IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

DORSEY RON MCCALL,

Applicant,

v.

APTIM CORP.,

Respondent.

APPLICATION TO THE HON. SAMUEL A. ALITO, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Dorsey Ron McCall ("McCall") hereby moves for an extension of time of 30 days, to and including Friday, September 28, 2018, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit dated April 17, 2018 (Exhibit 1). A petition for rehearing was denied on May 31, 2018 (Exhibit 2). Unless an extension is granted, the deadline for filing the petition for certiorari will be August 29, 2018. The jurisdiction of this court is based on 28 U.S.C. §1254(1).

1. McCall is a former employee of The Shaw Group, Inc. ("Shaw"). When McCall left Shaw to work for a competitor, Shaw believed that McCall violated a non-compete agreement in his employment contract. Instead of invoking the non-compete agreement's arbitration clause, Shaw filed a damages lawsuit in Louisiana state court. While the state-court litigation was ongoing, Respondent Aptim Corp.

("Aptim") acquired the rights to McCall's employment contract. Shaw then moved to dismiss its own state-court complaint and Aptim filed a demand for arbitration with the AAA, asserting the same claims Shaw had been litigating in state court. McCall moved to stay the arbitration, arguing that Aptim had waived its right to arbitrate because its predecessor-in-interest had filed and pursued a damages action in state court. Before the state court ruled on the waiver issue, Aptim turned to the federal courts, filing a Petition to Compel Arbitration and asking the Eastern District of Louisiana to order McCall into arbitration and to enjoin future state-court proceedings.

2. At this point, the identical question was pending in parallel proceedings in state and federal courts—*i.e.*, both courts had been asked to decide whether Aptim had waived its arbitration rights. The state court acted first, ruling that any right to arbitration had been waived and staying the arbitration. McCall then explained to the federal court that the state court had already decided the dispositive question—*i.e.*, that Aptim waived any right to arbitrate—and asked the district court to abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) or, alternatively, to defer to the state court's decision on waiver. McCall also explained that the Anti-Injunction Act, 28 U.S.C. §2283, prohibits federal courts from enjoining state-court proceedings. Notwithstanding the state court's already-issued decision, the federal court declined to abstain, expressly disagreed with the state court, and granted the petition to compel arbitration. And notwithstanding the Anti-Injunction Act, the federal court enjoined further state-court proceedings, concluding

that this case fell within the Anti-Injunction Act's "relitigation" exception. The court also granted Aptim's subsequent request to broaden the injunction to encompass not just state-court litigation between McCall and Aptim, but also between McCall and Shaw, which was not even a party to the federal lawsuit.

3. The Fifth Circuit affirmed, explaining that "the federal district court did not abuse its discretion in declining to abstain, Aptim did not waive its arbitration rights, and the district court properly invoked the relitigation exception to defend its final judgment." Ex. 1 at 21. In holding that Aptim did not waive its arbitration rights, the court declined to decide whether Shaw's pre-assignment litigation activities were imputable to Aptim, instead ruling that a party arguing waiver must *always* prove prejudice, and that McCall did not make that required showing. Ex.1 at 15-16. Judge Owen dissented in part, explaining that she would "reverse the district court's judgment to the extent that it purports to enjoin the state-court litigation as to [Shaw]." Ex. 1 at 22. Judge Owen also wrote separately "to address statements in Supreme Court opinions that, at least facially, lend support to McCall's contention that the federal district court was powerless under the Anti-Injunction Act to stay state-court proceedings." Ex. 1 at 22.

4. This case presents three issues of exceptional importance that warrant this Court's review. First, the decision below conflicts with decisions from three other circuits that have required *Colorado River* abstention under indistinguishable circumstances. Under *Colorado River*, federal courts should stay their hand when parallel state-court litigation has substantially progressed and exercising federal

jurisdiction could lead to piecemeal litigation and conflicting results. Three courts of appeals have thus correctly concluded that *Colorado River* abstention is warranted when, as here, a state court has already resolved the sole arbitration issue pending before the federal court. *Preferred Care of Del., Inc. v. VanArsdale*, 676 F. App'x 388 (6th Cir. 2017); *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223 (10th Cir. 2013); *Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332 (4th Cir. 2002). The balance of the *Colorado River* factors is not even close in such a case, as conflicting decisions and piecemeal litigation are inevitable—and so too are the state-federal tensions that abstention is designed to prevent—when a federal court takes up jurisdiction for the express purpose of overriding an already-issued state court decision. The Fifth Circuit's decision directly conflicts with the principles behind *Colorado River* and with decisions from three other circuits.

5. Second, the decision below conflicts with this Court's precedent interpreting the Anti-Injunction Act's "relitigation" exception. In furtherance of the same comity and federalism principles as the *Colorado River* doctrine, the Anti-Injunction Act creates an absolute prohibition against enjoining state-court proceedings unless the injunction falls within one of the Act's three narrow exceptions. The decision below relies on the so-called "relitigation" exception, but this Court has made clear that the "relitigation" exception allows federal courts only to protect their own first-in-time rulings from subsequent relitigation in state court, not to override the first-in-time rulings of state courts. By allowing a federal court to displace an already-issued state court ruling, the decision below disregards this

Court's admonition that the relitigation exception may not be used "to seek appellate review of a state decision in the Federal District Court." *Atl. Coast Line RR Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 293 (1970).

6. Third, the decision below deepens an entrenched and long-recognized circuit split on whether a party arguing waiver of the right to compel arbitration must always prove prejudice. *See, e.g., Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011) ("There is a circuit split over whether the party asserting waiver must show prejudice."). Some circuits, like the Fifth Circuit below, hold that "prejudice is the touchstone for determining whether the right to arbitrate has been waived." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007); *see also* Ex. 1 at 15 ("To support a finding of waiver, McCall must demonstrate prejudice."). Other circuits, however, have held that "[a] finding of prejudice is not necessary in order to conclude that a right to compel arbitration has been waived." *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008); *see Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) ("a party need not show that it would be prejudiced if the stay were granted and arbitration ensued."). This Court previously granted certiorari on this question, *Stok & Assocs., P.A. v. Citibank, N.A.*, 562 U.S. 1215 (2011) (granting petition), but the parties settled their dispute before this Court could resolve the issue, *Stok & Assocs., P.A. v. Citibank, N.A.*, 563 U.S. 1029 (2011) (dismissing case).

7. Applicant requires additional time to research the record and complex legal issues presented in this case and to decide whether to file a petition for writ of

certiorari. Furthermore, before the current due date of August 29, Applicant's Counsel of Record, Erin E. Murphy, has substantial briefing obligations, including a petition for writ of certiorari in *Zappos.com, Inc. v. Stevens*, No. ____ (U.S.) (August 20); and a petition for writ of certiorari in *Kinder Morgan Energy Partners L.P. v. Upstate Forever*, No.____ (U.S.) (August 28).

For the foregoing reasons, Applicant requests that a 30-day extension of time to and including Friday, September 28, 2018, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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August 16, 2018