SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO:SC03-1610

RAYMOND JAMES FINANCIAL SERVICES, INC., a Florida corporation and RICHARD VANDENBERG,

Petitioners,

vs.

STEVEN W. SALDUKAS and STESAL INVESTMENTS, LLC.,

Respondents,

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS
LAKELAND, FLORIDA

PETITIONERS' REPLY BRIEF ON THE MERITS

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JURISDICTION

Saldukas and the LLC agree that this Court has discretionary jurisdiction to review the decision below because it expressly and directly conflicts with a decision of this Court or another district court of appeal on the same question of law. (ABR, p. 1-2) Saldukas and the LLC then interject another reason that this Court should accept jurisdiction: to resolve the abuse of mandatory arbitration clauses. Respondents' perceived belief that a mandatory arbitration clause was "abused" in this case is a non-issue, and not part of this appeal. Neither Saldukas nor the LLC argued this issue in either the trial court or Second District, and it is too late to raise it now. Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999). Even if it had been raised, there are simply no facts to support Respondents' argument. As will be shown, *infra*, Raymond James always agreed to arbitrate with the proper entity with whom it had an arbitration agreement. Raymond James has acted consistent with its right to arbitrate from the inception of the parties' dispute.

REPLY STATEMENT OF THE CASE AND THE FACTS

Raymond James and Vandenberg correct the following misstatements made in Respondents' answer brief:

1. Respondents continuously state or imply that Raymond James and Vandenberg moved to dismiss on the substantive merits of Respondents' claim. (ABR, p.6, 13, 44) This statement is false. Raymond James and VandenBerg moved to dismiss Plaintiffs' complaint on purely procedural grounds. (A3:1) The only point they raised in the motion to dismiss was whether the Partnership was properly registered to do business in Florida and thus able to maintain the lawsuit. (A3:9-10)

2. Respondents constantly assert Raymond James initially took the position that it had no obligation to arbitrate the case. (ABR, p. 3-4, 12, 38) These statements are incomplete. From the inception of the NYSE arbitration, Raymond James recognized its duty to arbitrate with the entity that signed the customer agreement containing the arbitration clause, but simply questioned whether that party was the same as the entity that filed the NYSE arbitration. (A1:Ex3:1)

3. Respondents represent that they "participated in the [NYSE] arbitration only for the purpose of scheduling." (ABR, p. 5) This statement is untrue. Respondents participated in the selection of a mediator and the arbitrators, attended a pre-

hearing conference, agreed to an arbitration date, and agreed to discovery. (A9:ExA; A11:7) In short, the arbitration proceeded, with Respondents actively facilitating its progress.

4. Respondents assert that Raymond James never withdrew its motion to dismiss after it filed its answer in arbitration. (ABR, p. 7) In fact, Raymond James requested the NYSE to place its motion to dismiss on hold until the completion of discovery. (A9:Ex.A; A11:3)

5. Respondents claim that Raymond James would not sign a submission agreement to arbitrate. (ABR, p. 7) Raymond James agreed to sign a submission agreement if Respondents provided the merger documents to show that the LLC was a correct entity to the arbitration. (A16:31)

REPLY ARGUMENT

I. RAYMOND JAMES AND VANDENBERG'S CONDUCT WAS CONSISTENT WITH THEIR RIGHT TO ARBITRATE GIVEN THAT RAYMOND JAMES AND VANDENBERG ACKNOWLEDGED THEIR DUTY TO ARBITRATE WITH THOSE PERSONS AND/OR ENTITIES WITH WHOM THEY HAD A CONTRACTUAL AGREEMENT TO ARBITRATE, AND NEVER ACTIVELY LITIGATED THE MERITS OF PLAINTIFFS' CLAIMS.

