No. _____

In The

Supreme Court of the United States

DAVID JAMES MURPHY,

Petitioner,

v.

CITIGROUP GLOBAL MARKETS, INC.,
CITICORP SECURITIES SERVICES, INC.,
AND OKAN PEKIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New York, Appellate Division, First Department

PETITION FOR A WRIT OF CERTIORARI

DAVID JAMES MURPHY
Pro Se
57 Wallaroy Road Woollahra, NSW,
Australia 2025
+61 450 134 545
david.james.murphy@hotmail.com

MAY 19, 2021

QUESTION PRESENTED

(1) There is an arbitration agreement and it contains a delegation clause. Respondents argued that Petitioner's claims are subject to arbitration, under that agreement, and are therefore barred on res judicata by a prior arbitration. Petitioner argued that he is not bound by the arbitration agreement and that his claims cannot therefore be barred on res judicata by the prior arbitration. However, as Petitioner has challenged the enforceability of the arbitration agreement as a whole, and not the delegation clause specifically, he cross-moved to compel arbitration of arbitrability, pursuant to the severable delegation clause. Should the lower courts have granted Petitioner's cross-motion and denied or stayed Respondents' motion to dismiss, at least to the extent it was based on res judicata?

RELATED PROCEEDINGS

New York Supreme Court:

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017 (dated March 19, 2019) (order of Justice Shlomo S. Hagler granting Respondents' motion to dismiss and denying as moot Petitioner's cross-motion to compel arbitration of arbitrability)

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017 (dated November 6, 2019) (order of Justice Shlomo S. Hagler denying Petitioner's motion to reargue)

New York Supreme Court, Appellate Division, First Department:

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017, AD1 Docket No. 2019-3781 (dated July 16, 2020) (order of First Department denying Petitioner's appeal)

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017, AD1 Docket No. 2019-3781 (dated September 29, 2020) (order of First Department denying Petitioner's motion to reargue or, in the alternate, for leave to appeal)

RELATED PROCEEDINGS – Continued

New York Court of Appeals:

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017, New York Court of Appeals Motion No. 2020-741 (dated December 22, 2020) (order of New York Court of Appeals denying Petitioner's motion for leave to appeal)

David James Murphy v. Citigroup Global Markets, Inc., Citicorp Securities Services, Inc., and Okan Pekin, Index No. 156466/2017, New York Court of Appeals Motion No. 2021-111 (dated April 1, 2021) (order of New York Court of Appeals denying Petitioner's motion for leave to reargue)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. _____

In The
Supreme Court of the United States

DAVID JAMES MURPHY,

Petitioner,

v.

CITIGROUP GLOBAL MARKETS, INC.,
CITICORP SECURITIES SERVICES, INC.,
AND OKAN PEKIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New York, Appellate Division, First Department

PETITION FOR A WRIT OF CERTIORARI

David James Murphy respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department ("First Department") in this case.

OPINIONS BELOW

The opinion of the First Department, denying Petitioner's appeal, is reported at 125 N.Y.S.3d 560, 185 A.D.3d 486 (App. Div. 2020) and reprinted at App. I-A. The order of the New York Court of Appeals, denying Petitioner's motion for leave to appeal, is reported at 36 N.Y.3d 903 (2020) and reprinted at App. I-B. The New York Supreme Court's unreported and sealed opinion, granting the Respondents' motion to dismiss and denying Petitioner's cross-motion to compel arbitration of arbitrability, is reprinted at App. II-E.

The First Department's denial of Petitioner's motion to reargue, or in the alternate for leave to appeal, is reprinted at App. I-C (2020 NY Slip Op 72303(U)). The unreported order of the New York Court of Appeals, denying Petitioner's motion to reargue that court's denial of his motion for leave to appeal, is reprinted at App. I-D. The New York Supreme Court's unreported and sealed opinion, denying Petitioner's motion to reargue, is reprinted at App. II-F.

The New York Supreme Court's unreported and sealed order, sealing the record in this matter before that court, is reprinted at App. II-G.

JURISDICTION

The judgment of the First Department denying Petitioner's timely filed appeal was dated and entered July 16, 2020 and served by Petitioner on Respondents,

with Notice of Entry, on July 24, 2020. The First Department's denial of the Petitioner's timely filed motion to reargue, or in the alternate for leave to appeal, was dated and entered September 29, 2020 and served by Petitioner on Respondents, with Notice of Entry, on October 11, 2020.

Petitioner's timely filed motion to the New York Court of Appeals, for leave to appeal, was decided and entered on December 22, 2020. Petitioner's timely filed motion to the New York Court of Appeals, for leave to reargue that denial, was decided and entered on April 1, 2021.

This Court has jurisdiction over the First Department's decision and order affirming the denial of Petitioner's cross-motion to compel arbitration of arbitrability under 28 U.S.C. § 1257(a) (*Southland Corp. v. Keating*, 465 U.S. 1, 6–8 (1984)), because this case falls within the remit of the Federal Arbitration Act ("FAA") (*Salvano v. Merrill Lynch*, 85 N.Y.2d 173, 180, 623 N.Y.S.2d 790, 647 N.E.2d 1298 (1995)).

STATUTORY PROVISIONS INVOLVED

The FAA, 9 U.S.C. §§ 1–16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a

> controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case raises an important issue. Where there is an arbitration agreement with a delegation clause, can a plaintiff challenging the enforceability of the arbitration agreement, as a whole, compel arbitration of those challenges?

