No. 23- _____

In The

Supreme Court of the United States

Shichinin, LLC,
Petitioner,

v.

Sprint Corporation,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where Respondent Sprint Corporation filed a motion for arbitration in Hawaii state court pursuant to the Hawaii arbitration statute, and the Hawaii State judge granted the motion pursuant to the Hawaii arbitration statute and stayed the Hawaii state case pending arbitration, and the Hawaii arbitration statute provided that all post-arbitration proceedings be filed in the Hawaii state case, did the Fifth Circuit Court err in affirming the decision of the Texas federal District Court that 1) permitted post-arbitration proceedings to proceed in Texas federal court pursuant to the venue provision of the Federal Arbitration Act ("FAA"), 9 USC 9, because the arbitration award was issued in Texas, instead of Hawaii state court, and 2) applied Fifth Circuit precedent which was favorable to Appellee in post-arbitration proceedings instead of applying Hawaii precedent and procedures which were unfavorable to Appellee in post-arbitration proceedings?

Put another way, should the venue provision of the FAA, 9 USC 9, be allowed to be abused by the prevailing party in an arbitration to permit forum shopping for post-arbitration proceedings in a jurisdiction not agreed to by the parties thereby avoiding unfavorable post-arbitration law in the jurisdiction in which the parties had previously agreed to litigate post-arbitration proceedings?

The Fifth Circuit's Opinion in this case is in direct conflict with the principles set forth by this

Court in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), relating to enforcement of arbitration proceedings pursuant to the *agreement of the parties* rather than pursuant to the prevailing party's decision to use the FAA, contrary to the agreement of the parties.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner, Shichinin, LLC and Respondent Sprint Corporation.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of Petitioner Shichinin, LLC.

RELATED PROCEEDINGS

Shichinin, LLC v. Sprint Corporation, Case No. 1CC141002485, in the Circuit Court of the First Circuit, State of Hawaii.

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The Fifth Circuit's decision (Pet. App. 1a-2a) is attached. The District Court's opinion (Pet. App. 3a-15a is attached.

JURISDICTION

The Fifth Circuit entered its decision on July 14, 2023. Pet. App. 1a-2a. This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are 9 USC 9 (reproduced at Pet. App.16a) and Sections 7(a), 9, 23(b), & 27, Hawaii Revised Statutes (HRS) (relevant Hawaii statutes) (reproduced at Pet. App. 17a-18a).

STATEMENT OF THE CASE

District Court Summary of Facts. The "Memorandum Opinion and Order" ("MOO") was filed by the District Court on September 20, 2022. The MOO sets out an undisputed summary of many of the facts which led to arbitration in this case and resulted in arbitration through the JAMS Dallas Texas office and the ultimate Arbitration Award leading to post-arbitration litigation between the parties in the United States District Court for Northern District of Texas, Dallas Division, and in Hawaii federal District Court, and Hawaii state court. The MOO summary is (with record citations omitted):

This case arises out of a longstanding dispute between Sprint and Shichinin over a failed joint venture.[1] In July 2006, Shichinin and Clearwire U.S., LLC ("Clearwire U.S.") entered into an Amended and Restated Limited Liability Company Agreement ("LLC Agreement"). The agreement made Shichinin a minority investor in Clearwire Hawaii Partners, LLC ("Clearwire Hawaii"), a telecommunications company seeking to offer mobile broadband data services in Hawaii. Clearwire U.S. was the only other member of the joint venture. Sprint subsequently acquired Clearwire U.S. and became the majority stakeholder and manager of Clearwire Hawaii. After [allegedly] failing to turn a profit, Sprint ended the joint venture.

In December 2014, one of Shichinin's members filed suit against Shichinin and Sprint in Hawaii state court. Shichinin filed a cross-claim against Sprint relating to the management and wind-down of the joint venture. In May 2017, the state court compelled arbitration between Shichinin and Sprint in accordance with the LLC Agreement. The parties subsequently agreed to an arbitration in

[1] The District Court refers to the partnership between Sprint and Shichinin as a "joint venture" which is incorrect. The term "Hawaii Partnership" is used hereafter by Shichinin.

> Dallas, Texas, administered by JAMS. A three-arbitrator panel issued a final award denying Shichinin's claims and awarding attorneys' fees and costs to Sprint.
>
> On September 28, 2021, Sprint petitioned [the District] Court to confirm the arbitration award. Shichinin subsequently moved to vacate the award pursuant to 9 USC 10(a)(2), (4). While this case was proceeding, Shichinin also attempted to vacate the award in Hawaii federal court and Hawaii state court. Finally, Shichinin filed a motion in this Court to dismiss, or in the alternative, to stay or transfer the case.

In a footnote, the MOO notes as follows with respect to the action filed by Shichinin in Hawaii federal court – "*See Shichinin, LLC v. Sprint Corp.*, 2022 WL 392985, at *6 (D. Haw. 2022) (dismissing the case in favor of this first-filed federal action)." In a second footnote, the MOO notes as follows with respect to the action filed by Shichinin in Hawaii state court – "*See CJPJ Holdings, LLC v. U.S. Pac Cap. Co.*, No. 1CC141002485 (Haw. 1st Cir. Ct. 2022), Dkt. No. 167 (follow 'eCourt Kokua'; then follow 'Case Search' for Case ID 1CC 141002485) (denying Shichinin's motion to vacate and deferring to this Court)."

