No. 21-328

In the Supreme Court of the United States

ROBYN MORGAN, on Behalf of Herself and All Similarly Situated Individuals,
Petitioner,

v.

SUNDANCE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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October 1, 2021

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit panel majority correctly concluded, on the totality of the circumstances, that Sundance did not waive its right to compel arbitration where the initial scheduling conference had yet to take place, no discovery had been initiated by either side, no merits-based motion had been filed, and Petitioner's participation in private mediation with the overlapping Wood Action was wholly voluntary.

2. Whether, by conceding in the lower courts that waiver of arbitration requires the party opposing arbitration to show prejudice and indeed arguing in favor of prejudice, Petitioner failed to preserve her claim that the Eighth Circuit erred in considering prejudice in determining whether a litigant has waived its right to compel arbitration.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent makes the following disclosure:

Sundance, Inc. does not have a parent corporation and no publicly-held corporation owns 10% or more of its stock.

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Respondent, Sundance, Inc. ("Sundance" or "Respondent"), respectfully prays that this Court enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit filed by Petitioner, Robyn Morgan ("Morgan").

STATEMENT OF THE CASE

Morgan, a former Sundance employee, signed an agreement at the start of her employment that, among other things, compelled the arbitration of her federal wage and hour claims in this case. Despite this agreement, on September 25, 2018, Morgan filed a putative nationwide collective action alleging that Sundance engaged in a common plan to violate the overtime provisions of the FLSA, by failing to pay herself and all similarly situated employees for all hours they worked and/or by failing to pay employees the required overtime rate for all hours worked over forty in a week. 8th Cir. App. 7-13, ¶¶ 1-2.[1]

Morgan's Complaint was a near verbatim copy of a collective action Complaint filed nearly two years earlier in the Eastern District of Michigan, *Wood v. Sundance, Inc.*, Case No. 2:16-cv-13598-GCS-RSW (the "Wood Action") (8th Cir. App. 7-13, 33-48). By the time Morgan filed her lawsuit, substantial discovery had been conducted in the Wood Action, an agreed conditional class had been certified, and the Wood Action was still being actively litigated. *See* Stip. Order Cond. Cert., Dkt. No. 23, *Wood v. Sundance, Inc.*, No. 2:16-cv-13598 (E.D. Mich. June 21, 2017).

[1] Sundance strenuously denies Morgan's allegations of off-the-clock work or failure to pay overtime, which have not been litigated in the courts below.

A. Trial Court Proceedings

On November 8, 2018, in lieu of a response to the merits of Morgan's lawsuit, Sundance sought to stay consideration of this case, pursuant to Fed. R. Civ. P. 12(b)(3), in light of the long-pending Wood Action that involved substantially overlapping issues and parties. 8th Cir. App. 14-30. Sundance's request for a stay was premised on the first-filed rule and argued that the district court should stay and/or dismiss Morgan's Complaint without prejudice because it substantially overlapped the Wood Action already being actively litigated. 8th Cir. App. 30-48. Nearly four months later, on March 5, 2019, during which intervening period no activity took place in this case, the district court denied Sundance's request for a stay of this litigation. 8th Cir. App. 182-88.

On April 15, 2019—only approximately a month after the district court's denial of a stay – the parties to this case, as well as the plaintiffs in the pre-existing Wood Action, voluntarily participated in a joint private mediation of the two cases. 8th Cir. App. 248.[2] Mediation of the Wood Action had been contemplated for some time. Given the similarity of the issues and

[2] In the Petition, Morgan continues to falsely assert that Sundance produced thousands of e-mails to Morgan in connection with the mediation. Pet., p. 7. This is not true. The "thousands of emails" Morgan references were, in fact, produced in discovery in the Wood Action, not this lawsuit – a fact raised throughout Sundance's briefing and never rebutted by Morgan. 8th Cir. App. 238, 214. Furthermore, in connection with the mediation, Morgan was not required to, and did not, produce any information to Sundance. Essentially, at the mediation, Morgan was piggybacking on the information and arguments developed in the Wood Action.

claims, Sundance consented to include the Morgan lawsuit in an effort to achieve a potential global resolution. Although the joint mediation resulted in a settlement of the Wood Action, the Morgan case did not settle. 8th Cir. App. 249.

