IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 64,140

OPPENHEIMER & CO., INC.,

Defendant-Petitioner

vs.

MARCIA YOUNG,

Plaintiff-Respondent.

ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON REMAND

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INTRODUCTION

Petitioner Oppenheimer & Company, Inc. ("Oppenheimer") files this Reply Brief on Remand pursuant to this Court's Order granting the parties leave to brief the issues for reconsideration in light of the Supreme Court's Order vacating this Court's judgment. See Oppenheimer & Co. v. Young, 105 S.Ct. 1830 (1985).

SUMMARY OF ARGUMENT

Oppenheimer agrees with Respondent Marcia Young ("Young") that Dean Witter Reynolds, Inc. v. Byrd, 105 St.Ct. 1238 (1985), requires arbitration of Young's state securities and common law claims. Accordingly, this Court should reconsider its decision on the preemption issue in light of Byrd.

This Court should not, however, reconsider its decision on the waiver issue on Young's untimely and unauthorized application for rehearing. This Court properly concluded that Oppenheimer did not waive its right to arbitrate the state securities claims. Accordingly, this Court should reaffirm its holding that Oppenheimer did not waive arbitration.

ARGUMENT

In her Supplemental Brief on Remand (at page iv), Young properly concedes that under Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985), Young's state securities and common law claims must be arbitrated pursuant to the Federal Arbitration Act. See also Sager v. The District Court for the Second Judicial District of the State of Colorado, 698 P.2d 250 (Colo. 1985) (holding that Byrd and Southland Corp. v. Keating, 104 S.Ct. 852 (1984), mandate arbitration of state securities act claims involving interstate commerce notwithstanding a state anti-waiver provision).

Nevertheless, Young contends that there is still an issue remaining on remand--whether Oppenheimer waived its right to arbitration. Young is wrong. That issue was previously briefed and argued by the parties and decided by this Court in favor of Oppenheimer. See Oppenheimer & Co. v. Young, 456 So.2d 1175 at 1177 n.1 (Fla. 1984). Young's arguments in her latest brief merely repeat the arguments previously rejected by this Court.

Young argues that Oppenheimer waived its right to arbitration in the federal court action by answering the second amended complaint. Young made the identical argument in her brief on the merits. This Court considered and rejected that argument in its original decision:

> Prior to initiating suit in state court, respondent brought suit in federal district court

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> on both federal and state causes of action. The state cause of action was dismissed for lack of pendent jurisdiction. Respondent urges that Petitioner waived its right to arbitration by failing to invoke the arbitration agreement in federal court. Petitioner counters, and we agree, that it would have been pointless to invoke the agreement in federal court because federal law prohibits enforcement of such agreements where the dispute concerns securities in interstate commerce. Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953).

456 So.2d at 1177 n.1 (emphasis added). Young now seeks a rehearing of that conclusion.[1/]

Should the Court wish to reconsider the waiver issue, Oppenheimer responds as follows to the points made by Young.

I

OPPENHEIMER DID NOT WAIVE ITS RIGHT TO ARBITRATION

A. Introduction

Significantly, Young does not contend that Oppenheimer waived its right to arbitration by its conduct in this action. On the contrary, Oppenheimer filed its motion to compel arbitration immediately after Young instituted her state court action. Young merely claims that by answering the second amended complaint in federal court, Oppenheimer waived its right of arbitration.

1/ The Supreme Court, in vacating this Court's decision for reconsideration on the preemption issue in light of Byrd, did not direct this Court to reconsider its waiver holding. Thus, Young is barred from seeking a rehearing of the waiver holding.

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Young previously argued that state law governs the waiver issue. She stubbornly refuses to concede that once a party invokes the Federal Arbitration Act, federal law governs all questions of interpretation, construction, validity, revocability and enforceability of the arbitration agreement:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S.Ct. 927, 941-42 (1983) (emphasis added; footnote omitted).