Further research on eCourt Kokua will show that on July 2, 2022, Shichinin filed an appeal of the Hawaii state court's "Order Denying Shichinin, LLC's

Motion to Confirm Arbitration Award, Filed April 4, 2022 Without Prejudice" filed on June 30, 2022, and "Order Denying Cross-Claim Plaintiff Shichinin, LLC's Motion to Vacate Arbitration Award and *Ex Parte* Motions for Issuance of Commission to Take Out-Of-State Depositions Without Prejudice" filed on April 1, 2022. On November 18, 2022, the Hawaii Intermediate Court of Appeals ("ICA") filed an "Order for Temporary Remand." This Order directed the lower court to clarify that it intended its June 30, 2022, Order Denying Shichinin, LLC's Motion to Confirm Arbitration Award to be a final appealable order. The ICA noted, "[I]t appears the Circuit Court sought to end the arbitration-related proceedings via the 6/30/22 Order, pending the resolution of a separate, but related, proceeding in the United States District Court, Northern District of Texas, and it appears the related proceeding has concluded." In other words, there were parallel appeals pending in the ICA in Hawaii and in the Fifth Circuit Court at that point.

In addition to the above stated summary of facts by the District Court, the following facts about the proceedings in both Hawaii state court and the arbitration are relevant to this Petition.

Hawaii State Court Proceedings Regarding Sprint's Demand for Arbitration. On December 5, 2014, one of Shichinin's members filed suit in Hawaii First Circuit Court, Civ. No. 14-1-2485-12 JHC (now renumbered as Civ. No. 1CC141002485) ("the Hawaii state case") against Shichinin, U.S Pacific Capital Co.,

Ltd., Diamond Hat Honey LLC, and Sprint. Sprint was represented by the Hawaii law firm Cades Schutte.

Even though there was lack of diversity of citizenship between the Plaintiff and the Defendants in the Hawaii state case because Plaintiff and the named Defendants other than Sprint were all citizens of the State of Hawaii, Sprint waived its right at that time to transfer the Hawaii state case to Hawaii federal court. Sprint could have requested the transfer to Hawaii federal court by arguing in support of a motion to transfer in federal court that the Hawaii Defendants should be "realigned" with the Plaintiff so that there was complete diversity between Plaintiff and the Hawaii Defendants "realigned" as Plaintiffs, on the one hand, and Sprint as the sole Defendant, on the other hand. *See Dolch v. United Cal. Bank*, 702 F.2d 178, 181 (9th Cir. 1983). Instead, Sprint never sought to move the Hawaii state case to federal court, thereby waiving its unfettered right at that time to do so. Also, for a year and a half, the Hawaii state case was litigated in the State of Hawaii. Sprint had been arguing that there was no "privity of contract" between the sole Plaintiff in the Hawaii state case and Sprint and that "privity of contract" existed only between Sprint and Shichinin. This prompted Shichinin to file a Cross-Claim against Sprint on June 28, 2016, and a First Amended Cross-Claim against Sprint on August 24, 2016.

The First Amended Cross-Claim in turn caused Sprint to file on October 18, 2016, its Motion to Compel

Arbitration and to Stay Proceedings against Shichinin. Sprint filed its motion to compel arbitration based on the Hawaii arbitration statute, Chapter 658A of the Hawaii Revised Statutes ("HRS"), particularly citing to HRS 658A-7(a), Sprint based its motion to compel arbitration solely on the "Dispute Resolution" provision of the limited liability company operating agreement (Section 6.8[2]) between Shichinin and Clearwire US. Note that Section 6.8's only reference to the United States Arbitration Act ("FAA") literally provided that only the "arbitrators" would be

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[2] Relevant provisions of Section 6.8 of the arbitration agreement between Clearwire US and Shichinin:

> (a) If a dispute arises out of this Agreement or the Transactions, the parties shall make a good faith effort to resolve such dispute promptly. If the parties are unable to resolve the dispute within thirty (30) days of notice by one Member to the other Members and Manager of the dispute, then any Member (the "Initiating Member") may initiate arbitration proceedings against the other Member (the "Remaining Members"). The dispute shall then be settled by arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration in effect on the date hereof, by a panel of three arbitrators. The Initiating Member shall select one of three arbitrators, the Remaining Members shall select a second arbitrator, and these two arbitrators shall select the third arbitrator. The arbitrators shall be governed by the United States Arbitration Act, 9 U.S.C. Sections 1-16, and judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof. The place of arbitration shall be chosen by the three arbitrators.

"governed by" the FAA and did not provide that the partners would be governed by the FAA or that any post-arbitration proceedings would be governed by the FAA.

Shortly after Sprint filed its motion to compel arbitration, the Plaintiff in the Hawaii state case entered into a Stipulation filed on November 2, 2016, for partial dismissal without prejudice of the Second Amended Complaint against Sprint. This left only Shichinin and Sprint to argue the arbitration issue.

Shichinin opposed Sprint's motion to compel arbitration on several grounds all related to Hawaii's arbitration statute. Shichinin argued in its Memorandum in Opposition to Sprint's motion to compel arbitration filed on December 27, 2016, that Sprint had failed to demand arbitration because Sprint had not initiated arbitration proceedings as required by HRS 658A-9, that Sprint had waived the possibility of demanding arbitration by waiting until more than two years after Shichinin had objected to dissolution of the Hawaii Partnership, that the arbitration clause was no longer valid because the Hawaii Partnership had been dissolved by Sprint (the party then seeking to benefit from the same clause in the Hawaii Partnership agreement it had already unilaterally dissolved), and that the arbitration clause in the Hawaii Partnership agreement was permissive and not mandatory.