Respondents argue facts not shown by this record and legal positions never taken by Raymond James nor VandenBerg. Respondents defend the trial court's waiver finding based upon Raymond James' alleged refusal to arbitrate. (ABR, p. 38) According to Respondents, Raymond James "den[ied] the existence of any agreement to arbitrate." (ABR, p. 38) Raymond James' initial correspondence shows otherwise:

> Contrary to the insinuations of Claimants, Dr. Saldukas never had an individual account at RJFS. While it is admitted that he did have an IRA account or accounts, a review of the Statement of Claim discloses that there has been no claim advanced on behalf of his IRA account. Consequently, insofar as Dr. Saldukas, individually, is concerned, there was never any contractual relationship between him and RJFS which would give rise to an agreement to arbitrate. Conspicuously absent from the Statement of Claim are allegations to the effect that somehow the New York Stock Exchange has jurisdiction over this cause.
>
> Similarly, there was no customer or contractual relationship between Stesal Investments, LLC, and RJFS. ***Stesal Investments Limited Partnership did have an***

> ***account at RJFS (see Exhibit E to the Statement of Claim), but Stesal Investments Limited Partnership is not a party to the case.***

(A1:Ex3)(emphasis added) In sum, Raymond James never took the position that it did not have to arbitrate ***at all.*** Raymond James merely questioned who was the correct party and whether that party had filed the arbitration demand. Though Respondents do their best to alter the facts to bolster their waiver argument, all their massaging and rewriting of the facts cannot convert Raymond James' actual conduct into conduct inconsistent with the right to arbitrate.

These facts also contravene Respondents' newly-raised argument that Raymond James abused the mandatory arbitration process. (ABR, p. 1-2) From the initiation of the lawsuit, Raymond James asked Respondents' counsel for documents to show that the LLC and the Partnership were one and the same. For reasons never explained in the lower courts or here, Respondents failed to provide Raymond James with those documents. If those documents had been timely provided, the arbitration would have proceeded, and the parties would have likely resolved their dispute by now. (A16:30-31) All of the acts taken by Raymond James that Respondents (and the lower courts) deem inconsistent with the right to arbitrate resulted from Respondents' refusal

to provide the documents Raymond James requested. It is certainly unfair for Respondents to refuse Raymond James the documents needed to show their right to arbitrate, then argue that Raymond James' request for those documents amounted to acts inconsistent with the right to arbitrate.

Respondents argue that Raymond James' conduct in the arbitration was inconsistent with its right to arbitrate because it filed a motion to dismiss, not an answer. (ABR, p. 42) The Arbitrator's Manual expressly provides for the filing of a motion to dismiss, and under the exact same circumstances occurring here:

> **Prehearing Motions**
>
> > Although arbitration is an informal process, a variety of matters may be the subject of prehearing motions, such as the appropriateness of arbitration, hearing locale, and postponements.
>
> **Motions Regarding the Appropriateness of Arbitration**
>
> > Any party may challenge the appropriateness of arbitration. ***A party may request that the arbitrators dismiss the arbitration and refer the parties to their remedies at law.*** One type of case that may be appropriate for such a dismissal is a case in which claims are asserted against parties who have not agreed to arbitrate. Since such parties may not agree to participate in arbitration, a referral to legal remedies may avoid multiple proceedings and ultimately conserve legal resources. (emphasis added)

www.nyse.com/pdfs/arbmanual.pdf (emphasis added) Moreover, despite Respondents' assertions to the contrary (ABR, p. 42), Raymond James is not a member of the NYSE, and thus not bound to arbitrate under its Rule 600(a).

Respondents next argue that Raymond James and VandenBerg's litigation in circuit court was inconsistent with their right to arbitrate. (ABR, p. 43) According to Respondents, Raymond James and VandenBerg filed a motion to dismiss that went to the merits of the claim because, if granted, it would have resolved their right to compensation. (ABR, p. 44) This assertion is extraordinary. Raymond James and VandenBerg moved to dismiss on the basis that the company filing the lawsuit was not registered to do business in Florida. If granted, the order would have no res judicata effect on Respondents' claim for damages, but would have simply required Respondents to comply with Florida's corporate registration law before proceeding with a lawsuit.

Respondents' argument that Raymond James should have submitted this "standing" issue to the arbitrators is equally puzzling. (ABR, p. 44) Raymond James argued that Respondents could not maintain a lawsuit in ***a Florida court*** until they registered under Florida law. (A3:7) Obviously, this same argument could not be made to the arbitrators in a NYSE proceeding.

Notably absent from Respondents' brief is contradiction of all the Florida cases that require litigation ***on the merits*** before there can be a finding of acts inconsistent with the right to arbitrate. (IBR, p.16-17) Also absent from Respondents' brief is any authority to support their argument that Raymond James' motion to dismiss for failure to register its companies is litigation on the merits. In the absence of either, Respondents cannot prevail on their assertion that Raymond James and VandenBerg acted inconsistent with their right to arbitrate based upon the limited pleadings Raymond James and VandenBerg filed in the circuit court.

