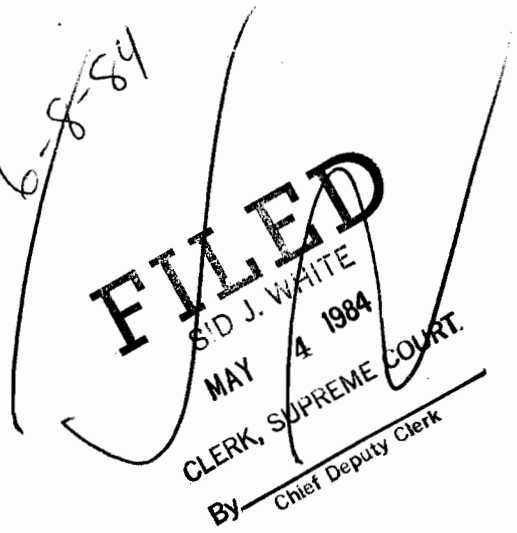

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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 THE MERITS

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Preliminary Statement

In its initial brief on the merits, Petitioner Oppenheimer & Co., Inc. ("Oppenheimer") urged that the Third District erred in holding that a provision of the Florida Securities Act bars arbitration of claims brought under that Act. See Oppenheimer initial brief, at 4-7. Oppenheimer also contended that even if that provision could be construed to bar arbitration, such a construction directly conflicts with §2 of the Federal Arbitration Act, 9 U.S.C. §2 (1976), and thus violates the Supremacy Clause of the United States Constitution. See Oppenheimer initial brief, at 8-12.

In her answer brief, Respondent Marcia Young ("Young") argues that §517.241 bars arbitration of state securities claims because that section encompasses the provision of the Securities Act of 1933 barring arbitration of federal securities law claims.[1/] Young also argues that the Federal Arbitration Act, which mandates arbitration of claims involving interstate commerce, does not apply to her state securities law claim.[2/]

As shown below, Young's contentions are without merit. If the Florida legislature intended to prohibit arbitration of state securities claims, and to repudiate its own strong policy favoring arbitration, it would have done so

---

1/ This provision of the Securities Act of 1933, 15 U.S.C. §77n (1976), is commonly referred to as the federal "anti-waiver" provision.

2/ Young further claims that Oppenheimer impliedly waived its right to arbitration in this case by filing an answer in a separate lawsuit instituted by Young in federal district court -- an issue which the Third District did not address. Because this issue has been raised for the first time in this appeal, Oppenheimer will respond to the waiver argument in Part III of this brief.

expressly. Moreover, as the United States Supreme Court has recently reaffirmed in Southland Corp. v. Keating, 104 S.Ct. 852 (1984), the Federal Arbitration Act mandates arbitration of all claims involving in interstate commerce, and there is no exception for state securities law claims.

ARGUMENT

I. THE FLORIDA LEGISLATURE DID NOT INTEND TO REPUDIATE ITS STRONG PUBLIC POLICY FAVORING ARBITRATION BY ENACTING §517.241.

Young's answer brief focuses almost exclusively on policy considerations allegedly disfavoring arbitration of securities law claims. She ignores the equally strong public policy considerations, as expressed both by Congress and the Florida legislature, in favor of arbitration.

The concept of arbitrating disputes has not always been favored by courts. At common law, courts uniformly held arbitration agreements unenforceable since they viewed such agreements as attempts to "oust" the courts of jurisdiction over disputes. See, e.g., Fenster v. Makovsky, 67 So.2d 427 (Fla. 1953).

In enacting the Federal Arbitration Act, Congress intended to eradicate this hostility toward arbitration. See S.Rep. No. 536, 68th Cong., 1st Sess., 2-3 (1924); Southland Corp. v. Keating, 104 S.Ct. 852 at 862 (1984)(Stevens, J., concurring in part and dissenting in part); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed, 364 U.S. 801 (1960). Section 2 of the Federal Arbitration Act embodies the federal policy mandating arbitration of disputes arising from transactions in interstate commerce by unequivocably declaring arbitration provisions "valid, irrevocable and

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enforceable." 9 U.S.C. §2 (1976). The Federal Arbitration Act constitutes federal substantive law which is equally enforceable in both state and federal courts. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S.Ct. 927 (1983); Donmoor, Inc. v. Sturtevant, 9 F.L.W. 837 (Fla. 5th DCA 1984)(and cases cited therein).