Judge Crabtree (the Hawaii state court judge who has presided over the Hawaii state case since it

was filed and who continues to preside over the Hawaii state case) rejected all of Shichinin's arguments against arbitration, and on May 25, 2017, Judge Crabtree filed his "Order Granting in Part and Denying in Part Cross-Claim Defendant Sprint Corporation's Motion to Compel Arbitration and to Stay Proceedings, or in the Alternative, Motion to Dismiss Cross-Claim Plaintiff Shichinin LLC's First Amended Cross-Claim" ("Hawaii State Court Arbitration and Stay Order"). The Hawaii State Court Arbitration and Stay Order interpreted "the arbitration clause of the Clearwire agreement to require the parties to arbitrate upon the demand of any party." The portion of Sprint's motion which was "denied" by the Hawaii State Court Arbitration and Stay Order was Sprint's alternative motion to dismiss the First Amended Cross-Claim filed by Shichinin against Sprint.

The last sentence of the Hawaii State Arbitration and Stay Order stated, "Sprint's motion to compel arbitration and stay proceedings is granted as to Shichinin's cross-claim against Sprint." In other words, the Hawaii State Arbitration and Stay Order provided that the Hawaii state case regarding the dispute between Shichinin and Sprint was never dismissed and was only instead stayed pending arbitration. Plaintiff and other Defendants remained in the Hawaii state case while the case was stayed pending the arbitration between Shichinin and Sprint. Pursuant to the Hawaii State Arbitration and Stay Order, the Hawaii state case remains active to this day, and the judge who issued the Hawaii State

Arbitration and Stay Order in the Hawaii state case (Judge Crabtree) still presides over the Hawaii state case pending the outcome of the arbitration required by the Hawaii State Arbitration and Stay Order issued pursuant to the Hawaii arbitration statute which was cited by Sprint as the basis for compelling arbitration. Although Sprint could have elected at the time it filed its 2017 motion to compel arbitration to cite directly or in the alternative the FAA as a basis for seeking an order compelling arbitration, Sprint elected to rely solely on Sprint's interpretation of Section 6.8 of the Hawaii Partnership's partnership agreement, and Sprint only cited to the Hawaii arbitration statute to compel arbitration. Now, Sprint seeks to make the argument that the FAA applies to post-arbitration proceedings in federal court despite having chosen either to ignore or waive its right to transfer this case to Hawaii federal court in favor of its choice to permit this case to remain in Hawaii state court where this case was "first filed" and where arbitration issues were argued according to the applicability of the Hawaii arbitration statute, not the FAA. Hawaii's arbitration statute, HRS 658A-27, specifically provides that all subsequent motions related to arbitration (which would include post-arbitration motions) shall be made in the court hearing the initial arbitration motion.

Arbitration Proceedings and the Agreements of the Parties Related to Arbitration Proceedings. Even though Section 6.8 of the Hawaii Partnership's partnership agreement provided that any dispute referred to arbitration "shall then be settled by arbitration in accordance with the CPR

Institute for Dispute Resolution Rules for Non-Administered Arbitration on the date hereof, by a panel of three arbitrators," the parties mutually agreed instead to arbitration through JAMS.

Section 6.8 of the Hawaii Partnership's partnership agreement also provided that the "***arbitrators*** [emphasis added] shall be governed by the United States Arbitration Act, 9 U.S.C. Sections 1-16, and judgment may be entered by any court having jurisdiction thereof." In spite of this provision, the parties also later agreed that the arbitrators would be "governed by" the JAMS Arbitration Rules and Procedures and the JAMS Arbitrators Ethics Guidelines.

The parties agreed to use three arbitrators who were, according to Sprint, experts in resolving the issues under consideration involving complicated valuation of 5G spectrum assets. All three of the Arbitrators eventually selected by the parties were based out of JAMS' offices in Texas, so the arbitration proceedings proceeded via Zoom with the Arbitrators in Texas and the parties and witnesses scattered at various locations throughout the United States.

After seven days of arbitration over Zoom on April 26-30, 2021, and May 3-4, 2021, the three JAMS Arbitrators issued their Interim Award on August 6, 2021, and their Final Award on September 1, 2021. The Final Award was delivered to and served upon the parties on September 13, 2021.

Post-Arbitration Proceedings. Although Sprint and all of its attorneys were well aware of the May 25, 2017, Hawaii State Court Arbitration and Stay Order and the Hawaii state case which had been stayed pending arbitration, and without seeking permission, much less guidance, from the "first to file" Hawaii judge who issued the Hawaii State Court Arbitration and Stay Order, Sprint and its attorneys made the decision to file Sprint's Petition to Confirm Arbitration Award ("Petition to Confirm") in the federal district court for the Northern District of Texas, Dallas Division, on September 29, 2021. The jurisdiction of the District Court was based on diversity of citizenship between Sprint and Shichinin, and venue in the District Court was based on 9 USC 9 which provides that a motion to confirm an arbitration award may be made in the to the United States district court "in and for the district in which the award was made" *if the parties had not otherwise specified where the motion to confirm the award should be made.*

In order to avoid the entry of a default judgment against Shichinin in Texas federal court, on December 8, 2021, Shichinin filed in Texas federal court an Answer to Sprint's Petition to Confirm and a Cross-Petition and Motion to Vacate Arbitration Award. As noted above, Shichinin also filed a motion in Texas federal court to dismiss or transfer Sprint's Petition to Confirm.