II. UNDER EITHER THE FEDERAL ARBITRATION ACT OR FLORIDA ARBITRATION CODE, A PARTY ASSERTING WAIVER OF THE RIGHT TO ARBITRATE SHOULD BE REQUIRED TO PROVE IT WAS PREJUDICED BY THE ACTS ALLEGEDLY INCONSISTENT WITH THE RIGHT TO ARBITRATE.

Respondents approach the issue certified by the Second District by insinuating that Raymond James and VandenBerg seek acceptance of a novel issue, accepted by only the fringe legal community. Not only do the majority of federal courts require a showing of prejudice for there to be a waiver of the right to arbitrate (IBR, p. 19, n.5), judges from the court below question its own precedent that holds to the contrary (IBR, p. 21-22, n.6). While Respondents' historical review of the waiver

doctrine is interesting, it ignores the fact that courts nationwide continue to march towards the prejudice requirement.

Respondents implicitly recognize that this dispute falls under the FAA, but claim that, under the FAA, arbitration contracts cannot receive more favorable treatment than other contracts. (ABR, p. 15-17) Respondents confuse the presumption favoring arbitration (the "construction issue") with the concern that arbitration agreements be placed on the same footing as other contracts (the "enforcement issue").

The first is a rule of contract construction. Because of an expressed federal public policy favoring arbitration Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987), courts apply a presumption favoring arbitration. McKee v. Home Byuers Warranty Corp., 45 F. 3d 981 (9th Cir. 1995). True, this rule of construction ***is*** different than those afforded to other types of contracts. Nonetheless, this presumption supports valid legislative goals related to resolving disputes expeditiously and inexpensively. Wilko v. Swan, 346 U.S. 427, 438 (1953)("Congress has afforded... participants an opportunity to generally secure prompt, economical and adequate solutions of controversies through arbitration...").

Conversely, the other concern raised by Respondents - that

arbitration agreements are on equal footing with other contracts – addresses the historical prejudice courts had towards ***enforcing*** arbitration agreements. In the early 1960's, the Supreme Court and other courts recognized that the FAA was meant to overcome judicial hostility towards arbitration contracts. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967). Accordingly, the language upon which Respondents rely does not undermine the contract-construction presumption favoring arbitration. Rather, this principle recognizes that arbitration agreements were to be viewed like any other contract, given the same right to ***enforcement***. Id. When the Supreme Court states that "arbitration agreements [are] as enforceable as other contracts, but not more so," the Court simply means that parties may not be forced to arbitrate disputes ***that they never agreed to arbitrate.*** E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002)(recognizing that the policy favoring arbitration does not override the ***clear absence*** of an agreement to arbitrate). So, in determining the scope of an admitted agreement to arbitrate, the courts apply the presumption favoring arbitration (the "contract issue"). Id. Respondents do not deny the existence of an agreement to arbitrate. Thus, the "enforcement issue" and its attendant analysis is inapplicable.

Further, Respondents' argument ignores the Supreme Court's ***specific holding*** that the presumption of arbitrability applies to waiver defenses. In Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), which issued ***after*** Prima Paint, the Supreme Court expressly recognized that waiver defenses should be construed in a manner favoring arbitration:

> 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.

The Court continues to follow this rule. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 62 n.8 (1995). At bottom, then, the Supreme Court itself has stated that allegations of waiver should be construed in a manner favoring arbitration. Requiring a showing of prejudice to find waiver ***supports*** the Supreme Court's mandate that defenses to arbitrability should be resolved in favor of arbitration. Respondents' assertion that the minority view is the better reasoned view conflicts with the Supreme Court's continued support of its rule that waiver defenses should be resolved in favor of arbitration. (ABR, 26-31)

Respondents oddly argue that Raymond James and VandenBerg

improperly request this Court to hold that federal law preempts Florida law. (ABR, p. 18-20) The United States Supreme Court has addressed and resolved the preemption issue, and it is not open to debate. In Volt Info. Sciences v. Boardd of Trustees, 489 U.S. 468 (1989), the Court stated:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."