In 1957 the Florida legislature similarly abrogated the common law hostility toward arbitration by enacting the Florida Arbitration Code.[3/] Section 682.02, Fla. Stat. (1983), follows the Federal Arbitration Act by declaring arbitration provisions "valid, enforceable and irrevocable." Moreover, numerous Florida decisions have upheld arbitration clauses and have recognized Florida's strong public policy favoring arbitration of disputes. See, e.g., U.S. Fire Insurance Co. v. Franko, 443 So.2d 170 (Fla. 1st DCA 1983); Lapidus v. Arlen Beach Condominium Association, Inc., 394 So.2d 1102 (Fla. 3d DCA 1981); Raymond, James & Associates, Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980); Merkle v. Rice Construction Co., 271 So. 2d 220 (Fla. 2d DCA), cert. denied, 274 So.2d 234 (Fla. 1973). These courts have noted that arbitration is a desirable alternative to litigation since it provides an expeditious and inexpensive resolution to disputes.[4/]

3/ The Florida Arbitration Code is codified at Chapter 682, Fla. Stat. (1983).

4/ The Dade County Bar Association has recently begun a pilot program to encourage voluntary arbitration of civil disputes, in order to provide for speedy resolution of such disputes. 58 Miami Review and Daily Record No. 224, April 30, 1984, at 1.

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The Third District, in its decision below, ignored these state and federal policies favoring arbitration by construing §517.241(3), Fla. Stat. (1981),[5/] as barring arbitration of claims brought under the Florida Securities Act. That subsection reads in full:

> Remedies. --
>
> . . .
>
> (3) The same civil remedies provided by laws of the United States for the purchaser or seller of securities under any such laws, in interstate commerce, shall extend also to purchasers or sellers of securities under this chapter.

§517.241(3), Fla. Stat. (1981)(emphasis added).

Recognizing that this provision does not expressly bar arbitration of state securities law claims, Young argues that §517.241(3) impliedly prohibits arbitration based upon the following tortured reasoning: §517.241(3) refers to federal "civil remedies"; the federal anti-waiver provision is a "civil remedy"; thus, the Florida legislature must have intended to prohibit arbitration of state securities law claims.[6/]

In essence, Young attempts to justify the Third District's unusual construction of §517.241(3) by resurrecting the long abandoned common law hostility toward arbitration. Only on this basis can Young support the holding below.

5/ Although the Third District in Young cited §517.241(2),(3) and (4), it relied solely upon subsection (3) in concluding that Young's state securities claims were not arbitrable. The court did not explain how subsections (2) and (4) could possibly be read to prohibit arbitration of state securities claims.

6/ The Second District Court of Appeal rejected this reasoning in Raymond, James & Assoc., Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980), finding that the Florida Securities Act does not contain a statutory counterpart to the anti-waiver provision of the Securities Act of 1933.

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Young's argument is unpersuasive. If the Florida legislature intended to repudiate its stated policy favoring arbitration, as evidenced by the Florida Arbitration Code, and to carve out an exception for state securities claims, it certainly would have indicated the exception in unambiguous terms, either by adopting the language of the federal anti-waiver provision[7/] or by expressly prohibiting arbitration of state securities claims. The legislature, however, has not done so. What it has done is to state unambiguously that arbitration agreements are "valid, enforceable and irrevocable." §682.02, Fla. Stat. (1983). As for §517.241(3), that section means simply that whether a state securities claim is before a judge or an arbitrator, the same civil remedies (i.e., damages, injunctions, etc.) provided under federal law are also available.[8/]

Young cannot point to any express provision of the Florida Securities Act barring arbitration, but rather must rely on a strained reading of a statutory provision that does not even mention the subject of arbitration.

7/ The Wisconsin legislature has adopted the federal anti-waiver provision in the Wisconsin Uniform Securities Law. The state provision reads as follows: "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void." Wisc. Stat. §551.59(8).

