-Injunction Act, even though that decision also recognized that "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least

¹⁷ See RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 4.

¹⁸ See, e.g., *Atl. Coast R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) ("In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.").

¹⁹ *Id.* (citing *Donovan v. City of Dallas*, 377 U.S. 408 (1964) and *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922)).

until judgment is obtained in one of them which may be set up as res judicata in the other.”²⁰

In *Rivet v. Regions Bank of Louisiana*, the Supreme Court signaled that a federal district court would have authority under the Anti-Injunction Act to enjoin state-court proceedings if necessary to protect or effectuate its judgment, even if that judgment had also been raised in a defensive plea in state court.²¹ The Court’s actual holding in *Rivet* was that “claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b),” and that “[s]uch a defense is properly made in the state proceedings, and the state courts’ disposition of it is subject to this Court’s ultimate review.”²² In a footnote appended to these statements, however, the Court said, “[w]e note also that under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings ‘where necessary . . . to protect or effectuate its judgments.’”²³ On remand after the Supreme Court’s decision in *Rivet*, the Fifth Circuit proceeded to address preclusion issues under Louisiana law in accordance with *Parsons Steel, Inc. v. First Alabama Bank*,²⁴ in deciding whether the

²⁰ *Donovan*, 377 U.S. at 412 (quoting *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939)).

²¹ 522 U.S. 470, 478 (1998).

²² *Id.*

²³ *Id.* n.3 (quoting 28 U.S.C. § 2283).

²⁴ 474 U.S. 518 (1986).

federal district court had properly stayed proceedings under the Anti-Injunction Act.²⁵

There is no rationale expressed in any of the Supreme Court's decisions that supports differentiating how the Anti-Injunction Act is applied solely on the basis of whether a state court's ruling occurred before the federal district court issued a final judgment.

II.

The majority opinion in the present case concludes that “[b]ecause Shaw assigned all of its interest in the litigation to Aptim, it is not apparent what litigation there is to continue in state court,” and therefore that “Shaw’s interest is moot.”²⁶ As a consequence, the majority opinion affirms the district court’s judgment in its entirety. With respect, I disagree with this disposition for at least two reasons.

First, the district court did not purport to resolve whether Shaw had waived its right to arbitrate disputes with McCall. Nothing in the district court’s memorandum setting forth the reasons for its decision in this case addresses Shaw’s right to arbitrate. After the district court entered its final judgment, McCall filed a “Motion to Stay Order and Judgment Pending Appeal.” In the order denying this motion, the district court confirmed that its conclusion that Aptim is entitled to an order compelling arbitration did not consider whether Shaw’s actions were imputed to Aptim under Louisiana law regarding assignments,

²⁵ *Regions Bank of La. v. Rivet*, 224 F.3d 483, 492-95 (5th Cir. 2000).

²⁶ *Ante* at ___, n.14.

and that since McCall had not raised that argument in the district court initially, it was waived.²⁷ The district court also observed in the order denying a stay pending appeal that in any event, Aptim was joined as an additional party in state court and not substituted for Shaw. McCall had opposed substituting Aptim for Shaw in state court. The federal district court reasoned that “[i]t is therefore difficult for this Court to say that Aptim should now be held accountable for Shaw’s actions when Defendant opposed a substitution and such was never actually made.” Shaw was not a party to the federal district court suit, and the district court did not adjudicate whether Shaw was entitled to arbitrate claims against McCall.

The Supreme Court has made clear that a federal district court can stay a state-court action only as to issues actually determined by the federal district court.²⁸ In *Chick Kam Choo*, the Court discussed its

²⁷ The district court’s order states:

Defendant argues that under Louisiana’s assignment law, Aptim stepped into the shoes of Shaw and all defenses available against Shaw should have been available against Aptim. It argues that Shaw’s actions in the State Court Action should therefore have been imputed to Aptim. Defendant, however, did not make any argument regarding Louisiana assignment law in its opposition to Plaintiffs Motion to Compel Arbitration. Indeed, this Court noted in its prior Order that, “Defendant has offered no argument why Shaw’s actions should be imputed to [Aptim].” “[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal.”