The FAA "places arbitration agreements on an equal footing with other contracts." *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citations omitted). But who decides "gateway" issues such as whether an arbitration agreement is enforceable? Arbitrators, if the parties have clearly and unmistakably agreed to "arbitrate arbitrability", through a delegation clause, otherwise the courts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Delegation clauses are severable from the arbitration agreement in which they appear. As a result, challenges going to the enforceability of an arbitration agreement, as a whole, are for the arbitrators to decide, whereas challenges that are specific to a delegation

clause are for the courts to decide. *Rent-a-Center*, 561 U.S. at 72. The application of these principles to the present action should have been straightforward.

Petitioner asserted certain claims (the "Arbitrated Claims") against Citigroup Global Markets, Inc. and Citicorp Securities Services, Inc. (together the "Citi Entities") in arbitration (the "Arbitration"). Those claims were subject to mandatory arbitration under the rules of the Financial Industry Regulatory Authority ("FINRA"). Petitioner subsequently brought the present action in court asserting different claims (the "Discrimination Claims"), which are not subject to mandatory arbitration under the rules of FINRA. Nevertheless, Respondents moved to dismiss, arguing the Discrimination Claims were subject to an arbitration agreement between the parties (the "Arbitration Agreement") and were therefore barred on res judicata (claim preclusion) by the Arbitration (the "Motion to Dismiss").

Petitioner contends he is not bound by the Arbitration Agreement, on the basis of breach and fraudulent inducement, and that as a result the Discrimination Claims cannot by barred on res judicata. However, the Arbitration Agreement contains a delegation clause and Petitioner has not challenged that clause specifically. He therefore cross-moved to compel arbitration of arbitrability (the "Cross-Motion to Compel").

The court of first instance claimed discretion to consider the Motion to Dismiss first and denied the Cross-Motion to Compel as moot (App. II, S. 27a).

In denying Petitioner's appeal, the First Department proceeded on the basis that the question of arbitrability was for the court to decide (App. I, 1a-2a). During oral argument, the First Department said it was inconsistent for Petitioner to challenge the enforceability of the Arbitration Agreement and to move to compel arbitration of those challenges under the delegation clause. This is incorrect.

"[U]nless specifically (and successfully) challenged, the [delegation] clause is in and of itself treated as a valid contract that must be enforced under the FAA's enforcement provisions. *See Rent-A-Center*, 561 U.S. at 72." *Singh v. Uber Technologies*, 939 F.3d 210, 215 (3d Cir. 2019). Because Petitioner has challenged the enforceability of the Arbitration Agreement as a whole, it is consistent for him to make such a challenge and still enforce the parties' "additional, severable agreement to arbitrate threshold issues" (*Shockley v. PrimeLending*, 929 F.3d 1012, 1018 (8th Cir. 2019)). With due respect, the First Department's failure to recognize this is a little startling. *Rent-a-Center*, 561 U.S. 63 was decided over a decade ago and yet its "Russian nesting dolls" are (apparently) still capable of causing confusion.

Prior to reading *Rent-a-Center*, 561 U.S. 63, Petitioner thought the court could rule on his challenges to arbitrability. He figured if he was not bound by the

Arbitration Agreement, he was not bound by the delegation clause either. However, whilst such an argument may sound consistent, it was rejected by this Court, *id.* at 72. On the First Department's reasoning, if Petitioner says he is not bound by the delegation clause, he is contradicting *Rent-a-Center*, 561 U.S. 63, and if he says he is bound by that clause, he is being inconsistent. This flawed result arises from a failure to uniformly apply the severability principle.

This Court recently addressed the enforcement of delegation clauses in *Henry Schein v. Archer and White Sales*, 139 S.Ct. 524 (2019) and initially granted certiorari to consider it further in *Henry Schein v. Archer and White Sales*, No. 19-963 (June 15, 2020). However, that writ of certiorari was later dismissed as improvidently granted (592 U.S. ___ (2021)). In that case, delegation relied on the incorporation of the AAA rules. Furthermore, on remand, the Fifth Circuit had made two relevant holdings, but this Court granted certiorari on only one, even though it was difficult to consider one without the other.

In contrast, the Arbitration Agreement here contains an express delegation clause. It is obvious that the courts below should have enforced that clause and their repeated refusal to do so should (with due respect) shock this Court.

Furthermore, granting of this writ may present an opportunity to address a long-standing split amongst the Circuits – does waiver of a right to compel arbitration require prejudice? If it does, it could be argued

that the Cross-Motion to Compel should have been granted, come what may, because Respondents have never pled prejudice.

A. Background

In *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-407 (1967), this Court held an arbitration clause is severable from the contract in which it is embedded and that as a result, a claim of "fraud in the inducement of the arbitration clause itself" could be resolved in court, but a claim of "fraud in the inducement of the contract generally" must be resolved in arbitration.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), this Court addressed the application of severability in state court, writing:

> "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts."

In so ruling, this Court held that it did not matter whether a particular challenge to validity "would render the contract void or voidable" (*id.*, at 446), but did recognize that "[t]he issue of the contract's validity is different from the issue whether any agreement

between the alleged obligor and obligee was ever concluded" (*id.*, at 444, n.1).

In *Rent-A-Center*, 561 U.S. 63, this Court extended the reasoning in *Prima Paint*, 388 U.S. 395 (1967), holding that where parties have clearly and unmistakably agreed to arbitrate questions of arbitrability, that agreement, referred to as a delegation clause, is severable from the arbitration agreement in which it is embedded. As a result, it was held that a challenge to the enforceability of the arbitration agreement as a whole, based on unconscionability, must be ordered to arbitration, whereas a claim of unconscionability going to the delegation clause specifically would be decided in court, *id.* at 72.