8/ In our initial brief, we suggested that anti-waiver provision of the federal securities laws is not a "remedy," but rather merely a forum selection provision. Young disagrees and argues that the anti-waiver provision is a "remedy." The United States Supreme Court has stated, however, that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974). It follows, therefore, that a provision of law, such as that contained in §14 of the Securities Act of 1933, barring arbitration and requiring disputes to be resolved in courts is a "forum-selection" device, not a remedy.

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In light of Florida's strong public policy in favor of arbitration, and in the absence of clear legislative intent to the contrary, this Court should hold that §517.241 does not bar arbitration of claims brought under the Florida Securities Act.

II. WHATEVER READING IS GIVEN §517.241, THE FEDERAL ARBITRATION ACT COMPELS ARBITRATION OF YOUNG'S STATE CLAIMS.

Even if §517.241 can be read to bar arbitration of claims brought under the Florida Securities Act, that section directly conflicts with §2 of the Federal Arbitration Act and therefore is invalid under the Supremacy Clause of the United States Constitution. Southland Corp. v. Keating, 104 S.Ct. 852 (1984); Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983), cert. denied, 104 S.Ct. 1001 (1984). See Oppenheimer initial brief, at 8-12.

In her answer brief, Young does not dispute the existence of a direct and irreconcilable conflict between §2 of the Federal Arbitration Act and §517.241(3), as construed by the Third District. Rather, in an attempt to avoid the inevitable conclusion that the Federal Arbitration Act necessarily preempts the contrary state law, Kroog v. Mait, 712 F.2d 1148 at 1154 (7th Cir. 1983), cert. denied, 104 S.Ct. 1001 (1984), Young contends that Florida's alleged policy against arbitration of state securities claims and the federal policy against arbitration of "interstate securities transactions" somehow combine to override the Federal Arbitration Act. See Young answer brief, at 19-20.[9/] The fact that every other court which has considered

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9/ The Third District's recent decision in Sabates v. National Medical Centers, Inc., 9 F.L.W. 807 (Fla. 3d DCA 1984), belies Young's view

(continued)

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this issue has reached a contrary conclusion means, according to Young, that those courts have erred and should be overruled.[10/]

Southland Corp. v. Keating, 104 S.Ct. 852 (1984), makes clear that a state legislature may not prohibit arbitration of claims within the purview of the Federal Arbitration Act: "In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the

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9/ (continued)

that the holding in Young v. Oppenheimer & Co. is restricted to securities transactions. In Sabates the Third District held that state anti-trust claims were not arbitrable under Florida law, citing federal decisions holding that federal anti-trust claims are not arbitrable. Despite the fact that the state anti-trust claims undoubtedly involve interstate commerce, thereby triggering the Federal Arbitration Act, the court did not mention the Act.

Moreover, the Third District held that a state civil anti-theft claim was arbitrable, not because of the Federal Arbitration Act, but rather because the claim does not have a great impact upon the public, as do anti-trust claims. Further, the court indicated that the civil anti-theft statute "contains no indication that the legislature intended such claims to be within the exclusive province of the courts. . . ." 9 F.L.W. at 809 (emphasis added). The clear implication of the court's rationale is that the Third District may create exceptions to the Federal Arbitration Act beyond the securities field.

10/ Young asks this Court to overrule the following Florida decisions that hold directly contrary to the Third District's conclusions in Young v. Oppenheimer & Co.: Raymond, James & Assoc., Inc. v. Maves, 384 So.2d 716 (Fla. 2d DCA 1980)(holding that the Florida Securities Act does not prohibit arbitration of state securities claims); Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981)(holding that the Federal Arbitration Act applies to and mandates arbitration of state securities claims even if the claims are not arbitrable under state law); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transp., Inc., 442 So.2d 414 (Fla. 2d DCA 1983)(same).

Young also argues the decision of the United States Court of Appeals for the Seventh Circuit in Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983), cert. denied, 104 S.Ct. 1001 (1984), was wrongly decided. In that case the Seventh Circuit held, directly contrary to Young, that Wisconsin's state anti-waiver provision barring arbitration of state securities claims was preempted by the Federal Arbitration Act.

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states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Id. at 858 (emphasis added).

