No. 18-7618

IN THE

Supreme Court of the United States

DAVID SHAUN NEAL,

Petitioner,

v.

ASTA FUNDING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

RANDY M. MASTRO
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmastro@gibsondunn.com

Counsel for Respondent

QUESTION PRESENTED

Whether disputes over the satisfaction of an alleged condition precedent to arbitration are properly addressed by an arbitrator or a court.

RULE 29.6 STATEMENT

Asta Funding, Inc. has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

BRIEF IN OPPOSITION FOR ASTA FUNDING, INC.

Respondent Asta Funding, Inc. ("Asta") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by David Shaun Neal ("Neal").

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit is unreported, but available at 2018 WL 5877237. Pet. App. A. The opinions of the U.S. District Court for the District of New Jersey affirmed by the court of appeals are unreported, but available at 2016 WL 3566960, Pet. App. B, 2016 WL 7238795, Resp. App. 1a-7a, and 2017 WL 3168983, Resp. App. 8a-13a.

JURISDICTION

The court of appeals entered its opinion on November 8, 2018, and denied Neal's petition for rehearing en banc on December 4, 2018. Pet. App. A, C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None. Although Neal's petition references 9 U.S.C. §§ 10 and 11, none of the statutory provisions contained therein are relevant to the question presented in the petition.

STATEMENT

In April 2014, an arbitrator issued a final award in Asta's favor, awarding Asta more than $3 million against Neal, Robert F. Coyne ("Coyne"), and their company, New World Solutions, Inc. ("NWS"). The ar-

bitrator found, *inter alia*, that "NWS committed multiple material breaches" of an information technology services agreement between Asta and NWS ("ITS Agreement"), and that Neal and Coyne, who were NWS's sole owners, officers, and directors, "committed common law and consumer fraud." Pet. App. B. at 13.

In confirming the arbitration award, the district court determined that Neal and Coyne were bound by the arbitration provision in the ITS Agreement because, among other reasons, Neal and Coyne were alter egos of NWS, which was the signatory to the parties' agreement. On appeal, Neal and Coyne "d[id] not challenge any of the bases upon which the District Court determined that the dispute was arbitrable, such as the District Court's finding that they were bound to the ITS Agreement under a veil-piercing/alter-ego theory." Pet. App. A at 5 n.3.

Instead, Neal and Coyne argued on appeal that the district court "erred by applying federal law, instead of New Jersey law, in finding that it was proper for the arbitrator to decide whether Neal and Coyne were individually bound." Pet. App. A at 5. But the Third Circuit flatly rejected their argument and held that there was "no further remedy to which Appellants would be entitled" because "the District Court permitted the parties to take discovery and made its own independent determination that the claims against Neal and Coyne were arbitrable." *Id*.

Neither Neal nor Coyne seek review of the Third Circuit's ruling on this point. Instead, Neal, but not Coyne, seeks this Court's review on the ground that a "condition precedent" to arbitration "had not been met." Pet. 4-5. The alleged "condition precedent," which Neal's petition does not describe, was that Asta try to resolve its disputes with NWS's designated "IT

Services Manager" before proceeding to arbitration. NWS's designated "IT Services Manager" was Neal.

Even accepting Neal's contention that there was a "condition precedent" to arbitration, it is well settled that disputes about "procedural preconditions for the use of arbitration" such as "the satisfaction of . . . 'conditions precedent to an obligation to arbitrate,'" are for arbitrators, not courts, to decide. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34-35 (2014) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)).

Here, the arbitrator was presented with, and rejected, Neal's contention that the alleged condition precedent had not been met. Resp. App. 17a-18a (¶¶ 7-8); *see also* Certification of Steven I. Adler, Esq., ¶¶ 70-74, *Neal v. Asta Funding, Inc.*, No. 2:13-CV-03438 (D.N.J.), ECF No. 34-1.

In requesting that the district court vacate the arbitration award, Neal did not dispute that the arbitrator found against him on whether the alleged condition precedent was met. Instead, contrary to *BG Group* and *Howsam*, Neal argued that "[a]ny determination by the arbitrator was a nullity." Resp. App. 65a-66a (¶¶ 7-8); *compare with id.* at 17a-18a (¶¶ 7-8).