²⁸ See, e.g., *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988) (“[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction

decision in *Atlantic Coast Line*²⁹ to illustrate this principle, observing that “[t]he Court assessed the precise state of the record and what the earlier federal order *actually* said; it did not permit the District Court to render a *post hoc* judgment as to what the order was *intended* to say.”³⁰ In the present case, the district court neither actually addressed Shaw’s right to arbitrate nor whether the state-court proceeding was moot.

Second, it does not appear that the state-court proceedings are moot as to Shaw. In this court, McCall attached exhibits to a motion for stay pending appeal. One of those exhibits is a filing in the state-court action that asserts that McCall’s claims against Shaw in state court include a claim for damages against Shaw for tortious interference with McCall’s contract with Allied.³¹

For these reasons, I would vacate the portion of the district court’s judgment issuing a stay that appears to include Shaw as “an entit[y] in privity with” Aptim. I would otherwise affirm the district court’s judgment.

insulates from litigation in state proceedings actually have been decided by the federal court.”).

²⁹ 398 U.S. 281 (1970).

³⁰ *Chick Kam Choo*, 486 U.S. at 148 (analyzing *Atlantic Coast Line*).

³¹ Motion for Stay Pending Appeal, Ex. C (“Motion to Consolidate”).

App-36

Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-30772

APTIM CORPORATION,

Plaintiff-Appellee,

v.

DORSEY RON MCCALL,

Defendant-Appellant.

Filed: May 31, 2018

Before Reavley, Smith, and Owen,
Circuit Judges.

ORDER

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing is DENIED.
- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

App-37

Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Entered for the Court:

[handwritten: signature]
United States Circuit Judge

App-38

Appendix C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

No. 17-8081

APTIM CORPORATION,
Plaintiff,

v.

DORSEY RON MCCALL,
Defendant.

Filed: Sept. 19, 2017

ORDER AND REASONS

Before the Court is Plaintiff's Motion to Compel Arbitration and Stay State Court Proceeding (Doc. 7). For the following reasons, the Motion is GRANTED.

BACKGROUND

Despite its recent filing, this matter has brought with it a sordid and complicated procedural background. On June 15, 2017, Shaw Group, Inc. ("Shaw") filed an action against Dorsey Ron McCall in the 19th Judicial District Court of Louisiana alleging breach of a non-compete and non-solicitation employment agreement (the "Employment Agreement") and requesting an injunction and damages (the "State Court Action"). The parties proceeded to a hearing on Shaw's motion for a

temporary restraining order to prevent McCall from working for his new employer, Allied Power Management, LLC (“Allied”). The parties ultimately entered into a joint protective order. Allied joined the State Court Action as an intervenor.

On June 30, 2017, Aptim Corp (“Aptim”) acquired the capital services business segment of Shaw. As part of the sale, Aptim was assigned rights relating to McCall’s Employment Agreement. On July 6, 2017, Shaw filed a motion to substitute Aptim as plaintiff in the State Court Action. McCall and Allied opposed this motion and sought discovery of the assignment of rights between Aptim and Shaw.

On July 17, 2017, prior to the issuance of an order regarding the motion to substitute, Shaw withdrew the motion. On the same day, Shaw amended its petition to remove its request for damages and then moved to voluntarily dismiss its claims with prejudice. Also on that same day, Aptim filed a demand for arbitration with the AAA pursuant to the arbitration clause in McCall’s Employment Agreement. Perceiving Shaw’s actions to be indicative of forum shopping and in violation of the protective order, McCall and Allied opposed its motion for voluntary dismissal. The state court thereafter denied Shaw’s motion for voluntary dismissal.

Upon receiving the notice of arbitration, McCall and Allied filed a Motion to Stay Arbitration in the State Court Action. After a hearing on the motion, the state court issued an order on September 1, 2017, stating that:

IT IS HEREBY ORDERED that:

1. Aptim is recognized and joined with Shaw as a party-litigant, effective June 30, 2017, in accordance with La.C.C.P. art. 807.

IT IS FURTHER ORDERED that:

2. The filing and prosecution of the above captioned action constituted a waiver of the arbitration provision of the Employment Agreement and Noncompete Agreement entered into between McCall and The Shaw Group, Inc. ("Shaw"), effective January 1, 2012.