Young argues that Southland is distinguishable because the case involved the validity of an anti-waiver provision in a state franchise act, not a state securities act. According to Young, §517.241 can withstand Southland because that statutory provision reflects an overriding state policy favoring a judicial forum for securities claims. In other words, the dispositive factor distinguishing Southland is that Florida has a stronger state policy to preserve than California did in Southland.[11/]

Young's putative "distinction" is a distinction without a difference, as demonstrated by the United States Supreme Court's recent disposition of York International v. Alabama Oxygen Co., 104 S.Ct. 1260 (1984). In that case the United States Supreme Court vacated the judgment of the Alabama Supreme Court, which held that Alabama's longstanding public policy against arbitration of all claims brought in state court prevailed over the Federal Arbitration Act.[12/] See Alabama Oxygen Co. v. York International, 433 So.2d 1158 (Ala. 1983).

11/ It is interesting to note that the Florida statutory provision which allegedly evinces this special policy does not even mention the subject of arbitration. See §517.241(3).

12/ The Alabama statute provided:

> The following obligations cannot be specifically enforced:
>
> . . .
>
> (3) An agreement to submit a controversy to arbitration.

§8-1-41, Ala. Code (1975). It is difficult to imagine a stronger or more clearly expressed state policy against arbitration.

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The United States Supreme Court remanded the case to the state court "for further consideration in light of Southland Corporation v. Keating, 465 U.S. ____, 104 S.Ct. 852, 78 L.Ed. 2d ____ (1984)." York, 104 S.Ct. at 1260. On the heels of Southland, the United States Supreme Court's disposition of York demonstrates, contrary to Young's position, that state public policy considerations disfavoring arbitration, however strong, cannot affect the validity of arbitration agreements which Congress has declared "valid, irrevocable and enforceable." 9 U.S.C. §2 (1976).13/

Young appears to argue that the Florida legislature has the constitutional authority to enact an exception to §2 of the Federal Arbitration Act with respect to state securities claims. Young stresses that Congress has enunciated a strong public policy in favor of protecting securities investors and argues that the Florida legislature has effectuated that policy by enacting §517.241(3). We recognize the investor-protection philosophy behind the federal securities laws, but as set forth below, those laws do not empower the states to bar arbitration of state securities claims.

Young appears to argue alternatively that despite the clear mandate of the Federal Arbitration Act, there is a federal-state prohibition against

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13/ Moreover, Young is incorrect in stating that there is no comprehensive federal franchising regulatory scheme. Pursuant to its rule-making authority to promulgate substantive prohibitions against unfair trade practices pursuant to the Federal Trade Commission Act, 15 U.S.C. §45, see Nat'l Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974), the Federal Trade Commission in 1978 enacted comprehensive disclosure requirements and prohibitions concerning franchising and business opportunity ventures, which are contained at 16 C.F.R. §§436.1-3 (1983). These rules, like the federal securities laws, reflect a comprehensive federal regulatory scheme designed to insure full disclosure to franchise investors.

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arbitrating all claims, both federal and state, arising from "interstate securities transactions." There is no such all-encompassing prohibition.

The flaw in Young's argument is that the proper analysis under the Supremacy Clause is not whether the Florida Securities Act is in conflict with the Securities Act of 1933, but instead whether the Florida Securities Act is in conflict with the Federal Arbitration Act. Young's invocation of "the dual federal-state regulatory scheme in the securities field and the Supreme Court's interpretation of the 'intention of Congress concerning the sale of securities' in Wilko v. Swan, 346 U.S. at 427, 438, 74 S.Ct. at 188, is essentially irrelevant to the required analysis." Kroog v. Mait, 712 F.2d 1148 at 1154 (7th Cir. 1983), cert. denied, 104 S.Ct. 1001 (1984).

That the federal securities laws do not extend their prohibition against arbitration to state securities law claims is evident from a plain reading of §14 of the Securities Act of 1933. That section provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities and Exchange] Commission shall be void." (emphasis and brackets added). The words "this subchapter" refer to the Securities Act of 1933. See 15 U.S.C. §77a (1976). Thus, the federal anti-waiver provision, which has only been read to bar arbitration of federal securities law claims, Wilko v. Swan, 346 U.S. 427 (1953), is limited, by its express terms, to claims arising under those laws, and therefore does not extend to state securities law claims. See Sawyer v. Raymond James & Associates, Inc., 642 F.2d 791 (5th Cir. 1981).