On May 3, 2019, just three weeks after the unsuccessful attempt to settle this lawsuit, and less than two months after the district court had denied Sundance's non-merits request for a stay, Sundance moved to compel arbitration. 8th Cir. App. 191-210.[3] At the time of Sundance's Motion to Compel Arbitration ("Motion to Compel"), no discovery had commenced from either side. Indeed, the parties had not submitted a proposed scheduling order, and the district court had not entered a discovery schedule. The initial Scheduling Conference was set for May 8, 2019. 8th Cir. App. 3-4, 248-249. Sundance's Motion to Compel was

[3] On April 24, 2019, the Supreme Court issued a decision in *Lamps Plus v. Varela*, providing significant clarification as to the availability of class arbitration when an arbitration agreement is ambiguous on the issue. 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019). Specifically, it held that class arbitration is not authorized if an arbitration agreement is ambiguous as to the issue. *Lamps Plus, Inc.*, 139 S. Ct. at 1419. Sundance's arbitration agreement suffered from the same potential ambiguities as were at issue in the Lamps Plus agreement. A. 259. For instance, both agreements required the arbitration of all disputes and incorporated the rules of the American Arbitration Association ("AAA"). This incorporation introduced ambiguity because the AAA rules provide a procedural mechanism for the resolution of class arbitration. *Lamps Plus*, 139 S. Ct. at 1429 (J. Kagan dissenting). As such, prior to *Lamps Plus*, Sundance faced a greater risk of being compelled to arbitrate Morgan's claims on a collective basis, which would have undermined the efficiencies inherent in the arbitration process.

filed before the initial Scheduling Conference took place.

Sundance's Motion to Compel set forth facts establishing that the parties had entered into a binding arbitration agreement that covered the wage and hour dispute set forth in Morgan's Complaint. 8th Cir. App. 199-204. Morgan's response to Sundance's Motion to Compel focused entirely on the issue of waiver. 8th Cir. App. 218-230. Notably, Morgan did not develop any arguments concerning the validity of the arbitration agreement, whether the agreement was unconscionable, or whether Morgan's Complaint fell within the scope of the agreement. 8th Cir. App. 251. Rather, Morgan asserted that Sundance had waived its right to compel arbitration, relying heavily upon the mere passage of time since the lawsuit filing date (even though most of that time was spent simply waiting for the district court to rule on Sundance's motion to stay while nothing else happened), and upon the parties' participation in the wholly voluntary joint private mediation. 8th Cir. App. 218-230.

In opposing Sundance's Motion to Compel, Morgan relied upon the Eighth Circuit's test for waiver set forth in *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007). 8th Cir. App. 221. Pursuant to *Lewallen*, a party waives the right to arbitration if it (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudices the other party by these inconsistent acts. *Lewallen*, 487 F.3d at 1090. Not once did Morgan argue before the district court that the Eighth Circuit's test was improper or that she should not be required to

show prejudice in order to establish Sundance's waiver of its right to enforce the terms of its arbitration agreement. 8th Cir. App. 218-230. To the contrary, Morgan affirmatively contended that she had satisfied the prejudice prong of the test. 8th Cir. App. 223-224.

On June 28, 2019, the district court entered its Opinion and Order Regarding Sundance's Motion to Compel Individual Arbitration and Dismiss ("Opinion") in which the district court denied Sundance's Motion to Compel. 8th Cir. App. 244-260. The district court found that the parties did not dispute that a valid arbitration agreement existed and that this particular dispute fell within the terms of the agreement. 8th Cir. App. 251. Nevertheless, the district court held that Sundance had waived its right to compel arbitration. 8th Cir. App. 260.

B. Proceedings on Appeal

On July 8, 2019, Sundance filed a Notice of Appeal from the district court's Opinion. 8th Cir. App. 261-262. On appeal, Sundance argued that the district court erred in denying Sundance's Motion to Compel by (a) failing to give appropriate deference to the Federal Arbitration Act's strong presumption in favor of arbitration; (b) failing to consider the totality of the circumstances in assessing waiver; and (c) impermissibly taking into account Sundance's efforts to settle this lawsuit through private mediation, which were designed to avoid invoking litigation, rather than engaging in it.