Claims for breach of contract must be handled in a similar manner to claims of unconscionability and fraud in the inducement.

Where there is a contract with an arbitration clause, a claim of breach going to the overall contract is for the arbitrators to decide. "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach." *Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO v. Needham Packing Co.*, 376 U.S. 247, 251-52 (1964).

In contrast, where a claim of breach goes specifically to an arbitration agreement, that claim is for the courts, provided there is no delegation clause. In *Brown v. Dillard*, 430 F.3d 1004, 1012 (9th Cir. 2005), Dillard's motion to compel was denied, because

"Dillard's breached the arbitration agreement itself by refusing to arbitrate." In *Tri-Star Petroleum v. Tipperary Corp.*, 107 S.W.3d 607, 614 (Tex. Sup. Ct. 2003), the court held that Tri-Star's misconduct in a prior arbitration was so egregious as to constitute a material breach of the arbitration agreement and Tri-Star's motion to compel arbitration of subsequent disputes was therefore denied.

Finally, where there is a delegation clause, a claim of breach going to the overall contract or even specifically to the arbitration clause, is for arbitrators to decide, whereas a claim of breach specific to the delegation clause would be for the courts. *In Re: CenturyLink Sales Practices and Securities Litigation*, MDL No. 17-2795 (MJD/KMM) Docket No. 596 (D. Minn. Dec. 4, 2020), for example, the court first determined that the parties had not delegated arbitrability to arbitration and only then considered whether there had been a material breach of the arbitration agreement.

In summary, a severed arbitration or delegation clause can be enforced, even though the overall contract in which it is embedded is challenged. Moreover, either party can enforce the severed clause – the party challenging the overall contract and the party resisting that challenge. "When a contract is separable or divisible into a number of elements or transactions, each of which is so far independent of the others that it might stand or fall by itself, and good cause for rescission exists as to one of such portions, it may be rescinded and the remainder of the contract affirmed." *Ripley v. International Railways of Central America*, 8

N.Y.2d 430, 438 (1960) (internal quotations and citations omitted).

Consistent with the above, and given the nature of Petitioner's challenges to arbitrability, Petitioner cross-moved to compel arbitration of arbitrability pursuant to the delegation clause. He contends that in denying that motion, the First Department failed to correctly apply *Rent-a-Center*, 561 U.S. 63. It is not the first time.

In *Matter of Monarch v. National*, 26 N.Y.3d 659, 675-676 (2016), the New York Court of Appeals overturned the First Department's application of *Rent-a-Center*, 561 U.S. 63. In *Garthon Business Inc. v. Stein*, 30 N.Y.3d 943, 944 (2017), it did so again. In both these cases, appeals were available as of right, but not always because the dissenting opinion below correctly applied *Rent-a-Center*, 561 U.S. 63. In *Matter of Monarch v. National*, 123 A.D.3d 51, 993 N.Y.S.2d 275 (App. Div. 1st Dep't 2014), for example, the majority got the wrong outcome (at 73) and the minority got the correct outcome for the wrong reason (at 77-78). The opinions in that case are lengthy and thoughtful, and yet all five judges simply did not understand the implications of *Rent-A-Center*, 561 U.S. 63.

Furthermore, it could also be argued that the Cross-Motion to Compel should have been granted, because Respondents have never pled prejudice. However, the issue of prejudice highlights a split amongst the Circuits.

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits hold that waiver by litigation conduct requires prejudice. See for example: *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015); *Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 626 F.3d 156, 159 (2d Cir. 2010) ("key to a waiver analysis is prejudice" (citations and internal quotations omitted)); *In re Mirant Corp.*, 613 F.3d 584, 591 (5th Cir. 2010); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008); *Gordon v. Dadante*, 294 Fed. Appx. 235, 238 (6th Cir. 2008); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1093 (8th Cir. 2007); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 15 (1st Cir. 2005); *Cargill Ferrous Intern. v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003); and *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002).

The Seventh and D.C. Circuits require no prejudice, holding that conduct inconsistent with arbitration is sufficient. See for example: *Khan v. Parsons Glob. Services, Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008) ("[a] finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived"); and *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011).

Finally, most Tenth Circuit opinions treat prejudice as one of many factors to be considered in assessing waiver, but some treat it as being required.

BOSC, Inc. v. Bd. of Cty. Comm'rs, 853 F.3d 1165, 1174-75 (10th Cir. 2017).

Moreover, even amongst those Circuits requiring prejudice, no two Circuits apply exactly the same standards, making the split worse. See further, Paul Bennett IV, *"Waiving" Goodbye to Arbitration: A Contractual Approach*, 69 Washington and Lee Law Review 1609 (2012), pp. 1635-1663.

This Court granted certiorari to consider whether prejudice is necessary to a finding of waiver in *Stok & Associates, P.A. v. Citibank, N.A.*, 562 U.S. 1215 (2011), but the case was settled and the writ dismissed, *Stok & Associates, P.A. v. Citibank, N.A.*, 563 U.S. 1029 (2011).

B. Facts and Procedural History

In September, 2014, Petitioner's employment with the Citi Entities was terminated.

In December, 2014, Petitioner commenced the Arbitration against the Citi Entities asserting the Arbitrated Claims. Those claims were denied. The Arbitrated Claims did not include any claims of discrimination and were subject to mandatory arbitration under FINRA's rules.

After the Arbitration, Petitioner asserted three causes of action in the New York Supreme Court sounding in discrimination and hostile work environment. These claims were not subject to mandatory arbitration under FINRA's rules.