Now, Neal claims that the Third Circuit overlooked this "condition precedent issue." Pet. 4. But it was the sole issue briefed in Neal's petition for rehearing en banc, and neither *BG Group* nor *Howsam* were referenced in the petition, Resp. App. 93a-110a, which the Third Circuit denied. Pet. App. C.

Far from presenting any split in the Circuits or raising any "issue of first impression," Pet. 5, this case

is squarely addressed by the Court's existing precedents. Accordingly, Neal's petition should be denied.

1. On July 1, 2009, Asta and NWS entered into the ITS Agreement with NWS. Neal and Coyne were the sole owners, officers, and directors of NWS.

In July 2012, Asta initiated an arbitration proceeding against NWS pursuant to an arbitration clause in the ITS Agreement, which provided:

> In the event that a dispute, controversy, or claim between the Parties arising directly or indirectly out of or in connection with this Agreement cannot be resolved by the IT Services Managers, either Party may elect to have such dispute, controversy, or claim resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA").

In September 2013, Asta initiated an arbitration proceeding against Neal and Coyne based on the same claims it had asserted against NWS.

2. During the arbitration proceedings, NWS and Neal argued that Asta was barred from arbitrating its claims because it failed to attempt to resolve its disputes with NWS's designated "IT Services Manager" before proceeding to arbitration. NWS's designated "IT Services Manager" was Neal. The arbitrator rejected their condition precedent argument. Resp. App. 17a-18a (¶¶ 7-8).

On October 16, 2013, the arbitrator issued a preliminary determination that Neal and Coyne were bound by the arbitration clause in the ITS Agreement and consolidated the arbitration against Neal and Coyne with the proceeding against NWS.

On November 18, 2013, Neal filed suit in the U.S. District Court for the District of New Jersey seeking, *inter alia*, a declaratory judgment that he could not be compelled to arbitrate ("Declaratory Judgment Action").

Following the district court's denial of Neal's applications to enjoin or stay any arbitration hearing, an arbitration hearing was held across multiple days in January 2014.

On March 5, 2014, the arbitrator issued a partial final award in which he determined, *inter alia*, that "Mr. Neal and Mr. Coyne used NWS . . . to defraud Asta of hundreds of thousands if not millions of dollars" and that Neal and Coyne were bound by the arbitration clause in the ITS Agreement under a veil-piercing/alter-ego theory, and that Neal was additionally bound under the theory of equitable estoppel. Pet. App. B at 11.

On April 2, 2014, the arbitrator issued a final award in which he determined, *inter alia*, that NWS breached the ITS Agreement, that NWS was an alter ego for Neal and Coyne, and that Neal and Coyne "committed common law and consumer fraud." Pet. App. B at 13. The arbitrator awarded Asta approximately $3 million against NWS, Neal, and Coyne, jointly and severally.

3. On April 17, 2014, Asta filed an action in the U.S. District Court for the District of New Jersey to confirm the arbitration award. On April 21, 2014, Coyne filed an action to vacate the arbitration award. On June 4, 2014, Neal filed an action to vacate the arbitration award. On December 29, 2014, the district court consolidated these actions with Neal's Declaratory Judgment Action for pretrial purposes.

On June 30, 2016, the district court ruled on a number of motions. In connection with Neal's Declaratory Judgment Action, the district court granted summary judgment in Asta's favor, holding that Neal and Coyne were individually bound by the arbitration clause in the ITS Agreement. The district court also granted Asta's motion to confirm the arbitration award and dismissed the petitions filed by Neal and Coyne to vacate the arbitration award. Pet. App. B.

On December 14, 2016, the district court denied motions for reconsideration filed by Neal and Coyne. Resp. App. 1a-7a. On July 26, 2017, the district court denied a Rule 60(b)(3) motion filed by Neal. Resp. App. 8a-13a.

4. On appeal, Neal and Coyne argued, *inter alia*, that the district court erred "in finding that it was proper for the arbitrator to decide whether Neal and Coyne were individually bound." Pet. App. A at 5. On November 8, 2018, the Third Circuit affirmed the district court's orders. In its ruling, the Third Circuit explained that "[t]he problem with Appellants' contention is that the District Court . . . made its own independent determination that the claims against Neal and Coyne were arbitrable." *Id*. Neal and Coyne "d[id] not challenge any of the bases upon which the District Court determined that the dispute was arbitrable, such as the District Court's finding that they were bound to the ITS Agreement under a veil-piercing/alter-ego theory." *Id.* at 5 n.3.