In response to Sundance's appeal, Morgan once again argued that the district court properly applied

the *Lewallen* standard for waiver of a right to arbitrate a dispute. Morgan App. Br., p. 11 (App. ECF No. 19). At no point during the appeal did Morgan argue that the *Lewallen* waiver test was improper or that she should not be required to show prejudice to establish Sundance's waiver of its arbitration rights. Indeed, Morgan's appellate brief asserted that she "must also establish that she was prejudiced," and she devoted a section of her brief to contending that she had been prejudiced. Morgan App. Br., pp. 25-26 (App. ECF No. 19).

On March 30, 2021, the Eighth Circuit Court of Appeals issued an opinion reversing the district court's order denying Sundance's Motion to Compel. App. 1. The Eighth Circuit applied the three-part test for waiver set forth in *Lewallen*, as well as the principle that "any doubts concerning waiver of arbitrability should be resolved in favor of arbitration." App. 3.

In support of its ruling, the Court addressed whether waiver had taken place "in light of the totality of the circumstances." Along the way, the Court questioned the district court's finding that Sundance had acted inconsistently with its right to arbitration by substantially invoking the litigation machinery. App. 4. Specifically, the Court stated that the district court erred by not considering the non-merits nature of Sundance's motion to dismiss. Further, the Court reasoned that "although there was an eight-month delay, the parties spent very little of this time actively litigating and no time on the merits of the case." App. 4-5. And, noted the Court, Sundance's participation in private mediation was "an effort to avoid 'invoking the

litigation machinery.'" (internal citation omitted). App. 4-5.

After questioning the district court's finding as to whether Sundance had substantially invoked the litigation machinery – a prerequisite for a finding of acting inconsistently with one's right to arbitration – and citing the errors made by the district court in that regard, the Court noted that "[t]his all bears on the third element: prejudice." App. 5. Relying on the very same facts that it had already cited in questioning the district court's findings as to whether Sundance had acted inconsistently with its right to compel arbitration, the Court held that the district court erred in finding that Morgan was prejudiced by Sundance's ostensible delay and supposed litigation activities. The overlapping facts considered by the Court included the absence of any litigation on the merits that would result in duplication of efforts, the failure of any party to issue discovery, and that much of the delay consisted of simply waiting for disposition of Sundance's non-merits based motion to stay/dismiss. App. 5-6.

The Court's decision, in evaluating the totality of the circumstances, did not opine on whether prejudice should be a separate component of the test for waiver, and, as noted above, this was because neither party argued that point in the briefing before the district court or the Eighth Circuit.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. *First*, Petitioner has waived any argument that prejudice should not be required in assessing waiver by failing to raise the issue below. Indeed, Petitioner expressly argued that she was prejudiced, and there is no indication that the majority panel decision considered the issue. *Second*, this case is not a proper vehicle to address the issue raised by this Petition—even assuming, arguendo, there were any validity to it—as it is apparent that the Court below would have reached the same outcome on the same constellation of facts under the totality of the circumstances. *Third*, the so-called division or conflicts among the courts below is illusory as it is apparent that all courts consider prejudice to be at least a relevant factor in the waiver analysis—even those courts that do not treat it as a mandatory component. *Fourth*, whether prejudice is a mandatory or merely discretionary factor in the waiver analysis is of no practical import given the significant overlap between the facts bearing upon substantial invocation of the litigation machinery and prejudice to the non-movant. At bottom, all courts are looking at the totality of circumstances in assessing waiver. *Finally*, the issue raised by this Petition is stale, as any slight difference in the various approaches to determining waiver has existed for decades without causing any practical disruption or problem.

I. Petitioner Has Waived Any Argument That Prejudice Should Not Be A Required Element Of The Standard For Waiver Of Arbitration.

Morgan's question presented for review is based on arguments that were neither raised before nor addressed by the lower courts, and thus should not be considered. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (citations omitted) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). In *Yeskey*, this Court refused to consider whether application of the ADA to state prisons is a constitutional exercise of Congress's power because such argument "was addressed by neither the District Court nor the Court of Appeals." *Id*. at 212.

Here, in her trial court or appellate briefing or during oral argument on appeal, Morgan never once argued that a showing of prejudice was not or should not be a required element to demonstrate waiver of arbitration rights. To the contrary, in her trial court and appellate briefing, Morgan explicitly relied upon the same test that she is now seeking to overrule and argued that she was prejudiced. 8th Cir. App. 218-230; Morgan App. Br., pp. 11, 25-26. As a result, Sundance did not have an opportunity to address the issue below and weigh in on it, and the Eighth Circuit majority opinion manifestly did not consider it.