IT IS FURTHER ORDERED that:

3. Shaw and Aptim have engaged in a pattern of forum shopping.

IT IS FURTHER ORDERED that:

4. Aptim's filing of the arbitration proceeding against McCall with the American Arbitration Association on July 17, 2017 (Case No. 01-17-0004-1782) (the "Arbitration") was in violation of the Joint Protective Order entered by this Court on June 20, 2017.

IT IS FURTHER ORDERED that:

5. Allied and McCall's Joint Motion to Stay Arbitration is therefore granted and the Arbitration is stayed.

Accordingly, the State Court Action remains pending, and the parties are engaged in ongoing discovery.

On August 21, 2017, Aptim filed the instant action before this Court against McCall, asking for expedited consideration and seeking an order compelling arbitration and staying the state court proceeding pursuant to the Federal Arbitration Act ("FAA").

Pursuant to the FAA, a petition to compel arbitration “shall be made and heard in the manner provided by law for the making and hearing of motions,” and this Court ordered expedited response thereto.⁸ McCall filed an opposition, arguing that (1) this Court lacks jurisdiction, (2) that it should abstain from exercising its jurisdiction under the *Colorado River* abstention doctrine, and (3) that Plaintiff has waived its right to arbitration. The Court held oral argument on these issues on September 8, 2017 and took Plaintiff’s Motion under advisement.

In an attempt to give the parties some speedy relief, the Court held on September 12, 2017 that it had jurisdiction over this dispute and would exercise that jurisdiction. It ordered Defendant to file responsive pleadings. On September 18, 2017, Defendant filed a Motion to Dismiss setting forth substantially the same arguments at issue here.

LEGAL STANDARD

The question of arbitrability is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq., which broadly applies to any written provision in “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.”¹ A two-step analysis governs whether parties should be compelled to arbitrate a dispute.² The Court must first

⁸ 9 U.S.C. § 6.

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

² *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007).

determine whether the parties agreed to arbitrate the dispute.³ This determination involves two separate inquiries: (1) whether there is a valid agreement to arbitrate between the parties, and, if so, (2) whether the dispute in question falls within the scope of that agreement.⁴ Both inquiries are generally guided by ordinary principles of state contract law.⁵ The strong federal policy favoring arbitration applies “when addressing ambiguities regarding whether a question falls within an arbitration agreement’s scope,” but it does not apply “when determining whether a valid agreement exists.”⁶ If the Court finds the parties agreed to arbitrate, it must then proceed to the second step of the analysis and consider whether any federal statute or policy renders the claims non-arbitratable.⁷

LAW AND ANALYSIS

Before this Court can consider Plaintiff’s request to compel arbitration, it must consider the two threshold issues raised by Defendant. Defendant argues that (1) this Court lacks jurisdiction over this dispute, and (2) that the Court should abstain under the *Colorado River* doctrine from hearing this matter. This Court will consider each argument in turn.

³ *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004).

⁴ *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008).

⁵ See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

⁶ *Sherer*, 548 F.3d at 381.

⁷ *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002).

A. Jurisdiction

Defendant first argues that this Court lacks subject matter jurisdiction. Plaintiff alleges jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332. Defendant argues that the Complaint fails to properly plead the citizenship of Defendant when it states merely that he “resides in Lake Charles, Louisiana.” Defendant correctly points out that an allegation of residency is insufficient to establish citizenship.⁹

Plaintiff’s failure to properly allege citizenship is not fatal, however.¹⁰ Under 28 U.S.C. § 1653, “[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.” Where “jurisdictional problems are of the ‘technical’ or ‘formal’ variety, they fall squarely within the ambit of § 1653.”¹¹ Thus, amendment should be allowed where “diversity jurisdiction was not questioned by the parties and there is no suggestion in the record that it does not in fact exist.”¹²

Defendant does not argue that he is not a citizen of Louisiana, and there is nothing in the record to suggest such. Rather, the defect identified by

⁹ See *Monardes v. Ayub*, 339 F. App’x 369, 370 (5th Cir. 2009) (“An allegation of residency is not sufficient for diversity jurisdiction purposes; instead, a plaintiff must allege citizenship to satisfy the requirements of § 1332(a).”).

¹⁰ See *Whitmire v. Victus Ltd.*, 212 F.3d 885, 887 (5th Cir. 2000).