Under the Hawaii arbitration statute, HRS 658A-23(b), Shichinin had 90 days from the date Shichinin received notice of the Final Award to file a

motion to vacate the arbitration award. Shichinin's Motion to Vacate Arbitration Award was timely filed in the Hawaii state case on December 10, 2021. Shichinin had to file its Petition and Motion to Vacate in Texas federal court prior to filing its Motion to Vacate Arbitration Award in the Hawaii state case. Under the FAA, Shichinin had to *serve* its Petition/Motion to Vacate on Sprint, T-Mobile US and T-Mobile USA *using the federal Marshal* within "three months" of service of the Final Award upon it. Under Hawaii's arbitration statute, Shichinin was only required to *file* its Motion to Vacate Arbitration Award within 90 days of receipt of the Final Award – no physical service was required pursuant to the Hawaii arbitration statute. In order to meet the service deadline of the FAA in both Hawaii federal court and Texas federal court, Shichinin had to concentrate on the filing of its motions to vacate in federal court first, and then comply with the much less stringent filing procedures of the Hawaii arbitration statute after the more complex and technically rigorous filings in the federal courts were completed early enough to guarantee physical service of the petitions and motions to vacate using the federal Marshal's Office.

Post-Arbitration Discoveries by Shichinin. As Shichinin's Answer/Petition to Vacate alleged in the District Court below, Shichinin discovered a number of facts and failures of disclosures by the Arbitrators which Shichinin alleged required that the Arbitration Award be vacated. The Petition to Vacate alleged:

> 27. Shichinin was shocked by the

result of the arbitration. The Arbitrators had clearly made numerous, completely irrational, errors of fact, had showed a manifest disregard of law, and had showed little understanding of the subtleties of the valuation of the 5G spectrum assets even though, as stated above, these JAMS arbitrators had been touted by Sprint as experts in the area of spectrum valuation.

28. Based on these numerous errors of fact and law made by the Arbitrators, Shichinin began to engage in independent research regarding JAMS and the Arbitrators to determine if there was a basis to charge them with evident partiality.

29. Before Shichinin could complete its independent investigation of the Arbitrators, Sprint petitioned to confirm the Final Award in the United States District Court for the Northern District of Texas in Civ. No. 3:21-cv-02308-N by Petition filed on September 28, 2021...

* * *

Meanwhile, Sprint's petition to confirm the Final Award is presently pending before this Court.

30. Shichinin has now completed its investigation of matters which would relate to the evident partiality of the Arbitrators and has discovered the following facts which create a reasonable

impression of partiality and show the evident partiality of the Arbitrators which justifies Shichinin's federal and/or state Petitions to vacate the Final Award of the Arbitrators:

1) ***As to all three Arbitrators***:

(a) Shichinin has discovered that JAMS is a for-profit arbitration business and that many of the JAMS panelists have an ownership interest in JAMS. Shichinin has seen an estimate from JAMS that as many as 1/3 of all JAMS panelists have an ownership interest in JAMS. As owners in JAMS, these panelists receive not only a share of their own fees but also a share of JAMS' overall revenue. Although the JAMS standard Disclosure Checklist (which all three Arbitrators in this case filled out) has a general statement, "I practice in association with JAMS. I and each other JAMS neutral have an economic interest in the overall financial success of JAMS." This is an incomplete disclosure by the Arbitrators, and none of the Arbitrators disclosed whether they are owners of JAMS. If as many as 1/3 of JAMS panelists are owners, there is a 70% chance that

at least one of the three Arbitrators in this case was a JAMS owner, but this matter was never disclosed by any of the Arbitrators or by JAMS and should have been disclosed.

(b) Shichinin has discovered that prior JAMS representatives have described JAMS as follows: "In some respects we function like a law firm – that is, as a group of individual practices with people working together to pool their efforts and resources to produce greater benefit for our clients." This means that even if none of the three Arbitrators in this case was an owner of JAMS, which is not likely, the structure of JAMS like a "law firm" means that panelists are vying to "make partner" and become owners. The structure of JAMS was never disclosed by any of the Arbitrators or by JAMS and should have been disclosed.

(c) Shichinin has discovered that Sprint is what is known only by specialized experts regarding the arbitration trade as a "repeat player" or "recurring client" with JAMS – that is, JAMS earned significant income from presiding

over many arbitrations involving Sprint as a party. Shichinin has discovered that since 2015, Sprint has been a party in approximately 170 arbitrations and over 100 mediations with JAMS. Shichinin, on the other hand, only discovered last month that Shichinin is what is known only by specialized experts regarding the arbitration trade as a "one-off" party – that is, Shichinin was involved in an arbitration with JAMS for the first time and was not familiar with JAMS' structure as a for-profit business, nor with the fact that many JAMS arbitrators were also owners of JAMS, nor with Sprint's status with JAMS as a "repeat player." The fact that Sprint was a significant "repeat player" with JAMS overall, even if none of the Arbitrators had ever arbitrated a Sprint case, should have been disclosed by the Arbitrators and by JAMS.

(d) Shichinin has discovered that the firm representing Sprint in the arbitration proceeding, Alston & Bird, was also a "repeat player" with JAMS. Shichinin has discovered that Alston & Bird has appeared before JAMS more than

200 times. Alston & Bird's repeat player status with JAMS was never disclosed by Alston & Bird, or JAMS, or any of the Arbitrators and should have at least been disclosed. The attorneys representing Shichinin, on the other hand, were "one-off" counsel who were not familiar with JAMS, the structure of JAMS, the arbitrators at JAMS, or the "repeat player" status of Sprint and Alston & Bird.