While the dissent below, *sua sponte*, alluded to prejudice being "a debatable prerequisite," the dissenting judge also made clear that he would have found against Sundance under both prongs of the test

anyway. And there is no indication that the issue raised by this Petition was considered by the majority panel decision as there is no reference to the argument in the majority's opinion. App. 10-11. As such, the dissent's unprompted discussion of prejudice, absent "the adversarial dispute necessary to apprise the [] court of the arguments," does not amount to the Eighth Circuit's "considered judgment" on an issue that would warrant review from this Court. *See Illinois v. Gates*, 462 U.S. 213, 223 (1983).

This case does not represent one of the "unusual circumstances" that would allow the Court to abandon its default rule that it "will not entertain arguments not made below." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015). Thus, given that this is "a court of review, not of first view," it would be inappropriate for the Court to grant certiorari based on this new argument. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

II. The Decision Below And The Decisions Of Other Circuit Courts Do Not Present A Conflict That This Court Must Resolve.

A. This Case Is Not A Proper Vehicle To Address Whether Prejudice Should Be A Mandatory Component Of The Test For Waiver Of Arbitration.

Even assuming, *arguendo*, that Morgan had identified some material conflict among the circuits as to prejudice's role in the waiver analysis as applied to arbitration, which she has not, this case is not the proper vehicle to resolve such purported conflict. Here,

despite Morgan's strained assertions to the contrary (Pet., pp. 6, 7, 30, 31), it is apparent that the Court below would have reached the same outcome even if it had not chosen to rely upon the absence of prejudice to Morgan. On the issue of substantial invocation of the judicial machinery, the Court did much more than find "the question close," as asserted by Morgan in the Petition. Pet., p. 7. Rather, the Court expressly questioned the district court's finding that Sundance's conduct amounted to substantial invocation of the litigation machinery "in light of the totality of the circumstances." App. 4. In addition to questioning the district court's decision on that point, the Court also found that the district court erred by not considering the non-merits nature of Sundance's motion, and with respect to such motion, the Court reasoned that "although there was an eight-month delay, the parties spent very little of this time actively litigating and no time on the merits of the case." App. 4-5. All of this discussion by the Court was in the context of whether Sundance had substantially invoked the litigation machinery.

As discussed in more detail in Section II(b) below, and as is apparent from the Court's decision, whether a party has substantially invoked the litigation machinery and prejudice to the party opposing arbitration are substantially intertwined and often supported, as here, by the same facts. Hence, there is absolutely nothing to suggest that had prejudice not been treated as a separate component of the waiver test, the Court below would not have reversed the district court's decision on the totality of the circumstances based upon the very same facts. This is

especially true considering that "any doubts concerning scope of arbitral issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In sum, the question Morgan poses in her Petition is irrelevant and academic because, regardless of whether prejudice is required as part of the test for waiver, it is apparent that the Court would have reversed the district court's decision anyway.

B. The Purported Conflicts Among The Circuit Courts Are Illusory And Do Not Require Resolution By This Court.

Morgan repeatedly refers to "division" or "confusion" among the circuit courts and state courts over the role of prejudice in determining whether a party has waived its right to arbitrate a dispute. Pet., pp. 9, 11-12, 31. However, close examination of the authorities cited by Morgan reveals that any conflicts are illusory.

First, Morgan does not and cannot dispute that every Circuit Court considers prejudice to be a relevant factor in the waiver analysis—even if some courts do not treat it as a mandatory component.[4]This includes

[4] *See FPE Found. v. Cohen*, 801 F.3d 25, 31 (1st Cir. 2015) (citation omitted); *Technology in Partnership, Inc. v. Rudin*, 538 Fed.App'x. 38, 39 (2d Cir. 2013); *In re Pharmacy Ben. Managers Antitrust Litig.*, 700 F.3d 109, 117 (3d Cir. 2012); *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 587 (4th Cir. 2012); *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 421 (5th Cir. 2014); *Art Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 827–28 (6th Cir. 2015); *Cooper v. Asset Acceptance, LLC*, 532 Fed.Appx. 639, 641 (7th Cir. 2013); *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003); *Samson v. NAMA Holdings*, LLC, 637 F.3d