This Court should not accept Young's unprecedented assertion that the federal anti-waiver provision impliedly extends to state securities law claims

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by virtue of Wilko v. Swan, for such an extension would be contrary to the strong federal policy in favor of arbitrating disputes arising from interstate commerce transactions. The United States Supreme Court has recently reaffirmed that §2 of the Federal Arbitration Act:

> [i]s a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S.Ct. 927, 941 (1983). The Court stressed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." Id.

Moreover, the United States Supreme Court has itself retreated from Wilko v. Swan. For example, the Court has held that federal securities law claims arising from international commercial transactions are arbitrable, despite Wilko. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). That the anti-waiver provisions of the federal securities laws do not even affect all claims arising under those laws indicates that such provisions are not a barrier to arbitration of state law claims.[14/]

The United States Court of Appeals for the Seventh Circuit in Kroog v. Mait, 712 F.2d 1148 (7th Cir. 1983), cert. denied, 104 S.Ct. 1001 (1984), dealt with the precise issue before this Court, i.e., whether it would be appropriate "to apply the policy of Wilko to constrict the application of the

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14/ In addition, several federal courts have construed Wilko narrowly in order to facilitate arbitration of certain federal securities law claims. See, e.g., Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838 (2d Cir. 1971); Financial House, Inc. v. Otten, 369 F.Supp. 105 (E.D. Mich. 1973).

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Arbitration Act to claims based on breaches of state securities law." 712 F.2d at 1154. The Seventh Circuit found it would be "inappropriate":

> This is so because the Supreme Court in Wilko was concerned solely and expressly with the proper reconcilation of two "not easily reconcilable" federal mandates--the Securities Act and the Arbitration Act. It is a non sequitur to assume, as does plaintiff, that this lateral balance of diametrically opposed federal policies, and consequent delimitation of the Arbitration Act, would be applied vertically to restrict the Arbitration Act's impact on conflicting state procedures. To the contrary, to the extent that the Supreme Court held that a Wisconsin-style federal nonwaiver provision and the Arbitration Act were in direct conflict, its Wilko opinion suggests that the Wisconsin procedural provision would have to yield under the "actual conflict" and "physical impossibility" standards enunciated in Florida Avocado Growers, Inc. v. Paul, 373 U.S. 141, 83 S.Ct. 1216-1217 (1963), and its predecessors and progeny.

Id. at 1154 (emphasis in original; footnote and citations omitted). Accord Marley v. Drexel Burnham Lambert, Inc., 566 F.Supp. 333, 335 n.1 (N.D. Tex. 1983).

The Seventh Circuit, therefore, concluded as follows: "Here we face a naked and irreconcilable conflict between a precise federal mandate to arbitrate and a state provision which prevents arbitration. Once that conflict has been described, we need go no further, for federal preemption in such cases is automatic." Kroog, 712 F.2d at 1154.

The same conclusion is mandated in this case.

III. OPPENHEIMER DID NOT IMPLIEDLY WAIVE ITS CONTRACTURAL RIGHT TO ARBITRATION IN THIS ACTION BY FILING AN ANSWER IN A SEPARATE FEDERAL COURT ACTION.

A. Introduction.

It is significant to note that Young does not contend that Oppenheimer waived its right to arbitration by its conduct in this action. On the contrary, Oppenheimer filed a motion to compel arbitration immediately after

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Young instituted her state court action. Young merely claims that by answering the second amended complaint filed in a separate federal court action, Oppenheimer impliedly waived its right of arbitration in this action.

In support of her position on the waiver issue, Young cites Florida decisions holding that the filing of an answer in state court proceedings without demanding arbitration constitutes a waiver of that right. The state court cases cited by Young do not address the question whether Oppenheimer waived its right to arbitration in this suit by filing an answer in the federal court suit. Federal law, not state law, determines the answer to that question. As set forth below, Oppenheimer did not have the right to arbitrate the claims asserted in the federal court action and therefore could not have waived that right. Oppenheimer's conduct in a federal forum as respects the waiver issue is governed by federal law, and under federal law, Oppenheimer did not waive its right to arbitration.