¹¹ *Id.*

¹² *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 806 (5th Cir. 1991) (quoting *Leigh v. Nat’l Aeronautics & Space Admin.*, 860 F.2d 652, 653 (5th Cir. 1988)).

Defendant is easily remedied through an amendment to the Complaint. Because Plaintiff is a citizen of Delaware and Texas, Defendant is a citizen of Louisiana, and the amount in controversy exceeds \$75,000, this Court has diversity subject matter jurisdiction over this matter. Plaintiff shall be granted leave to amend its Complaint to properly allege such.

B. Abstention

Defendant next argues that this Court should abstain from deciding the issues before it pursuant to the *Colorado River* abstention doctrine. The *Colorado River* abstention doctrine allows a court to abstain from exercising its jurisdiction under exceptional circumstances. *Colorado River* applies “when suits are parallel, having the same parties and the same issues.”¹³ “Under *Colorado River*, a district court may abstain from a case only under ‘exceptional circumstances.’”¹⁴ The Supreme Court has identified six factors to consider in deciding whether “exceptional circumstances” exist:

- 1) assumption by either court of jurisdiction over a res, 2) relative inconvenience of the forums, 3) avoidance of piecemeal litigation, 4) the order in which jurisdiction was obtained by the concurrent forums, 5) to what extent federal law provides the rules of decision on the merits, and 6) the adequacy of

¹³ Stewart v. W. Heritage Ins. Co., 438 F.3d 488, 491 (5th Cir. 2006).

¹⁴ *Id.*

the state proceedings in protecting the rights of the party invoking federal jurisdiction.¹⁵

The factors are to be weighed “with the balance heavily weighted in favor of the exercise of jurisdiction.”¹⁶

The Court must therefore first determine the threshold question of whether this action is parallel to the State Court Action. To determine whether actions are parallel, “a court may look both to the named parties and to the substance of the claims asserted to determine whether the state proceeding would be dispositive of a concurrent federal proceeding.”¹⁷ The Fifth Circuit has stated that the identity of the parties and issues need not be precise. “The critical determination is whether the non-federal litigation will dispose of all claims raised in the federal court action.”¹⁸

The action before this Court involves Aptim and McCall, while the State Court Action initially involved Shaw, McCall and Intervenor Allied. Since the filing of this action, however, the state court *sua sponte* added Aptim as a party in the State Court Action. Accordingly, there is currently a pending state court

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Air Evac EMS, Inc. v. Texas, Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 520 (5th Cir. 2017).

¹⁸ *Bar Grp., LLC v. Bus. Intelligence Advisors, Inc.*, 215 F. Supp. 3d 524, 543 (S.D. Tex. 2017).

action between Aptim and McCall.¹⁹ The State Court Action has addressed the right to arbitration under the same Employment Agreement at issue here. Setting aside the unusual procedural posture of the State Court Action, it remains that the state court's decision to include Aptim as a party and stay the arbitration is potentially conclusive of the claims at issue here. Accordingly, the matters are parallel.

This Court will therefore consider whether there is an exceptional circumstance for which abstention is warranted in this matter.

1. Res at Issue

Neither this Court nor the state court has assumed jurisdiction over any res. Therefore, this factor weighs against abstention.²⁰

2. Inconvenience of the Forums

This factor “primarily involves the physical proximity of [each] forum to the evidence and witnesses.”²¹ The state court in Baton Rouge is only about 80 miles from this Court in New Orleans. Accordingly, this factor is neutral at best.

3. Avoidance of Piecemeal Litigation

Defendant argues that this factor supports abstention because without abstaining the Court will have to litigate the same issues addressed by the state

¹⁹ “*Colorado River* abstention may be applied when: a state proceeding is ongoing and is parallel to the federal proceeding” *Air Evac EMS, Inc.*, 851 F.3d at 520.

²⁰ *See Bar Grp., LLC*, 215 F. Supp. 3d at 543.