the Seventh, Tenth and D.C. Circuits that have adopted the so-called minority view with respect to prejudice. *See St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prod. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) ("prejudice is but one relevant circumstance to consider in determining whether a party has waived its right to arbitrate."); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (in certain cases "prejudice to the other party, the party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration."); *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987) ("Of course, a court may consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate."); *Peterson v. Shearson/American Exp., Inc.*, 849 F.2d 464, 467-68 (10th Cir. 1988) ("In determining whether a party has waived its right to arbitration, this court examines several factors" including "whether the delay 'affected, misled, or prejudiced' the opposing party."). There is simply no material disagreement among the Circuit Courts regarding the relevance of prejudice as a factor in the waiver analysis.[5]

915, 934 (9th Cir. 2010); *In re Cox Enterprises, Inc.*, 790 F.3d 1112, 1116 (10th Cir. 2015); *Grigsby & Assoc's, Inc. v. M Securities Inv.*, 635 Fed.Appx. 728, 731 (11th Cir. 2015); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990); *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 428 (D.C. Cir. 2008).

[5] Additionally, at least one of the four state courts of last resort that do not require prejudice to find waiver nonetheless finds it relevant to the analysis. *See Hudson v. Citibank (S.D.) NA*, 387 P.3d 42, 49 (Alaska 2016) ("We conclude that 'a court may consider

Second, whether prejudice is a mandatory or discretionary factor to be considered in the waiver analysis is an academic distinction with no practical significance because of the substantial overlap between the facts bearing upon invocation of the litigation machinery and prejudice. For instance, in this case, the Court below analyzed these two concepts in tandem and relied upon the same facts as to each, as have many other courts that have adopted the so-called majority and minority views. For example, the Third Circuit considers the following factors as being generally indicative as to whether a party opposing arbitration suffers prejudice:

> (1) timeliness or lack thereof of the motion to arbitrate; (2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; (3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings; (4) the extent to which a party seeking arbitration engaged in non-merits motion practice; (5) the party's acquiescence to the court's pretrial orders; and (6) the extent to which the parties have engaged in discovery.

Gray Holdco, Inc. v. Cassady, 654 F.3d 444,451 (3d Cir. 2011). Each of these factors is relevant to whether a party substantially invoked the litigation machinery as

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prejudice to the [party opposing arbitration] as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate.'")

they all involve litigation activities. Indeed, litigation activities and prejudice are closely intertwined. *See also, e.g., Nat'l Found. for Cancer Rsch.*, 821 F.2d at 777 ("Substantial invocation of the litigation process, however, may cause prejudice and detriment to the opposing party."); *E.C. Ernst, Inc. v. Manhattan Const. Co.*, 559 F.2d 268, 269 (5th Cir. 1977) ("Substantially invoking the litigation machinery qualifies as the kind of prejudice ... that is the essence of waiver."); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1162 (5th Cir. 1986) (court observed that litigating a motion for summary judgment, in view of the time and expense associated with such litigation activity, "could not have caused anything but substantial prejudice to the [plaintiffs]").

Thus, any differences in the approaches adopted by the Circuit Courts in treating prejudice as a standalone requirement do not amount to substantial divisions or create a material Circuit split warranting this Court's review. At bottom, all of the Circuits are looking at the totality of the circumstances, as they should, in assessing waiver, and all are considering the existence of prejudice, whether as a mandatory or non-mandatory factor, as part of the assessment, based upon highly overlapping facts.

III. The Decision Below Does Not Raise Any Important Federal Question Requiring Resolution By This Court.

Morgan's repeated and hyperbolic contention that the differences in how courts treat prejudice "has spawned chaos" is also unsupported and misguided. Pet., p. 11, 32. The practical implications of any

differences between courts' approaches to the waiver analysis are minimal to non-existent given that all courts everywhere are looking at the totality of the circumstances and examining the same procedural facts in assessing waiver. The fact of the matter is that the slightly different formulations of the test for waiver have existed for decades and proven workable, without generating any anomalous results.