(e) In addition to the undisclosed "repeat player" status of Alston & Bird set out in subparagraph (d) above, Shichinin has discovered that only a few months before the April 2021 arbitration in this case, Bernard Taylor, Sr. Esq., joined JAMS. In a public statement by JAMS, it was stated that Mr. Taylor was "from Alston & Bird, where he was Chair of the firm's Management Committee and the Products Liability Group." This close relationship of JAMS with a previous significant manager of the Alston & Bird firm was never disclosed by Alston & Bird, JAMS, or any of the Arbitrators and should have been disclosed.

(f) Although the Arbitrators in this case were represented to be experienced in the area of valuation of 5G spectrum assets, Shichinin has discovered that none of the Arbitrators has ever been involved in any arbitration where the valuation of spectrum assets was an issue, or even an arbitration where spectrum assets were discussed. At the arbitration hearing, Shichinin called Dr. Muriel Medard, one of the world's leading experts on how spectrum works, and the comment of the Arbitrators at p. 45 of the Final Award was that Dr. Medard's testimony was "interesting and educational" which is hardly the comment Shichinin would expect to hear from arbitrators who were experienced in the area of spectrum analysis and valuation. The Arbitrators should have disclosed their lack of knowledge and experience in the area of 5G spectrum analysis and valuation.

2. ***As to Arbitrator Willcutts***:

(a) Shichinin has discovered, with respect to the most important of the three Arbitrators selected in the arbitration as Chair of the tribunal, that several attorneys

associated with the Alston & Bird law firm which represented Sprint in the arbitration proceedings had donated to Arbitrator Willcutts' campaign when she ran for judge in Texas. These attorneys were not members of the Alston & Bird law firm at the time the contributions were made, but became associated with the Alston & Bird firm at the time Ms. Willcutts was being considered as an arbitrator for Sprint and Shichinin. The contributions were not insignificant. The total was approximately $6,700. Ms. Willcutts never disclosed these facts to the parties and should have.

(b) As soon as the Alston & Bird firm appeared in the arbitration proceeding in 2020, it sent an *ex parte* letter with argument to Ms. Willcutts opposing Shichinin's motion to join T-MOBILE US as a party to the arbitration because of T-MOBILE USA's acquisition of Sprint. Ms. Willcutts received the letter and passed it on to local counsel in Hawaii, the Cades firm, which passed it on to Shichinin. The fact that Ms. Willcutts agreed to

receive the letter from the Alston & Bird firm and then did not advise Shichinin that she received it, while inappropriate, did not at the time suggest an intimacy between Ms. Willcutts and the Alston & Bird firm which caused Shichinin to object to the selection of Ms. Willcutts as the third arbitrator. Now that Shichinin has discovered the contributions made to Ms. Willcutts' run for judge by attorneys who were members of the Alston & Bird firm at the time Ms. Willcutts was selected as the third arbitrator, the intimacy of Ms. Willcutts with the Alston & Bird firm is more obvious. If Shichinin had known about the relationship between Ms. Willcutts and the Alston & Bird attorneys who were prior contributors to her judicial campaign, the *ex parte* communication between Ms. Willcutts and the Alston & Bird firm would have been an additional fact which would have caused Shichinin to object to Ms. Willcutts' appointment as the third arbitrator.

31. JAMS Comprehensive Arbitration Rule 15(h) provides:

> Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

If Shichinin had known about any one of the facts it has recently discovered as set out in paragraph 30 above which should have been disclosed by JAMS, the Arbitrators, and/or counsel for Sprint, Shichinin would not have agreed to arbitration with JAMS, and it would not have accepted any of the three Arbitrators who were ultimately selected for the arbitration panel.

32. Examples of clear, completely irrational, errors of fact made by the Arbitrators are as follows:

a) Allowing Clearwire US to receive credit for loans for which there was no actual bank account for the JV, and no bank statement or other banking records showing the claimed "loans" from Clearwire US to Clearwire Hawaii were funded with actual cash.

b) Giving validity to the alleged $40 million promissory note between Clearwire US and Clearwire Hawaii which was suspiciously supposedly executed on a Sunday (also see subparagraph 2(a) below).

c) Using an initial value for spectrum assets of less than $55 million where the parties agreed in the original JV that $55 million was the value of the spectrum assets. This was also a clear error of law.

d) Relying on Sprint's hand-picked "independent valuators" used to dissolve Clearwire Hawaii to value the spectrum assets at issue in the arbitration instead of relying on Sprint's own experts or Shichinin's expert called to testify at the arbitration hearing and

qualified beforehand as each party's "expert witness."

e) Showing complete technological ignorance of the most fundamental wireless spectrum properties and capabilities despite the Arbitrators having represented that they were supposed to have expertise in the field (p.45 of the Final Award refers to Dr. Medard's testimony as "interesting and educational" – see paragraph 32(1)(f) above).

f) Allowing Sprint employee (now T-Mobile employee) Brent Lilley to testify as a fact witness about documents and communications that had been made by other persons in years prior to Lilley's own personal knowledge or involvement with Shichinin which began in 2013.

g) Not allowing Lilley's teammate in 2013, and former Sprint employee Ryan White, to testify as a fact witness because White said someone at Sprint had warned him that he was going to be asked to testify by Shichinin and there was "no way" he would, despite a subpoena being issued (White evaded service and said so to the process server on the phone).