²¹ *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 800 (5th Cir. 2014).

court, creating the potential for inconsistent judgments. The Fifth Circuit has made clear, however, that the concern for inconsistent judgments is limited to cases involving pieces of property. “When, as here, no court has assumed jurisdiction over a disputed res, there is no such danger.”²² “Allowing a federal court to order arbitration, even where a state court may construe an arbitration clause differently, is fully consistent with this established congressional intent.”²³ “Furthermore, the potential problem of inconsistent judgments may be obviated through a plea of res judicata if one court renders judgment before the other.”²⁴

“The real concern at the heart of the third *Colorado River* factor is the avoidance of piecemeal litigation.”²⁵ The Supreme Court has stated that “a decision to allow [arbitrability] to be decided in federal rather than state court does not cause piecemeal resolution of the parties’ underlying disputes.”²⁶ In addition, the strong federal policy in favor of arbitration outweighs any concern for piecemeal litigation.²⁷ This factor therefore weighs against abstention.

²² *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650-51 (5th Cir. 2000).

²³ *Nationstar Mortg. LLC v. Knox*, 351 F. App’x 844, 851-52 (5th Cir. 2009).

²⁴ *U.S. Fire Ins. Co. v. Hous. Auth. of New Orleans*, 917 F. Supp. 2d 581, 590 (E.D. La. 2013).

²⁵ *Black Sea Inv., Ltd.*, 204 F.3d at 650-51.

²⁶ *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 20.

²⁷ *Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 892 (5th Cir. 2013).

4. Order of Jurisdiction

In considering this factor, the Supreme Court has counseled that “priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.”²⁸ The State Court Action was filed on June 15, 2017 and has already seen a flurry of filings, including a hearing on a temporary restraining order. This action was filed on August 21, 2017 and only the instant motion has been filed. Our analysis, however, does not stop there. As detailed above, Aptim was not added as a party to the State Court Action until the court’s order on September 1. Although substantial litigation has taken place in the State Court Action, nearly all of that litigation took place without the involvement of Aptim and without any party representing Aptim’s rights. After Aptim’s acquisition of Shaw’s rights in the State Court Action on June 30, 2017, litigation in the State

Court Action continued for more than a month without Aptim’s involvement. Aptim attempted to be substituted as the proper party plaintiff but withdrew this request in favor of arbitration after McCall and Allied opposed the substitution. Aptim was only recently added to the State Court Action²⁹ and thus has not engaged in substantial litigation of its rights. This factor is neutral at best.

²⁸ *Moses H. Cone Mem’l Hosp*, 460 U.S. at 21.

²⁹ This Court notes that McCall and Allied apparently had no objection to the sua sponte addition of Aptim as a party.

5. Federal Law Governance

Plaintiff's Petition to Compel Arbitration presents a question of substantive federal law.³⁰ "[T]he presence of federal-law issues must always be a major consideration weighing against surrender."³¹

6. Adequacy of State Proceedings

Finally, Aptim argues that this factor weighs heavily against abstention because the state court has been hostile toward its right to arbitration. This Court does not adopt such an argument, but rather, finds that "the state court is a concurrent forum where motions to compel arbitration may be considered on the merits, pursuant to 9 U.S.C. § 4."³² This Court sees no reason to "doubt the adequacy of the state court's ability to resolve arbitrability issues."³³ That said, "the adequacy of state proceedings never weighs in favor of abstention—it is either a neutral factor or one that weighs against abstention."³⁴ Accordingly, this factor is neutral.

In conclusion, three of the *Colorado River* factors weigh against abstention and three are neutral. There are therefore no exceptional circumstances that compel this Court to abstain from hearing Plaintiff's petition to compel arbitration and stay the State Court Action. Indeed, the *Colorado River* abstention doctrine

³⁰ *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26.

³¹ *Id.*

³² *Nationstar Mortg. LLC v. Knox*, 351 F. App'x 844, 852 (5th Cir. 2009).

³³ *Id.*

³⁴ *Saucier v. Aviva Life & Annuity Co.*, 701 F.3d 458, 465 (5th Cir. 2012).

“represents an extraordinary and narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”³⁵ This Court will exercise its jurisdiction.

