No. 22-18

In the Supreme Court of the United States

CUKER INTERACTIVE, LLC, PETITIONER,

v.

PILLSBURY WINTHROP SHAW PITTMAN, LLP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

LEAH S. STRICKLAND
TROUTMAN PEPPER HAMILTON SANDERS LLP
222 Central Park Ave., Ste. 2000
Virginia Beach, VA 23462
(757) 687-7511
leah.strickland@troutman.com

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe St., Ste. 3900
Chicago, IL 60606
(608) 999-1240
misha.tseytlin@troutman.com

Attorneys for Petitioner

SUPPLEMENTAL BRIEF

A. Respondent's conduct is part of an increasing problem, where litigants who foresee that they will lose before this Court seek to moot long-running cases at the eleventh hour, "manipulat[ing]" this Court's "docket" in a manner "that should not be countenanced." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting).

In Petitioner's underlying litigation against Wal-Mart Stores, Inc. ("Walmart"), Respondent saddled Petitioner with unjustifiably high attorney's fees, in large part due to Respondent's misunderstanding of Petitioner's flagship trade-secret claim. *See* Final Award, *In re arbitration of Pillsbury Winthrop Shaw Pitman LLP v. Cuker Interactive, LLC*, AAA Case No.01-18-0001-5005, at 148–64 (Sept. 14, 2022). Had Respondent understood the weaknesses of Petitioner's trade-secret claim and informed Petitioner of these issues, Petitioner would not have litigated that claim to judgment with Respondent, and so would not have incurred those substantial attorney's fees. *See id.* at 163 n.44. This is one of the reasons why, in the parties' arbitration over their attorney's fees dispute, the arbitrators awarded Respondent no further fee award for its deficient representation. Instead, the award was limited to Respondent's unreimbursed out-of-pocket expenses incurred in the Walmart litigation. *See id.* at 163–64.

Having racked up these unjustified attorney's fees in the Walmart litigation, Respondent then forced Petitioner to expend *additional* substantial resources litigating this choice-of-law dispute over Respondent's asserted lien for those fees. *See* Pet.5–9. Respondent began this dispute by filing its underlying proof of claim for its unpaid attorney's fees in the Walmart litigation against Petitioner's bankruptcy estate, asserting that this claim was secured by a lien against the Walmart judgment under Arkansas law, according to Respondent's view that *federal* choice-of-law rules apply and require application of that State's law. Pet.6. This compelled Petitioner to initiate these adversary proceedings, and then to litigate them at considerable expense, including up to this Court.

Then, once it became clear to Respondent that it would lose before this Court—after Petitioner filed its Petition; after *amici curiae* professors of law filed their *amicus* brief in support; and after this Court called for the view of the Solicitor General—Respondent sought to moot this case by waiving any interest on its proof of claim, including in order to avoid paying Petitioner's costs and attorney's fees for having to litigate this case. Resp'ts Supp'l Br.4–5.

B. This Court should not allow litigants to manipulate its docket by strategically manufacturing mootness before this Court. *See N.Y. State Rifle &*

Pistol Ass'n, 140 S. Ct. at 1527 (Alito, J., dissenting); *see also Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) ("[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). Rather, it is in this Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review" by strategically manufacturing "mootness." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

To ameliorate this recurring problem, Petitioner respectfully suggests that this Court should consider holding that—in a case like this one—where a party unquestionably had standing throughout the case and pleaded a request for costs and attorney's fees, 1 ER-147, if the other party seeks to moot the case for the first time before this Court, that the unsatisfied demand for costs and attorney's fees be sufficient to satisfy Article III standing. While this Court has properly held that a party's interest in costs and attorney's fees *generally* is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990), that holding rests on the concern that the judicial system would be overrun if forced to continue adjudicating every case where the sole remaining dispute was over such costs and fees, *see Friends of the Earth, Inc. v. Laidlaw*

Env't Servs. (TOC), Inc., 528 U.S. 167, 191–92 (2000).* But where, as here, a case is *already* before this Court *and* a party attempts to moot the case—including to avoid paying costs and attorney's fees—this Court should answer the Question Presented, as it would in a case under the capable-of-repetition-yet-evading-review exception. *See City of Erie*, 529 U.S. at 288. After all, this Court, Petitioner, *amici*, and the Solicitor General have already invested their "scarce resources" in "br[inging]," "litigat[ing]," and considering this case, *Friends of the Earth*, 528 U.S. at 191—which case presents a sharp, well-entrenched circuit split, Pet.10–13—and "abandon[ing] the case at [this] advanced stage" is "more wasteful than frugal," *Friends of the Earth*, 528 U.S. at 192.