Respondents moved to dismiss the Discrimination Claims on the grounds of res judicata. They argued that the Discrimination Claims were subject to mandatory arbitration under the Arbitration Agreement and were therefore barred on res judicata by the Arbitration. In the alternate, Respondents moved to dismiss the third cause of action for failure to state a claim.

Petitioner argued that he is not bound by the Arbitration Agreement on various grounds, including breach and fraudulent inducement and that the Discrimination Claims cannot therefore be barred on res judicata. In support of this last point, Petitioner cited *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011), a case governed by the FAA and wrote "where two separate proceedings result from their being arbitrable and nonarbitrable claims, one action will not bar the other on res judicata" and "a determination in one case may raise questions of collateral estoppel (issue preclusion) in the other, but res judicata (claim preclusion) does not come into play."

However, the Arbitration Agreement contains a delegation clause, providing that "any dispute as to the arbitrability of a particular claim made pursuant to this Policy shall be resolved in arbitration." As a result, it was not for the court to decide arbitrability and Petitioner promptly cross-moved to compel arbitration thereof. In so moving, Petitioner committed to challenging arbitrability in arbitration, such that if he prevailed, his claims would return to court, consistent with his having initiated the action in that forum.

In his written submissions, Petitioner argued the court should grant the Cross-Motion to Compel and "decline to consider the Defendants' Motion to Dismiss." He also addressed the issue of waiver. To support his arguments, Petitioner cited numerous Federal cases, each decided under the FAA.

In addition to cross-moving to compel arbitration of arbitrability, Petitioner argued that the first two causes of action were premised, in part, on actions taken after the initiation of the Arbitration, and to that extent (at least) could not be barred on res judicata. "While claim preclusion bars relitigation of the events underlying a previous judgment, it does not preclude litigation of events arising after the filing of the complaint that formed the basis of the first lawsuit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000).

In their written opposition to the Cross-Motion to Compel, Respondents characterized that motion as "premature" and "blatant gamesmanship" and argued that the Motion to Dismiss "must be considered by this Court." However, the words waiver and prejudice do not appear with respect to the Cross-Motion to Compel.

During oral argument before the court of first instance, Justice Hagler questioned whether the court had discretion to consider the Motion to Dismiss first. Petitioner stated twice that the FAA applied, cited *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) as holding that the court had no discretion and attempted to cite additional Federal cases, decided under the FAA. But Justice Hagler was not interested in

Federal precedents, including decisions of this Court. Justice Hagler said the question of discretion was procedural and fell to be determined under state law, even though this case is governed by the FAA. His Honor said "there's been several cases from the court of appeals and the appellate division saying they have discretion, where if I wish I could deal with the motion to dismiss first." Petitioner said that if the court was intent on considering the Motion to Dismiss first, he "should be given an opportunity to argue why these disputes are not arbitrable." Justice Hagler declined, saying "That is another subject."

In Justice Hagler's written opinion, His Honor proceeded on the basis that the court had discretion, considered the Motion to Dismiss first, dismissed the first and second causes of action on res judicata and denied the Cross-Motion to Compel as moot (App. II, S. 23a and S. 27a). As to post-filing conduct, Justice Hagler relied indirectly on an already vacated decision to hold that Petitioner was obliged to amend his Statement of Claim in the Arbitration (*UBS Sec. LLC v. Highland Capital Mgt., L.P.*, 154 A.D.3d 631, 63 N.Y.S.3d 53 (App. Div. 2017) via *IDT Corp. v. Tyco Group, S.A.R.L.*, 156 A.D.3d 538 (N.Y. App. Div. 2017)) (App. II, S. 22a). Finally, Justice Hagler dismissed the third cause of action for failure to state a claim (App. II, S. 26a).

Petitioner moved to reargue. Respondents argued, for the first time, that Petitioner had waived his right to compel arbitration of arbitrability (App. II, S. 37a n.3), but they still did not plead prejudice. Justice

Hagler denied the motion to reargue. His Honor maintained the court had been correct to consider the Motion to Dismiss first, but wrote that if the court had considered the Cross-Motion to Compel on the merits, it would have been denied as waived (App. II, S. 35a and S. 37a). Justice Hagler did not address Respondents' failure to plead prejudice (or explain why it was appropriate to consider Respondents' untimely waiver argument).

Finally, in Justice Hagler's written opinion denying the motion to reargue, His Honor claimed Petitioner was seeking different relief or making a new argument (App. II, S. 36a). That was not the case. With due respect, Justice Hagler had simply not understood Petitioner's argument the first time around. In Petitioner's original written submissions, he argued multiple times that the Discrimination Claims could not be barred on res judicata unless they were subject to mandatory arbitration and reiterated that position during oral argument. Furthermore, the primary relief Petitioner seeks has always been the granting of the Cross-Motion to Compel. During oral argument on the original motions, Petitioner declined to withdraw his claims and resubmit them in arbitration and made clear that he only wanted to submit the question of arbitrability to arbitration.

On appeal, Petitioner argued again that this case was governed by the FAA (which has never been disputed); that the Discrimination Claims could not be barred on res judicata if they were not subject to mandatory arbitration; that the court was obliged to

consider the Cross-Motion to Compel first; that the court was bound to grant that cross-motion pursuant to the delegation clause; and that the court must deny or stay the Motion to Dismiss, at least to the extent it relied on the defense of res judicata. The First Department rejected the penultimate leg of this argument only (App. I, 1a-2a).