C. Arbitration

Aptim has asked this Court to compel McCall to submit to arbitration of its claims for breach of his Employment Contract and to stay the State Court Action. Defendant argues, however, that Plaintiff has waived its right to arbitration by initiating litigation in state court. “Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”³⁶ “Waiver of arbitration is not a favored finding, and there is a presumption against it.”³⁷ The party seeking to show waiver bears the heavy burden of proof.³⁸

Defendant argues that Plaintiff has waived its right to arbitration because it brought suit against him in state court seeking injunctive relief and damages. He argues that the parties have engaged in the filing of numerous pleadings and motions, held several court hearings, and engaged in discovery and depositions. Defendant’s arguments, however, impose the actions of Shaw onto Aptim. As Plaintiff points out, it has not participated in the State Court

³⁵ *Black Sea Inv., Ltd.*, 204 F.3d at 650.

³⁶ *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986).

³⁷ *Id.*

³⁸ *Broussard v. First Tower Loan, LLC*, 150 F. Supp. 3d 709, 725 (E.D. La. 2015).

Litigation, beyond momentarily seeking substitution. Plaintiff filed its arbitration demand only a month after the State Court Action commenced and only eleven days after it attempted to substitute into the State Court Action. Plaintiff's actions do not rise to the level of substantially invoking the judicial process, and Defendant has offered no argument why Shaw's actions should be imputed to Plaintiff. Accordingly, Plaintiff has not waived its right to arbitration.

Defendant does not argue that the arbitration agreement is not valid or that this dispute is outside its scope. Indeed, he does not assert any additional arguments against its enforcement. Accordingly, pursuant to the arbitration clause in his Employment Agreement, McCall shall be compelled to arbitrate Aptim's claims.

D. Stay of State Court Proceedings

Finally, Defendant contests Plaintiff's request for a stay of the State Court Action, arguing that it would be a violation of the Anti-Injunction Act. The Anti-Injunction Act states, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."³⁹ Plaintiff argues that the Court has the authority to stay the State Court Action under the third exception of the Anti-Injunction Act—to protect or effectuate its judgments. It is well-settled that "[a]n order compelling arbitration . . . is a final decision that qualifies as a 'judgment' under the Anti-Injunction

³⁹ 28 U.S.C. § 2283.

Act.”⁴⁰ In addition, the Fifth Circuit in *American Family Life Assurance Company of Columbus v. Biles* held that “a district court has the discretion to issue an order staying a related state court proceeding it has determined must be submitted to arbitration if the district court concludes that it is necessary to protect or effectuate its order compelling arbitration.”⁴¹

Defendant argues, however, that *Biles* is distinguishable because, in this matter, the state court has already ruled on the issue of arbitrability and stayed the arbitration. This Court agrees that the facts here are distinguishable from *Biles*, however, it finds that they present an even more compelling case for the issuance of a stay. The state court’s contrary holding necessitates action by this Court to protect its judgment. Indeed, the Fifth Circuit has affirmed a stay in a similar situation where the state court had previously issued an order staying any action on a motion to compel arbitration and permitting full discovery.⁴² Accordingly, this Court finds that “the principle of judicial economy, the strong judicial policy favoring arbitration expressed by the Supreme Court, the plain language of the Anti-Injunction Act, and the policies embodied in the FAA warrant a stay” of the State Court Action between Aptim and McCall.⁴³

⁴⁰ *Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 893 (5th Cir. 2013).

⁴¹ *Id.*

⁴² *See Conseco Fin. Servicing Corp. v. Shinall*, 51 F. App’x 483 (5th Cir. 2002).

⁴³ *Republic Fin. v. Cauthen*, 343 F. Supp. 2d 529, 538 (N.D. Miss. 2004).

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel Arbitration and Stay State Court Proceedings are GRANTED and a final judgment shall enter.

IT IS ORDERED that the Aptim Corp and Dorsey Ron McCall shall submit to arbitration Aptim's claims pursuant to McCall's Employment Agreement.

IT IS FURTHER ORDERED that *The Shaw Group v. Dorsey Ron McCall* (No. 658781, Division D) pending in the 19th Judicial District Court of Louisiana is STAYED as between Aptim Corp and McCall.

IT IS FURTHER ORDERED that Plaintiff shall amend its Complaint to properly allege diversity jurisdiction within 5 days of this Order.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss is DENIED AS MOOT.

New Orleans, Louisiana this
19th day of September, 2017

[handwritten: signature]
JANE TRICHE MILAZZO
UNITED STATES
DISTRICT JUDGE