B. In the Federal Court Action, Oppenheimer Had No "Right" of Arbitration to Waive.

Waiver is the intentional relinquishment of a known right. Thomas N. Carlton Estate, Inc. v. Keller, 52 So.2d 131 (Fla. 1951); Hochman v. Lazarus Homes Corp., 324 So.2d 205 (Fla. 3d DCA 1975). If the "right" does not exist, one cannot waive that right.

In her second amended complaint in federal district court, Young 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 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 identical factual allegations.

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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 claims in Young's second amended complaint) as to which an arbitrator would be "impelled to review the same facts" which supported the federal securities law claim. Sawyer v. Raymond James & Associates, Inc., 642 F.2d 791, 793 (5th Cir. 1981). In other words, a party, such as Oppenheimer, faced with both federal and state securities claims based on "the same facts" would have had its motion to compel arbitration denied and, under existing law, need not file a futile motion to preserve the right of arbitration. Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982).

The state trial judge ruled that Oppenheimer had not waived its right to arbitration and recognized that Oppenheimer should not be penalized for failing to file a futile motion in what the trial court aptly characterized as a "catch-22 position":

> It is this 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).

Young mistakenly asserts that the state and federal securities claims were severable because "in actual fact, the federal court severed the claims, so they were not incapable of being severed." Young answer brief, at 27 n.16. This contention confuses severability with federal subject matter

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jurisdiction. The federal district court did not "sever" the pendent state securities claim, as Young asserts, but rather sua sponte dismissed that claim for lack of subject matter jurisdiction on the authority of Stowell v. Ted S. Finkel Investment Services, Inc., 489 F.Supp. 1209 (S.D. Fla. 1980). Stowell holds that a federal district court will not exercise its discretionary subject matter jurisdiction over a pendent state securities claim to avoid jury confusion in considering the federal and state securities claims. Consequently, the federal district court's dismissal of Young's pendent state claim for lack of subject matter jurisdiction had nothing to do with whether the federal and state claims were inextricably intertwined.

C. Federal Law Governs the Waiver Issue and the Mere Filing of an Answer is not a Waiver.

Once the Federal Arbitration Act is invoked, federal law governs all questions of interpretation, construction, validity, revocability and enforceability of the arbitration agreement. Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949 (1972). Specifically, the question whether Oppenheimer waived its right to arbitration by filing an answer in the federal court action is governed by federal law:

> 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 at 941-42 (emphasis added; footnote omitted). Accord Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos, 553 F.2d 842 (2d Cir. 1977).

It is particularly appropriate to apply federal law 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 court action by reference to federal law.

Under federal law, a party seeking to establish a waiver of the right to arbitration must show conduct resulting in delay and substantial prejudice. The Second Circuit has expressed the federal 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 the plaintiff, no waiver had occurred. Other cases that have reached identical results are ITT World Communications, Inc. v. Communications Workers, 422 F.2d 77 (2d Cir. 1970); and Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329 (4th Cir. 1971). In these cases the defendant had answered the complaint without demanding arbitration, but in the absence of actual prejudice to the plaintiff, the courts held that no waiver had occurred.[15/]

Similarly, the record in the instant case is devoid of any basis for establishing a waiver under federal law. Young has failed to show any

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15/ Accord Graham Contracting, Inc. v. Flagler County, 444 So.2d 971 (Fla. 5th DCA 1984) (applying federal test to waiver issue in state court proceedings).

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prejudice resulting from Oppenheimer's filing an answer in the federal court action. Moreover, Young has failed to show any delay on the part of Oppenheimer in demanding arbitration; to the contrary, the record establishes that Young waited seven months after the federal judge sua sponte dismissed her pendent state law claims to file this action, and that immediately after Young instituted this action, Oppenheimer demanded arbitration. Accordingly, this Court should affirm the trial court's finding that Oppenheimer did not waive the right of arbitration in this action.

CONCLUSION

For the reasons stated above, this Court should reverse the Third District and stay the proceedings against Oppenheimer in the trial court pending arbitration of Young's claims against Oppenheimer.

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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 Respondent 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 3rd day of May, 1984.

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