During oral argument, Justice Gische said the "general rule is that the court decides arbitrability unless the arbitration agreement provides otherwise." Petitioner cited the delegation clause. Justice Gische objected that Petitioner could not look to enforce that clause, whilst challenging the validity of the Arbitration Agreement – "It's inconsistent. This is for the court to decide." A recording of oral argument is available on the First Department's website at the following URL, with discussion on this matter starting at 42:10.

http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2020_Jun24_13-59-44.mp4

Finally, on appeal, Petitioner also argued his claims could not be barred on res judicata to the extent they were based on post-filing conduct and that his third cause of action could not be dismissed for failure to state a claim. The First Department rejected these arguments (App. I, 1a-2a).

REASONS FOR GRANTING THE PETITION

A. Petitioner's Cross-Motion to Compel should have been granted and the Motion to Dismiss denied or stayed

(i) Res Judicata and Arbitrability

First, a statement of the obvious. The Discrimination Claims could not be barred on res judicata if they fell outside the scope of the Arbitration Agreement, or if there was no such agreement. *Cheslowitz v. Board of Trustees of Knox School*, 68 N.Y.S.3d 103, 106 (App. Div. 2017) (remaining causes of action "are not barred by the arbitration award, as those disputes did not fall within the purview of the arbitration clause and were not determined by the arbitrator"). *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson*, 765 F.3d 625, 631 (6th Cir. 2014) (arbitration did not bar on res judicata non-arbitrable claims because to do otherwise "would force a party, through the doctrine of res judicata, either to arbitrate a claim it had not agreed to arbitrate, or to effectively give up the claim"). *Wolf v. Gruntal & Co., Inc.*, 45 F.3d 524, 528-530 (1st Cir. 1995). *Williams v. E.F. Hutton & Co*, 753 F.2d 117, 119 (Ct. App. D. Columbia 1985).

However, the present action is more nuanced. Petitioner has not challenged the existence or scope of the Arbitration Agreement. Instead, he has challenged the enforceability of that agreement.

Respondents have argued that even if Petitioner is not bound by the Arbitration Agreement, the Discrimination Claims would still be barred on res judicata, as

Petitioner could have enforced that agreement, if he chose to. That position is not supported by case law, would undermine the notion that arbitration is a matter of contract and, in any case, was not accepted by the First Department. Nevertheless, Petitioner will address it.

In *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 764 F.Supp. 43 (S.D.N.Y. 1991), SNC brought claims in arbitration, as it was obliged to do, under a Licensing Agreement. It later brought other claims in court, under sections of the agreement that did not require arbitration. However, those other claims could have been brought in the earlier arbitration, under different sections of the agreement. The court held that whilst the plaintiff could have arbitrated those claims, they were not contractually bound to do so, and so the claims were not barred on res judicata. The court wrote, "issue is not whether claims could have been brought in arbitration, but whether they should have been brought there" (*id.* at 46). Cf. the Restatement (Second) Judgments s84, cmt. h, "for the parties are under no obligation to submit themselves to arbitration with broader effects than may be agreed upon" as quoted in *W.J. O'Neil Co.*, 765 F.3d 625, 632 (6th Cir. 2014).

In contrast, Respondents want courts to use res judicata to greatly impinge on the terms of arbitration agreed between parties. On their reasoning, the claims in *Schlaifer Nance*, 764 F.Supp. 43 (S.D.N.Y. 1991) should have been denied. Moreover, it is easy to think of other troubling situations where Respondents' reasoning would deny a party their contractual rights.

Imagine an arbitration agreement requires some claims be brought in arbitration and others in court. As one party is preparing to bring claims in arbitration, the other party states it would not object to all claims being brought therein. According to Respondents, if the claimant now brings some claims in arbitration and later brings other claims in court, the latter should be barred on res judicata. By offering to arbitrate otherwise non-arbitrable claims, one party would unilaterally deny the other their contractual right to bring claims in court.

Addressing the specifics of this case, it would be particularly egregious to bar Petitioner's claims on res judicata even if he can establish fraudulent inducement. The Discrimination Claims would not be barred if there was no Arbitration Agreement and Respondents should not get a better outcome if they fraudulently induced that agreement.

Ultimately, on this issue, the First Department sided with Petitioner. If the First Department had accepted Respondents' position, it could have denied Petitioner's appeal on the ground that his challenges to arbitrability were irrelevant to Respondents' res judicata defense. The court did not do so.

(ii) Incorrect application of *Rent-a-Center*

Instead, in the Decision and Order, dated July 16, 2020, the First Department wrote (App. I, 2a):

> "Plaintiff offers no response to the defense of res judicata, other than that his discrimination claims were not arbitrable. Plaintiff, however, has failed to make any showing in support of the non-arbitrability of those claims at the time they were decided (see *Sphere Drake Ins. Ltd. v Clarendon Natl. Ins. Co.*, 263 F3d 26, 31 [2d Cir 2001]; *McCaddin v Southeastern Marine Inc.*, 567 F Supp 2d 373, 379 [ED NY 2008])" (footnote omitted).

In so ruling, the First Department proceeded on the basis that Petitioner's challenges to arbitrability were for the court to decide. Of course, if this were correct, Petitioner would have to make a showing thereon to warrant a hearing, but it is not correct.

Petitioner contends he is not bound by the Arbitration Agreement on the basis of breach and fraudulent inducement. Such challenges go to the enforceability of the Arbitration Agreement as a whole. They are not specific to the delegation clause and do not go to the very existence of the Arbitration Agreement. If Petitioner had asked the court to resolve his challenges to arbitrability, Respondents could have successfully moved to compel arbitration thereof, provided they did so in a timely manner, so those challenges are indisputably arbitrable.