Examples of manifest disregard of law by the Arbitrators are as follows:

> h) Giving validity to a clearly insufficient note, the original of which was never produced: The Arbitrators failed to follow clear Washington State law regarding the validity of the $40 million promissory note between Clearwire US and Clearwire Hawaii which Sprint (as successor-in-interest to Clearwire US) claimed was valid. Washington State law applied because the claimed promissory note was allegedly executed in Washington State. The alleged note was invalid because it did not state a fixed amount, in violation of RCW 62A.3-104(a), because there was no value or consideration apparently given, in violation of RCW 62A.3-305(a)(2), because the claimed original promissory note was supposedly lost or destroyed and never in the possession of Sprint which caused Sprint not to have enforceable rights under the claimed note, in violation of RCW 62A.3-309, and because no documents were ever produced by Sprint showing authority to execute the note either by Clearwire Hawaii or Clearwire US. At the arbitration hearing, Sprint offered no witness, expert, or

fact to demonstrate that there had ever really been a promissory note from Clearwire Hawaii to Clearwire US or that the note had ever really been funded. Sprint did not even bother to enter into evidence an affidavit of lost or misplaced promissory note by the original signatories of the alleged valid note.

i) Using an initial value for spectrum assets of less than $55 million where the parties agreed in the original JV [the Hawaii Partnership] that $55 million was the value of the spectrum assets. Sprint was allowed at the arbitration hearing to claim a lesser value of the spectrum assets which Sprint had taken from a 2013 proposed settlement agreement which Sprint had drafted and Shichinin had never signed.

j) Disregarding the judicial admission, as a matter of law, made by Sprint fact witness David Ball of Duff & Phelps at the arbitration hearing that 2.5 GHz spectrum was in 2013 (the date of his "independent valuation") not "high band" but rather "mid band" spectrum and should be valued as such in accordance with Shichinin's position and directly

contrary to Sprint's position.

k) Disregarding the judicial admission, as a matter of law, of Sprint's chart presented at the arbitration hearing which stated that 2.5 GHz spectrum was the most desired and most valuable spectrum according to the GAO, which directly contradicted the argument made by Sprint's attorneys in opening statements at the arbitration hearing that 2.5 GHz spectrum is "not valuable."

l) Disregarding the judicial admission, as a matter of law, of Sprint set out in another GAO report placed in evidence at the arbitration hearing by Sprint that the 2.5 GHz spectrum which was in dispute at the arbitration hearing had been put into service and, as such, could not be lost or forfeited because it had already been deployed (making it more valuable), which directly contradicted the argument made by Sprint that the 2.5 GHz spectrum would be lost and forfeited if not deployed and hence had no value.

m) Disregarding the judicial admission, as a matter of law, made by Sprint's own fact witness, Ray Taylor (the responsible

employee at Sprint for wireless spectrum deployments) that Sprint had told its "independent valuation" firms to arrive at a valuation based upon the number which was provided by Sprint's general counsel instead of using their own methodology.

n) Wrongly finding that as a matter of Delaware law (the choice of law designated by the JV [the Hawaii Partnership]) that Shichinin's claims were time-barred by refusing to consider Shichinin's legal argument that there is no statute of limitations defense in arbitrations under Delaware law. Instead, the JAMS Panel's sole basis for determining that issue was their dictum that Shichinin pled this established proposition of Delaware law for the first time in Shichinin's post-hearing briefs – and on that basis, and that basis alone, the JAMS Panel simply struck Shichinin's entire defense to the statute of limitations claims without saying at what point in the arbitration Shichinin should have raised its legal argument. If the JAMS panel felt the issue should have been raised during the arbitration hearing, the panel never

> addressed how and why the issue should have been raised as a matter of law. This is a purely legal argument and not a point to be introduced by a witness. Prior to the evidentiary hearing, Shichinin was not aware of, and was not provided with, any other vehicle through which Shichinin could have raised (or was obligated to raise) this argument, or would have been obligated to. Moreover, the touchstone for an argument to preclude a defense is prejudice to the moving party. Here Sprint was not prejudiced by Shichinin's raising this defense in its post-hearing briefs. The statute of limitations defense was a legal argument which did not turn in any way on any facts. In sum, the Arbitrators rejection of Shichinin's defense that the statute of limitations does not apply in arbitration on the basis that it was not raised earlier is not supported by the law and should have been considered on the merits, which it was not.

In support of its allegation about campaign contributions made by various attorneys or firms associated with the Alston & Bird firm which was representing Sprint, a Declaration of counsel was

submitted on January 31, 2022.

As noted above, the District Court never allowed Shichinin to have a hearing or even oral argument on the allegations of its Petition to Vacate and dismissed Shichinin's Petition to Vacate by the MOO issued on September 20, 2022.

REASON FOR GRANTING THE WRIT

The decision of the Fifth Circuit conflicts with the principles set forth by this Court in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), relating to enforcement of arbitration proceedings pursuant to the agreement of the parties.