On November 18, 2018, Neal and Coyne filed a petition for rehearing en banc, arguing that "the District Court committed legal error" because it "bound [them] to the arbitration agreement" without first addressing the "threshold issue of condition precedent." Resp. App. 95a. The petition did not cite or otherwise

acknowledge this Court's decisions in *BG Group* and *Howsam* holding that disputes over whether a condition precedent to arbitration have been met are for arbitrators, not courts, to decide.

On December 4, 2018, the Third Circuit denied Neal's and Coyne's petition for rehearing en banc. Pet. App. C.

REASONS FOR DENYING THE PETITION

Neal conflates the substantive issue of whether he, as a non-signatory to the ITS Agreement, could be personally bound to arbitrate, with the procedural issue of whether an alleged condition precedent was met to make Asta's claims against Neal ripe for decision by the arbitrator.

The district court decided the substantive issue, and Neal did not appeal any of the grounds on which the district court held that Neal was personally bound by the arbitration provision in the ITS Agreement. Pet. App. A at 5 n.3.

On the procedural issue, this Court's precedents make clear that disputes over whether an alleged condition precedent has been met are for arbitrators to decide.

In *Howsam v. Dean Witter Reynolds, Inc.*, the respondent sued to enjoin the petitioner from commencing an arbitration, arguing that the dispute was "'ineligible for arbitration'" because the controversy was time-barred under the arbitral body's applicable time limitation rule. 537 U.S. 79, 82 (2002). The district court dismissed the action on the ground that the arbitrator, not the court, should interpret and apply the time limitation rule. *Id.* The Tenth Circuit reversed, holding that the time bar rule presented a question of

the dispute's "arbitrability," a question presumptively for the court to decide. *Id.*

This Court reversed, explaining that, "in the absence of an agreement to the contrary," "procedural" issues, such as whether "'time limits" or "other *conditions precedent* to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. at 85 (emphasis added) (quoting Revised Uniform Arbitration Act § 6, cmt. 2, 7 U.L.A., at 13 (Supp. 2002)).

In *BG Group, PLC v. Republic of Argentina*, the Court reiterated that "procedural preconditions for the use of arbitration" such as "the satisfaction of . . . 'conditions precedent to an obligation to arbitrate,'" are presumptively for arbitrators, not courts, to decide. 572 U.S. 25, 34-35 (2014) (quoting *Howsam*, 537 U.S. at 85).

Here, the arbitrator was presented with, and rejected, Neal's contention that Asta failed to satisfy the alleged condition precedent. Resp. App. 17a-18a (¶¶ 7-8); *see also* Certification of Steven I. Adler, Esq., ¶¶ 70-74, *Neal v. Asta Funding, Inc.*, No. 2:13-CV-03438 (D.N.J.), ECF No. 34-1.

Neal does not argue, nor could he, that the ITS Agreement reversed the ordinary presumption so that a court, rather than an arbitrator, would decide "procedural" issues such as whether a condition precedent to arbitration had been met.

Moreover, in requesting that the district court vacate the arbitration award, Neal did not dispute that the arbitrator found against him on whether the alleged condition precedent was met. Instead, contrary to *Howsam* and *BG Group*, Neal argued that "[a]ny determination by the arbitrator was a nullity." Resp. App. 66a-67a (¶¶ 7-8); *compare with id.* at 17a-18a

(¶¶ 7-8). Similarly, although the condition precedent issue was the only issue that Neal briefed in his petition to the Third Circuit for rehearing en banc, the petition made no reference to *Howsam* or *BG Group*. Resp. App. 93a-110a.

There is no "issue of first impression" here. Pet. 5. This Court's precedents in *Howsam* and *BG Group* are controlling, and the Third Circuit properly affirmed the district court orders confirming the arbitration award against Neal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RANDY M. MASTRO
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmastro@gibsondunn.com

Counsel for Respondent

March 6, 2019