Petitioner only had to establish the existence of the Arbitration Agreement, including the delegation clause, in order for the court to grant the Cross-Motion to Compel. He did not need to establish the merits of his challenges to arbitrability, just as a party moving

to compel arbitration of a tort claim does not need to establish the merits of that tort claim. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein*, 139 S.Ct. 524, 530 (2019).

In its decision, the First Department cited *Sphere Drake Ins. Ltd. v. Clarendon Natl. Ins. Co.*, 263 F.3d 26 (2d Cir. 2001) and *McCaddin v. Southeastern Marine Inc.*, 567 F.Supp.2d 373 (ED NY 2008), but these cases do not support the denial of Petitioner's appeal. In fact, they support Petitioner's position. For example, in *Sphere Drake*, 263 F.3d 26 (2d Cir. 2001), the court proceeded on the basis that a challenge to the very existence of a contract, with an arbitration clause, would be for the court to decide and that the plaintiff would need to make a showing with respect thereto to warrant a hearing. However, to the extent the plaintiff's challenges only went to the enforceability of the contract, that was for the arbitrators to decide, under the severed arbitration clause, and arbitration was so ordered, without the court making any assessment of the merits of the plaintiff's position.

During oral argument, the First Department said it was inconsistent for Petitioner to move to compel arbitration of arbitrability, whilst contending not to be bound by the Arbitration Agreement. With due respect, such reasoning fails to respect the severability of a delegation clause.

In *Rent-a-Center*, 561 U.S. at 70, this Court described a delegation clause as an "additional, antecedent agreement" and an "additional arbitration agreement." It is consistent for a party to challenge the enforceability of one contract between the parties, whilst looking to enforce another separate, unchallenged contract, and that is all the Petitioner has done. He has challenged the enforceability of the Arbitration Agreement, whilst enforcing the severed agreement to arbitrate arbitrability.

Today, New York law also treats an arbitration clause as severable. *Matter of Weinrott (Carp)*, 32 N.Y.2d 190, 198, 344 N.Y.S.2d 848, 298 N.E.2d 42 (1973). However, that was not always the case. The First Department's error in the present action can be nicely illustrated by reviewing an old case, decided under New York law, at a time when arbitration clauses were not severed.

In *Matter of Wrap-Vertiser Corp. (Plotnick)*, 3 N.Y.2d 17 (1957), Plotnick brought claims in arbitration, alleging fraud in the inducement of the contract and Wrap-Vertiser petitioned to stay part of the arbitration. Proceeding on the basis that the arbitration clause was not severable, the court stated that if Plotnick had sought rescission of the contract, none of his claims could be heard in arbitration, until the court ruled upon the claim of rescission, *id.*, 19. In the present action, in holding that Petitioner could not challenge the enforceability of the Arbitration Agreement, and compel arbitration of those challenges, the First

Department treated the delegation clause as not severable.

Petitioner believes that if the Arbitration Agreement and the delegation clause were expressly written as two separate contracts, the confusion in this case would have been avoided. He also believes the First Department would not make the same mistake when applying the severability principle to an arbitration clause in a broader contract. For some reason, the severability of a delegation clause seems uniquely able to perplex courts.

It is reasonable to ask, could Petitioner have done anything differently to ensure his challenges to arbitrability were decided in arbitration?

If he had submitted just the question of arbitrability to arbitration, the statute of limitations would have continued to run on the Discrimination Claims and, in any case, if Respondents refused to participate, the First Department might not compel them to do so. If Petitioner submitted the Discrimination Claims to arbitration, he may have waived his right to contest arbitrability. Moreover, with either path, if the arbitrators adopted the First Department's reasoning, they too may say Petitioner could not challenge the enforceability of the Arbitration Agreement and seek to arbitrate those challenges under the delegation clause.

The First Department has treated the delegation clause, not as a severable arbitration agreement, but a severable optional arbitration agreement, whereby Respondents can compel arbitration of arbitrability, but

Petitioner cannot. On the First Department's reasoning, the party accused of fraudulently inducing and materially breaching the Arbitration Agreement can still enforce the delegation clause, but the party making the allegation of misconduct cannot. Anytime a court finds itself granting greater contractual rights and options to a party accused of wrongdoing than a party not so accused, it is a pretty good guide that the court has erred.

Furthermore, Petitioner believes he chose the correct litigation path. "[U]ntil a defendant moves to compel arbitration, there is no reason for a plaintiff to assert any grounds for disregarding an arbitration agreement." *Minnieland Private Day S.C. v. Applied Underwriters*, 867 F.3d 449, 456 (4th Cir. 2017). Petitioner brought the Discrimination Claims in court, where he believes they belong, because he contends not to be bound by the Arbitration Agreement. It was the Respondents that raised arbitrability, through their res judicata defense. If they had not done so, there would have been no need to submit the issue of arbitrability to arbitration and the Discrimination Claims could have progressed in court, without interruption. As soon as Respondents raised arbitrability, Petitioner moved to compel arbitration of that issue, consistent with the delegation clause being an additional arbitration agreement.