The Parties' Choice of Litigating Arbitration Issues Pursuant to Hawaii's Arbitration Act. As can be seen from the procedural history of this case, the case was originally filed in Hawaii state court. The Hawaii state court case still exists, and is still pending, and is still stayed in Hawaii state court pending arbitration. Sprint moved for arbitration of the dispute between Shichinin and Sprint immediately after Shichinin filed a cross-claim against Sprint in the Hawaii court proceeding which had been pending for almost two years. Although Sprint could have moved the Hawaii litigation to Hawaii federal court by moving to "realign" the parties to create diversity of citizenship, Sprint chose not to make such a motion and moved for arbitration

pursuant to Hawaii's arbitration statute, HRS Chapter 658A. Sprint and Shichnin made arguments for and against arbitration pursuant to Hawaii's arbitration statute to the Hawaii judge, and the Hawaii judge eventually rejected all of Shichinin's arguments in opposition to arbitration and granted Sprint's motion to compel arbitration pursuant to Hawaii's arbitration statute. The Hawaii judge stayed the Hawaii case pending arbitration. HRS 658A-27 provides that once a motion is made to compel arbitration in Hawaii state court, "All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs." In this case, Sprint is the party that moved to compel arbitration pursuant to Hawaii law. Once Sprint chose to move under Hawaii law, and not the FAA, and chose to be subject to Hawaii law, Sprint was not free to "forum shop" for the jurisdiction with the most favorable post-arbitration law. "All subsequent motions" relating to arbitration were to be made in Hawaii court pursuant to HRS 658A-27, the arbitration law which the parties argued and by which the parties agreed to be bound.

Ignoring the provisions of the arbitration clause in the agreement between them, Sprint and Shichinin chose to arbitrate pursuant to JAMS arbitration instead of the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration as provided in the agreement. Also, the parties agreed that the Arbitrators would follow and be controlled by the JAMS arbitration rules instead of requiring the arbitrators to "be governed by the United States Arbitration Act, 9 U.S.C. Sections 1-16" as provided in the agreement. JAMS Rule 25 states, "Proceedings to

enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 USC Sec. 1, *et seq., or applicable state law* [emphasis added]." In this case, as noted above, the "applicable state law" was Hawaii's arbitration statute which the parties had invoked and argued and by which the parties had agreed to be bound.

Sprint's Strategic Forum Shopping Using 9 USC 9 of the FAA to Avoid Unfavorable Hawaiian Law and Rely on Favorable Fifth Circuit Law.. In spite of the fact that Sprint moved for arbitration pursuant to Hawaii's arbitration statute which required post-arbitration motions to be filed in the Hawaii state court proceeding, Sprint moved to confirm the arbitration Award in Texas federal district court citing 9 USC 9. Sprint, of course, was desperate to have the arbitration Award confirmed in Texas federal court subject to Fifth Circuit precedent because there were many unfavorable cases which Sprint avoided which would have applied or probably would have applied to Sprint if post-arbitration proceedings had been litigated in Hawaii state court. First, Sprint avoided *Bennett v. Chung*, 143 Haw. 266, 280, 428 P.3d 773, 787 (2018). In *Bennett*, the Hawaii Supreme Court gave a party seeking to vacate an arbitration award in Hawaii Circuit Court the full ninety days allowed to file a motion to vacate to file before the Circuit Court could consider any motion to confirm an arbitration award. This eliminated the "first to file" rule followed in federal court which is that the federal court in which the first post-arbitration motion is filed is the court which will hear all subsequent post-

arbitration motions. By filing its motion to confirm on the first day it was allowed to file the motion under the JAMS rules (JAMS Rule 24(k) provides that the arbitration award is considered "final" fourteen calendar days after service), Sprint sought to force all post-arbitration motions to be filed and litigated in Texas federal court instead of Hawaii state court because Texas federal court was the "first to file" court. Pursuant to the *Bennett* rule, Shichinin would have had an absolute right to file its motion to vacate for the full ninety day period allowed under Hawaii law thereby being the "first to file" any post-arbitration motion.

Second, Sprint avoided Ninth Circuit cases like cases like *Monster Energy Company v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019),[3] and *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009). While Ninth Circuit cases are not binding on Hawaii state courts, Hawaii often looks to the Ninth Circuit for guidance in the law, and, in any case, there was no chance that Sprint might have to deal with cases like *Monster* and *Comedy Club* because Fifth Circuit precedent was exactly contrary to *Monster* and *Comedy Club*. *See Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346 (5th Cir. 2004); *Pfeifle v. Chemoil Corp.*, 73 F. App'x. 720 (5th Cir. 2003); and *Kemper Corp. Servs. Inc. v. Comput Sci. Corp.*, 946 F.3d 817 (5th Cir. 2020); and *see* fn. 5 of the Texas

[3] This case included Sprint as a "repeat player" at JAMS, but Sichinin was never allowed to obtain discovery on the compensation packages for the Arbitrators or challenge JAMS' declaration that none of the Arbitrators was an owner of JAMS.

District Court's MOO specifically rejecting *Monster* because it was a "Ninth Circuit case" which did not apply in the Fifth Circuit.

Third, as a strategic matter, Sprint sought to have a Texas federal court review any possible challenge by Shichnin to the performance of the Arbitrators – one who was a retired Texas federal district court judge, and one who was a retired Texas state court judge.