It is particularly appropriate to apply a federal law standard to the waiver issue in this case since the activity which is the subject of that issue occurred solely in a federal forum. It would be unfair to measure Oppenheimer's conduct by state law where the parties, litigating in federal court, could not have reasonably anticipated that their actions would ever be governed by state law. Oppenheimer therefore properly gauged its conduct in the federal action by reference to federal law.

Waiver is the intentional relinquishment of a known right. Thomas N. Carlton Estate, Inc. v. Keller, 52 So.2d 131 (Fla. 1951). As this Court previously recognized in holding that no waiver had occurred, Oppenheimer did not have the right to arbitrate the intertwined state law claim in the federal action and did not need to file a futile motion in federal court to preserve its right of arbitration.

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B. The Federal Court Action

Young's second amended complaint in the federal action sought recovery against Oppenheimer in two counts. Count I claimed a violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Count II incorporated the same factual allegations on which the federal securities violation was based and asserted a pendent state securities law claim under Chapter 517, Fla. Stat. (1981). Thus, both the federal and state securities claims were premised on the identical facts.

Under existing federal law, Oppenheimer did not have the right to arbitrate Young's inextricably intertwined state law claim because federal law prohibited arbitrating federal claims as well as state claims premised on the same facts. The federal district court, under existing law, would have denied arbitration of state claims (such as the pendent state claim in Young's second amended complaint) as to which an arbitrator would be "impelled to review the same facts" which supported the federal securities claim.[2/] Sawyer v. Raymond James & Associates, Inc., 642 F.2d 791, 793 (5th Cir. 1981). In other words, a party, such

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2/ Young now claims that the state and federal claims were not intertwined because the ultimate facts differed. Yet, Young's own pleadings in federal court belie this contention. The second amended complaint contains twenty-nine factual allegations. Both the federal securities claim (Count I) and the pendent state claim (Count II) reaver all of the common factual allegations. Neither count contains any additional factual allegations.

as Oppenheimer, faced with both federal and state securities claims based on identical facts would have had its motion to compel arbitration denied, and as this Court previously held, a party need not file a futile motion to preserve its right of arbitration. Oppenheimer & Co. v. Young, 456 So.2d 1175 at 1177 n.1. See Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982).

The trial judge in this case, in finding that no waiver had occurred, similarly recognized that Oppenheimer should not be penalized for failing to file a futile motion in what the trial court apply characterized as a "Catch 22 position":

> It is the court's viewpoint that the defendant [Oppenheimer] has not taken an inconsistent position in light of the established case law of Sawyer v. Raymond James & Associates, Inc. 642 F.2d 791 (5th Cir. 1981), in not raising [the arbitration] issue.
>
> It would be hell for this Court to second-guess a defense lawyer in this particular case for not raising [arbitration] when he was placed in what I consider to be a Catch 22 position. (brackets added).

The trial court's factual finding that no waiver had occurred was not disturbed by the Third District and indeed was affirmed by this Court. Young has failed to demonstrate error in the trial court's finding.

Young erroneously contends that the intertwining doctrine did not apply because the federal court eventually dismissed Young's pendent state claim for lack of subject matter jurisdiction. According to Young, that dismissal means that the

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court must have found that the federal and state claims differed factually and legally.

Young confuses the doctrine of intertwining with the doctrine of pendent jurisdiction. A federal court has the power to hear state law claims under the doctrine of pendent jurisdiction whenever there is a substantial federal claim, the federal claim and the state law claims "derive from a common nucleus of operative fact" and the claims are such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding...." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

In a narrow set of circumstances, the federal courts in the Southern District of Florida have held that state law fraud claims which are pendent to claims under the federal securities laws should nevertheless be dismissed because the pendent state claims would create an undue risk of jury confusion if the state and federal claims were tried together. Stowell v. Ted S. Finkel Investment Services, Inc., 489 F.Supp. 1209 (S.D. Fla. 1980). In Stowell the court reasoned that a pendent common law fraud claim would permit a jury to impose punitive damages against a defendant where the same conduct might not even constitute a violation of the federal securities laws. The court also observed that punitive damages are not available in a 10b-5 action. The court therefore concluded that it would be inappropriate to allow a plaintiff, in effect, to append a

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federal claim to the state law claim which would predominate in the case.