Notably, this Court has the Article III jurisdiction to hear such cases for the same reasons (and more) as it has jurisdiction in cases under the capable-of-repetition-yet-evading-review exception. A party strategically mooting a case just before this Court's review presents similar concerns of this Court not being able to decide important issues teed up for this Court's review, *see FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 464 (2007); *accord Honig v. Doe*, 484

* Here, there could be no dispute that Petitioner would be entitled to costs if it prevails in this case, Fed. R. Civ. P. 54(d); Fed. R. Bankr. P. 7054(b), and Petitioner's right to attorney's fees would be a matter for the parties to litigate on remand.

U.S. 305, 331 (1988) (Rehnquist, C.J., concurring) ("mootness . . . may be connected to . . . Art. III, [but] it is an attenuated connection that may be overridden where there are strong reasons to override it"), while also permitting a soon-to-lose party to escape having to pay costs and attorneys' fees at the latest hour, when those fees have reached their highest cumulative amount, *see* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 596, 614–15 (2009).

C. If this Court nevertheless concludes that this case should be dismissed as moot, it should vacate the Ninth Circuit's erroneous decision below.

This Court's "established practice . . . in dealing with a civil case from a court in the federal system which has become moot while on its way" to this Court "or pending [this Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22–23 (1994) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). *Munsingwear* vacatur follows from the "principle[ ]" that is "implicit in [this Court's] treatment of moot cases"—"in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (citation omitted).

Here, Respondent sought to moot this dispute through its own "unilateral action" after it "prevailed in the lower court[s]," thus, this Court should follow its "established" vacatur "practice." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997). The parties' choice-of-law dispute ultimately influences the rate of interest, and therefore the amount of interest, that Respondent may obtain on its proof of claim for attorney's fees against Petitioner's bankruptcy estate. *See supra* pp. 1–2; Resp'ts Supp'l Br. 4–5. Then, at the eleventh hour, Respondent informed Petitioner that it "waives interest" entirely on its proof of claim for attorney's fees. ECF 587-2 at 4–5; ECF 587 at 3. Or, as Respondent itself explained, "Pillsbury [ ] informed Cuker that it was waiving *any* interest" on its proof of claim, and then "released the lien it had asserted" against the Walmart judgment after it received payment from Petitioner. Resp'ts Supp'l Br.4–5. Those circumstances compel vacatur per this Court's caselaw. *See U.S. Bancorp*, 513 U.S. at 22–23.

Respondent incorrectly asserts that this Court should not vacate the Ninth Circuit's decision because Petitioner "paid the arbitration award and [ ] moved to close the segregated account" holding the funds that Respondent had asserted a security interest against. Resp'ts Supp'l Br.7. But Petitioner did not moot the dispute, since Petitioner reserved its right to recover the excess payment of interest to Respondent

if Petitioner had prevailed before this Court. *See* ECF 597-1 at 8 ("Cuker wishes to fully satisfy [Respondent's] existing judgment, while reserving all its rights with respect to its appeal to the Supreme Court."). Instead, it was Respondent's "unilateral action," *U.S. Bancorp*, 513 U.S. at 22–23, of "waiv[ing]" any "interest" on its proof of claim, ECF 587-2 at 4–5; ECF 587 at 3, that sought to moot this dispute, as Respondent's own Supplemental Brief demonstrates, Resp'ts Supp'l Br. 4–7. Accordingly, assuming this Court determines that this case must be dismissed, it should follow its "established practice" and vacate the judgments below, since Respondent unilaterally mooted this case on its way to this Court. *U.S. Bancorp*, 513 U.S. at 22–23.

Respectfully submitted,

LEAH S. STRICKLAND
TROUTMAN PEPPER
HAMILTON SANDERS LLP
222 Central Park Ave.,
Ste. 2000
Virginia Beach, VA
23462
(757) 687-7511
leah.strickland@
troutman.com

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe St.,
Ste. 3900
Chicago, IL 60606
(608) 999-1240
misha.tseytlin@
troutman.com

December 2022