The case of *LG Elecs., Inc. v. Wi-Lan USA, Inc.*, No. 13-cv-2237-RA (S.D.N.Y. Jul. 21, 2014) – upheld on appeal in *LG Electronics, Inc. v. Wi-LAN USA, Inc.*, No. 14-3035, 623 F.App'x 568 (2d Cir. 2015) (Summary

Order) – is instructive. Wi-Lan USA, Inc. ("Wi-Lan") and LG Electronics, Inc. ("LG") entered into a patent license agreement ("PLA") granting LG certain licenses. Wi-Lan filed a complaint in court against LG alleging patent infringement. LG moved to dismiss arguing the products were covered by the PLA and that it was therefore entitled to sell them. Wi-Lan believed the products were not covered by the PLA, but moved to compel arbitration of that question under the arbitration clause in the PLA. It did so, even though it intended to argue the PLA did not apply to the products at issue, such that the claims would then return to court. The court held that Wi-Lan had not waived its right to compel, because it was not acting inconsistently.

The striking similarity between this precedent and the present action is no coincidence. Petitioner relied on this case in deciding how to proceed. On the question of inconsistency, the statements made by Justice Gische during oral argument in this action, are remarkably close to the arguments rejected in *LG Electronics*, No. 14-3035, 623 F.App'x 568 (2d Cir. 2015) (Summary Order).

(iii) Prejudice and Motions to Compel Arbitration

In *LG Electronics*, No. 14-3035, 623 F.App'x 568 (2d Cir. 2015) (Summary Order), it was held, in the alternate, that even if Wi-Lan was being inconsistent, its motion to compel should still be granted, because there was insufficient prejudice to warrant a finding of

waiver. Also, in *United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002), the defendant moved to dismiss on res judicata, but the court compelled arbitration, finding insufficient prejudice to warrant waiver. Respondents have never pled prejudice and it could be argued that this failure also supports granting of the Cross-Motion to Compel.

As noted above, there is a long-standing split between the Circuits on the question of whether prejudice is necessary for a finding of waiver and the denial of a motion to compel arbitration. Petitioner believes the requirement for prejudice is more in keeping with the strong Federal policy in favour of arbitration but either way, litigants are entitled to clarity and consistency on this issue.

If prejudice is required for a finding of waiver, that principle applies whether the moving party is the plaintiff or defendant. As courts have written: " . . . we recognize that a plaintiff's initiation of a lawsuit does not, by itself, result in a waiver of arbitration . . . " (*Louisiana Stadium*, 626 F.3d 156, 160 (2d Cir. 2010)); "the filing of an action in a district court is not a waiver of the right to arbitrate" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos*, 553 F.2d 842, 845 (2d Cir. 1977)); and "[party] must still show prejudice to establish waiver, for, as the district court observed, '[i]nvocation of the Judicial process, alone, is insufficient to support waiver of arbitration'" (*Raju v. Murphy*, No. 17-60550 (5th Cir. Jan. 26, 2018) (internal citations omitted)).

This case presents an opportunity to resolve a conflict between Circuits that has existed for over 50 years as to whether prejudice is necessary to a finding of waiver, and it does so on clean facts, as Respondents have never pled prejudice.

(iv) No Discretion

To round out the reasoning below, in the court of first instance, Justice Hagler proceeded on the basis that the court had discretion to consider the Motion to Dismiss first. During oral argument, His Honor stated that the question of discretion was procedural and therefore fell to be determined under state not federal law, even though the case is governed by the FAA. His Honor stated further that New York law supported discretion, citing *Flynn v. Labor Ready Inc.*, 6 A.D.3d 492, 775 N.Y.S.2d 357 (App. Div. 2004), *Singer v. Seavey*, 83 A.D.3d 481, 923 N.Y.S.2d 29 (App. Div. 2011), *Singer v. Jefferies & Co.*, 78 N.Y.2d 76, 575 N.E.2d 98, 571 N.Y.S.2d 680 (1991) and *Matter of Haupt v. Rose*, 191 N.E. 853, 265 N.Y. 108 (1934). All of this is wrong.

"By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

This principle is consistently applied. *Reyna v. Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016) ("Upon a motion to compel arbitration, a court should address the arbitrability of the plaintiff's claim at the outset of the litigation"); *Joshua Silfee v. Automatic Data Processing, Inc., ERG Staffing Service, LLP*, No. 16-3725 (3d Cir. Jun. 13, 2017) (Not Precedential) ("Because the District Court erroneously ruled on ERG's motion to dismiss before resolving its motion to compel arbitration, we will vacate and remand"); and *Edmondson v. Lilliston Ford, Inc.*, C.A. No. 14-1415, 593 F.App'x 108 (3d Cir. 2014) (Not Precedential) ("we will vacate and remand with instructions that the District Court decide the motion to compel before it reaches the motion to dismiss").

Moreover, New York state courts must yield to federal law in this context, for as the New York Court of Appeals wrote regarding state courts and the FAA, in *Matter of Rederi*, 25 N.Y.2d 576, 581, 255 N.E.2d 774, 307 N.Y.S.2d 660 (1970): "nor, it seems, can it apply its own rules of procedures if those rules would significantly affect the result of the litigation, i.e., would be outcome determinative." Cf. *Singer*, 78 N.Y.2d 76, 84-85, 575 N.E.2d 98, 571 N.Y.S.2d 680 (1991) and *Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 250, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005), in both of which the Court of Appeals yielded to federal principles on procedural matters, in cases governed by the FAA.