The "intertwining" doctrine, on the other hand, focuses on the similarity of factual findings in federal and state securities claims. If the findings of fact necessary to decide the state claim will also decide the federal claim, courts were concerned that the exclusive federal jurisdiction to decide the federal claim, Wilko v. Swan, 346 U.S. 427 (1953), would be undermined by a prior decision of an arbitrator who made factual findings on the state claim, which findings would later be binding on the federal court trying the federal claims. This attempt to protect the exclusive federal jurisdiction to hear and decide federal securities claims led federal courts to refuse arbitration of intertwined state law claims which were brought in the same case with a federal securities claim. Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982). In Dean Witter Reynolds, Inc. v. Byrd, the Supreme Court held that this concern over collateral estoppel was unwarranted and thus abolished the intertwining doctrine.

Young's brief badly confuses the two doctrines of dismissal of pendent claims and intertwining. The two doctrines bear no logical relationship to each other. The fact that federal and state claims may be intertwined for purposes of preserving exclusive federal jurisdiction does not imply anything regarding whether the pendent counts, or at least some of them, should

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nevertheless be dismissed because of fear of possible jury confusion.[3/]

II

YOUNG HAS FAILED TO DEMONSTRATE PREJUDICE ON THE WAIVER ISSUE

Under federal law a party seeking to establish a waiver of the right of arbitration must show conduct resulting in delay and substantial prejudice. The Second Circuit has expressed the test as follows:

> [T]here is an overriding federal policy favoring arbitration. Waiver, therefore, is not to be lightly inferred, and mere delay in seeking a stay of proceedings without some resultant prejudice to a party, . . . cannot carry the day.

Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968).

In Carcich the defendant answered the complaint without demanding arbitration. The Second Circuit held that in the absence of actual prejudice to plaintiff, no waiver had occurred. See also ITT World Communications, Inc. v. Communications Workers, 422 F.2d 77 (2d Cir. 1970); Carolina Throwing Co. v. S&E Novelty Corp., 442 F.2d 329 (4th Cir. 1971).

3/ That the federal securities count and the state blue sky count of Young's federal complaint were intertwined is apparent not only from the fact that the second amended complaint makes identical factual allegations in both counts, but also because Rule 10b-5 and § 517.301(1), Fla. Stat. (1981), are virtually word for word identical. In the appendix to this brief, we reprint the text of Rule 10b-5 and § 517.301(1), Fla. Stat. (1981).

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The record herein is totally devoid of any basis for finding a waiver under federal law. The only delay in this case was Young's own seven month delay in refiling her state claim in state court. Moreover, while Young complains that Oppenheimer is preventing her from trying her case in a judicial forum, to her ostensible prejudice, Young herself took a voluntary dismissal of her federal action just prior to the scheduled trial. Young could have tried her case in federal court years ago had she so desired.

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CONCLUSION

This Court should hold that Young's claims must be arbitrated pursuant to the Federal Arbitration Act for that is the law of the land as established by the United States Supreme Court in Byrd. This Court's prior ruling that Oppenheimer did not waive arbitration is correct and should not be disturbed.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Mercedes C. Busto, Esq., Bailey & Dawes, Attorneys for Young, Fifth Floor, 1390 Brickell Avenue, Miami, Florida 33131-33313; Curtis Carlson, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, Attorneys for Defendants Bache and Elgart, City National Bank Building, 5th Floor, 25 West Flagler Street, Miami, Florida 33130; and Bennett Falk, Esq., Ruden, Barnett, McClosky, Schuster & Russell, P.A., Attorneys for Defendant McKinnon, One Biscayne Tower, Suite 2000, 20th Floor, Miami, Florida 33131 by mail this 6th day of June, 1985.

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