There is no question why Sprint chose to avoid Hawaii state court for post-arbitration proceedings in spite of Sprint's original choice to pursue arbitration pursuant to Hawaii's arbitration statute. The question then becomes whether this Court will allow a prevailing party in an arbitration to use the *venue* provision of the FAA, 9 USC 9, as a weapon against the opposing party to forum-shop its way to a more favorable venue for post-arbitration litigation than the one the parties originally chose? This is inconsistent with the intent and reach of the FAA as enacted by Congress and as interpreted by this Court in cases like *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The Inconsistency of the Fifth Circuit's Decision with the Theory Behind the FAA as Set Forth in Volt. In *Volt*, this Court was faced with a case involving a contract between the parties which contained an arbitration provision which stated that the contract would be governed by "the law of the place where the Project is located." Volt was a construction

contractor for Stanford. A dispute arose about the contract, and Volt made a formal demand for arbitration. Stanford responded by suing Volt in California state court for fraud and breach of contract. Stanford also sued two other parties involved in the construction contract with which Stanford did not have any arbitration agreement for indemnification. Stanford moved to stay Volt's arbitration motion while it litigated the indemnification issue with the two other parties. The California state court granted Stanford's motion to stay based on a California statue which provided for stay while pending resolution of related litigation between a party to an arbitration agreement and parties not bound by the arbitration agreement. Volt appealed the stay claiming that the California statute was "preempted" by the FAA. The California appellate court held that the parties agreed to apply California law so there was no "preemption" problem and the contract would be enforced according to California law as agreed by the parties, and California law provided for a stay. The California Supreme Court denied review of the appellate court's decision.

On cert, this Court affirmed the California appellate court's decision. Making a very broad statement about the FAA, this Court held, "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." 489 U.S. at 476. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." 489 U.S.

at 479. This Court stated, "But Sec. 4 of the FAA does not confer a right to compel arbitration of a dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in the parties' agreement* [Court's emphasis]." 489 U.S. at 474-475. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." 489 U.S. at 477. The Court noted, regarding the purpose of the FAA, "The Act was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' . . . and place such agreements '"upon the same footing as other contracts."'" 489 U.S. at 474.

In particular, regarding the issue of the agreement between the parties in *Volt* to agree to abide by certain state rules of arbitration, this Court stated, "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." 489 U.S. at 479.

In this case, by their actions, *especially by the action of Sprint*, the parties agreed to proceed with arbitration according to Hawaii's arbitration statute, HRS Chapter 658A. Sprint moved for arbitration according to Hawaii's arbitration statute, the issue of whether arbitration should be compelled was litigated by the parties according the provisions of Hawaii's arbitration statute, the Hawaii case was stayed pending arbitration by the Hawaii judge, and HRS

658A-27 provides that once a motion is made to compel arbitration in Hawaii state court, "All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs." The parties eventually agreed to arbitrate pursuant to JAMS Rules, and JAMS Rule JAMS Rule 25 provides, "Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 USC Sec. 1, *or applicable state law* [emphasis added]." As this Court held in *Volt*, where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with goals of the FAA," and, in fact, *Volt requires* a federal court to follow the procedures selected by the parties for arbitration proceedings. In *Volt*, a stay of arbitration proceedings was required even where the FAA did not provide for a stay of arbitration proceedings.

In this case, the federal courts were required to follow Hawaii law and to refer post-arbitration proceedings to the Hawaii court from whence the arbitration originated pursuant to the parties' agreement to proceed with arbitration according to the provisions of the Hawaii arbitration statute. HRS 658A-27 required all post-arbitration proceedings to be referred back to Hawaii court unless the Hawaii court "otherwise directs." The fact that the Hawaii court denied Shichinin's motion to vacate *without prejudice* pending a decision by the Texas federal district court was not a "direction" by the Hawaii court that the federal court should ignore Hawaii law. The federal court was *required* to follow Hawaii law, as chosen by

the parties. Hawaii law provided for venue for post-arbitration proceedings back in Hawaii court, so the venue provision in the FAA, 9 USC 9, did not apply to post-arbitration proceedings by agreement of the parties to be subject to Hawaii law which provided for venue back in Hawaii court. Even 9 USC 9 provides that the court "specified" by the parties for post-arbitration proceedings is the court to which post-arbitration proceedings should be referred. It is only where a court is not "specified," that a prevailing party has the option of applying for confirmation of an arbitration award in a federal court where the arbitration award was issued. By their actions and agreements, the parties in this case agreed to be bound by the Hawaii arbitration statute – Hawaii was the "specified" court for post-arbitration proceedings.

In this case, Sprint was allowed to abuse the venue provision of the FAA and pursue post-arbitration proceedings in Texas federal court instead of Hawaii court to avoid Hawaii law and Ninth Circuit law which was clearly not in Sprint's favor and seek resolution of the post-decree motions in this case in the Fifth Circuit venue with post-arbitration Fifth Circuit law more favorable to Sprint. This is an important case for this Court to review because this Court cannot allow the FAA to be abused in the manner in which it has been abused by Sprint in this case. As this Court held in *Volt*, the FAA was never intended to "coerce" parties into any particular arbitration procedure dictated by the FAA. The FAA was only intended to enforce arbitration agreements like any other contracts are enforced *according to the agreement of the parties*. This Court should grant certiorari in this

case to make it clear to all federal courts that there is nothing "special" about the procedures set forth in the FAA. As this Court stated in *Volt*, "There is no federal policy favoring arbitration under a certain set of procedural rules." A strong statement from this Court in this case will prevent the kind of abuse of the FAA and unacceptable forum-shopping in which the federal courts so far have allowed Sprint to indulge.

CONCLUSION

Certiorari should be granted. This Court should reverse the decision of the Fifth Circuit and order that the Fifth Circuit remand this case to the District Court with an order that the case filed by Appellee in the District Court be dismissed in favor of proceeding with pending post-arbitration litigation in Hawaii state court.

Respectfully submitted,

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