In any case, courts do not have discretion under New York law either. *Matter of Praetorian Realty Corp.*,

40 N.Y.2d 897, 898, 357 N.E.2d 1006, 389 N.Y.S.2d 351 (1976) ("Once the courts have performed 'the initial screening process', determining that the parties have agreed to arbitrate the subject matter in dispute, their role has ended and they may not proceed to decide whether particular claims are tenable." (citations omitted)). *Brown v. Bussey*, 245 A.D.2d 255, 256, 666 N.Y.S.2d 15, 1997 N.Y. App. Div. LEXIS 12084 (App. Div. 1997) ("Here, the court should have first determined whether a valid arbitration agreement existed. If it concluded that no such agreement existed, only then should it have considered the cross motion for summary judgment."). Cf. *Dazco Heating & Air Conditioning Corp. v. C.B.C. Indus., Inc.*, 225 A.D.2d 578, 578, 639 N.Y.S.2d 99 (App. Div. 1996) and *Cheng v. Oxford Health Plans, Inc.*, 15 A.D.3d 207, 208, 790 N.Y.S.2d 4 (App. Div. 2005).

Finally, *Flynn*, 6 A.D.3d 492, 775 N.Y.S.2d 357 (App. Div. 2004) and related cases cited by Justice Hagler do not support a claim for discretion under New York law. In each of these cases, the defendant moved to dismiss and after the court had ruled on that motion, the defendant moved to compel arbitration. These cases deal with whether a defendant waives their right to compel arbitration by first moving to dismiss. They have nothing to do with discretion, because the courts did not face motions to compel and dismiss at the same time.

Most importantly, for this petition, the First Department did not claim discretion (App. I, 1a-2a).

(v) Even if Petitioner is bound by the Arbitration Agreement, arbitration should have been ordered

Finally, even if the lower courts had taken it upon themselves to resolve arbitrability and determined the Discrimination Claims were subject to mandatory arbitration, it is arguable they should have simply ordered those claims to arbitration, rather than barring them on res judicata.

In *Murchison Capital Partners, L.P. v. Nuance Communications, Incorporated*, No. 14-10819, 625 F.App'x 617 (5th Cir. 2015), the defendant argued that the plaintiff's claims were subject to mandatory arbitration, and should therefore be barred on res judicata, because they should have been asserted in an earlier arbitration. The court of first instance considered the arbitrability question first and only then ruled on res judicata. On appeal, the Fifth Circuit held that since the claims were arbitrable, they should have been dismissed on that basis alone, without any determination on res judicata, leaving the plaintiff free (but not obliged) to assert the claims in arbitration (*id.* at 626-27). The Fifth Circuit applied New York law to the interpretation of the contract (*id.* at 625) and held that it did not matter whether it applied Federal, New York, or Texas preclusion law (*id.* at 621, n.2).

The result in the above case highlights another conflict between Circuits, as courts in some other Circuits have denied claims on res judicata once it was determined that they were subject to mandatory

arbitration. See for example: *USG Companies, Inc. v. Advantage Sales & Marketing LLC*, Civil Action No. 1:17-CV-861, p.21 (D. Del. Jun. 25, 2018).

B. The severability of a delegation clause is an important and recurring topic that warrants the Court's further elaboration

In the present action, the question of arbitrability arose because of Respondents' res judicata defense. However, on the First Department's reasoning, the same result would hold if Respondents moved to compel arbitration of the Discrimination Claims, but not arbitration of Petitioner's challenges to arbitrability.

In *Checking Account Overdraft Litigation*, 754 F.3d 1290 (11th Cir. 2014), the plaintiff commenced an action in court and the defendant moved to compel arbitration thereof, but made no mention of the arbitration agreement's delegation clause. The plaintiff challenged the enforceability of the arbitration agreement and the court ruled thereon. Only thereafter did the defendant cite the delegation clause, arguing the court should not have ruled on arbitrability. The defendant was held to have waived their right to compel arbitration of arbitrability, because they "waited too long to invoke a delegation clause" (*id.*, at 1291). Cf. *Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269, 1275 (11th Cir. 2012); *Hough v. Regions Fin. Corp.*, 672 F.3d 1224, 1228 (11th Cir. 2012).

But what if the plaintiff in such a case had wanted to enforce the delegation clause? What if the plaintiff,

in response to the defendant's motion to compel arbitration of the claims, had moved to compel arbitration of arbitrability? On the First Department's reasoning, such a motion by a plaintiff should be denied.

The First Department's reasoning in this case would apply anytime a plaintiff challenges the enforceability of an arbitration agreement, as a whole, and moves to compel arbitration of those challenges. Delegation clauses in arbitration agreements are commonplace. *Rent-a-Center*, 561 U.S. 63 has been cited over 1,000 times. With due respect, plaintiffs are entitled to know whether they can enforce a delegation clause, whilst challenging an arbitration agreement as a whole. The First Department has said plaintiffs cannot and there is an urgent need for this Court to reject that position, as it is inconsistent with this Court's precedents.

C. Petitioner's pro se status has counted against him

The courts in this action have failed to address the case law cited by Petitioner; have misstated the record, always to Petitioner's detriment; and have allowed Respondents to raise new, untimely arguments without ever addressing the appropriateness of doing so. Would the lower courts have responded the same way if Petitioner had paid a lawyer, even a mediocre one, to make the same arguments on his behalf? Petitioner thinks not.

The First Department's reasons for denying the Cross-Motion to Compel must be gleaned from the recording of oral argument, as that motion rates no mention in the court's written opinion. However, the perfunctory nature of the First Department's opinion, should not count against the granting of this petition. It is tempting for lower courts, harried for time, to give short shrift to submissions from pro se litigants. That temptation only grows if by doing so, lower courts further insulate themselves from review.

Ultimately, I may be pro se, but that does not mean I am wrong.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DAVID JAMES MURPHY
Pro Se
57 Wallaroy Road Woollahra, NSW,
Australia 2025
+61 450 134 545
david.james.murphy@hotmail.com

MAY 19, 2021