Indeed, numerous Circuit Courts have observed that "[a]n inquiry into whether an arbitration right has been waived is factually specific and not susceptible to bright line rules." *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993); *St. Mary's Med. Ctr. of Evansville, Inc.*, 969 F.2d at 590 ("That principle is implicit in our repeated emphasis that waiver depends on all the circumstances in a particular case rather than on any rigid rules…"); *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 774-776 (10th Cir. 2010) (The application of waiver factors "was not intended to suggest a mechanical process in which each factor is assessed and the side with the greater number of favorable factors prevails."); *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 209 (3d Cir. 2010) ("the waiver determination must be based on the circumstances and context of the particular case."). Given this reality as to how federal and state courts look at waiver, the distinction between whether prejudice is considered a mandatory, separate component of the analysis, or just something to be considered in the mix, is simply not material to the outcomes of individual cases or to the development of the law in this area.

As further proof of this point, Circuit Courts on either side of the issue have been able to rely on decisions from Circuit Courts on the other side in evaluating prejudice and waiver. *See, e.g.*, *St. Mary's Med. Ctr. of Evansville, Inc.*, 969 F.2d at 591 (relying on Fourth Circuit decision in *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir.1980) in concluding that plaintiff was prejudiced by defendant's litigation activity); *Hill*, 603 F.3d at 773 (relying on First, Fourth, Second, Fifth, and Eleventh Circuits); *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 426 (D.C. Cir. 2008) (citing Fifth Circuit for proposition that litigation activities – *e.g.,* motions for summary judgment – are often sufficient to constitute prejudice in circuits requiring prejudice). The fact that different Circuits on either side of the supposed "divide" on this issue rely upon decisions from both sides in support of their assessment of waiver demonstrates that the vaunted distinction touted by Petitioner is of no practical significance.

Lastly, this issue is stale as any slight difference in approaches to waiver among the Circuits has existed for decades and has proven workable. In an effort to suggest this is an emergent issue requiring this Court's consideration, the Petition states that the Eighth Circuit, through the decision below, just "joined eight other federal courts of appeals and most state supreme courts" in requiring prejudice. Pet., pp. i, 3, 9. This is clearly not the case. The test for waiver relied upon by the Court below was originally set forth by the Eighth Circuit as early as 1991 in *Stifel, Nicolaus & Co., Inc. v. Freeman*, 924 F.2d 157 (8th Cir. 1991) ("To prove Stifel waived its right to arbitration, Freeman and Weyhmueller must show: (1) Stifel knew of an existing

right to arbitration; (2) Stifel acted inconsistently with that right; and (3) Stifel's inconsistent acts prejudiced them."). The Seventh Circuit adopted its current approach only a year later in 1992. *St. Mary's Med. Ctr. of Evansville, Inc.*, 969 F.2d at 585. The other Circuit Courts that adopted the so-called minority view – the Tenth and D.C. Circuits – staked out their positions even earlier. *Peterson*, 849 F.2d at 467-68; *Nat'l Found. for Cancer Rsch.*, 821 F.2d at 774. The remaining Circuit Courts' positions have also been set for at least twenty years.[6]

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[6] *Sevinor v. Merrill Lynch, Pierce, Fenner & Smith*, 807 F.2d 16, 19 (1st Cir. 1986) ("In order for plaintiffs to prevail on their claim of waiver, they must show prejudice."); *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000) (quoting *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997) (a party can waive its right to arbitration "when it engages in protracted litigation that prejudices the opposing party"); *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 784 (3d Cir. 1975); *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985) (a party will default its right to arbitration if it "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay."); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party."); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) ("a party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice."); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (A party seeking to prove waiver of the right to arbitrate must show: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration from such inconsistent acts."); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) ("A party has waived its right

Similarly, the Petition's reliance on this Court granting certiorari on this issue over ten years ago in *Citibank, N.A. v. Stok & Assocs., P.A.* is not evidence of the certworthiness of this issue. Pet., p. 31. Instead, it demonstrates the staleness of this issue. Indeed, much more recently, this Court denied certiorari on the very same issue. *See Morgenthau Venture Partners, LLC v. Kimmel*, 254 So. 3d 958 (Fla. Dist. Ct. App. 2018), *cert. denied* 139 S. Ct. 2693 (2019). Nothing that has occurred since this Court denied certiorari in *Morgenthau*, including the decision below, warrants re-examination of this Court's determination that certiorari is not warranted over this non-issue.

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to arbitrate if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right and, in so acting, has in some way prejudiced the other party.")

CONCLUSION

For the foregoing reasons, Sundance respectfully requests that this Court deny Morgan's Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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