Id. at 478. See also Jensen v. Rice, 809 So. 2d 895, 899 (Fla. 3d DCA 2002). Thus, the FAA ***does*** preempt state law that would require litigation when parties agreed to arbitrate.

Respondents attempt to circumvent this point by explaining that 9 U.S.C. § 2 provides that state principles control whether the contract has been revoked, so "waiver" is controlled by Florida law, not the FAA. (ABR, p. 18) As one federal court noted in rejecting a similar argument:

> We further conclude that ***waiver of the right to compel arbitration is a rule for arbitration, such that the FAA controls.*** Rules for arbitration include principles that affect the "allocation of power between alternative tribunals." Mastrobuono, 514 U.S. at 60. Waiver, in the arbitration context, involves the circumstances under which a party is foreclosed from electing an arbitration forum. Therefore, the question

> of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators. Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)(explaining that "an allegation of waiver" must be resolved in light of the FAA's preference for arbitration). Accordingly, the FAA, and not Illinois law, supplies the standard for waiver.

Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002), *as amended* 289 F. 3d 615 (9th Cir. 2002), *cert den*. 537 U.S. 825 (2002).

Respondents are clamoring over a non-existent dilemma. This Court need not resolve whether Florida law requires prejudice to find waiver. Raymond James and VandenBerg merely ask that this Court apply the ***federal*** presumption favoring arbitrability to hold that ***under the FAA,*** when one party argues waiver of the right to arbitrate through acts inconsistent with the right to arbitrate, the presumption favoring arbitration should invoke a prejudice analysis. This proposed rule of construction does not transmute Florida's law on waiver; Respondents' histrionics are unjustified.

But even if this Court believed it was necessary to resolve Florida law, Respondents incorrectly claim that attaching a prejudice requirement to a waiver defense is novel under Florida law. (ABR, p. 21) As noted by the First District in Benedict

v. Pensacola Motor Sales, Inc., 846 So. 2d 1238, 1240-1241, n. 2 (Fla. 1st DCA 2003), "Florida courts consistently require a showing of prejudice prior to compelling strict compliance with many procedural requirements." Indeed, those courts that follow the no- prejudice requirement have begun to question their own precedent. GE Life & Annuity Assur. Co. v. Vogel, 849 So. 2d 330 (Fla. 2d DCA 2003)(per curiam Altenbernd, C.J., and Salcines and Covington, JJ.) While Florida courts are free to fashion their own rule under the Florida Arbitration Code (for matters not involving interstate commerce), consistent with the mandates of Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999), Florida law should parallel the FAA. Any other result undermines the arbitration process.

Respectively Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Christopher T. Vernon, Esquire and Benjamin C. Iseman, Esquire, 3080 Tamiami Trail, E., Naples, FL 34112-571; Bruce W. Barnes, Esquire, Bruce W. Barnes, P.A., 5801 Ulmerton Road, Suite 200, Clearwater, FL 33760-3951 and F. Paul Bland, Jr., Esquire, 1717 Massachusetts Avenue, NW, Suite 800, Washington, D.C. 20036 on January 20, 2004.

By: _____

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and is printed in Courier New font.

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Hala Sandridge

TABLE OF CONTENTS

JURISDICTION iv

REPLY STATEMENT OF THE CASE AND THE FACTS 1

REPLY ARGUMENT 3

I. RAYMOND JAMES AND VANDENBERG'S CONDUCT WAS CONSISTENT WITH THEIR RIGHT TO ARBITRATE GIVEN THAT RAYMOND JAMES AND VANDENBERG ACKNOWLEDGED THEIR DUTY TO ARBITRATE WITH THOSE PERSONS AND/OR ENTITIES WITH WHOM THEY HAD A CONTRACTUAL AGREEMENT TO ARBITRATE, AND NEVER ACTIVELY LITIGATED THE MERITS OF PLAINTIFFS' CLAIMS. 3

II. UNDER EITHER THE FEDERAL ARBITRATION ACT OR FLORIDA ARBITRATION CODE, A PARTY ASSERTING WAIVER OF THE RIGHT TO ARBITRATE SHOULD BE REQUIRED TO PROVE IT WAS PREJUDICED BY THE ACTS ALLEGEDLY INCONSISTENT WITH THE RIGHT TO ARBITRATE. 7

CERTIFICATE OF SERVICE 14

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT 15

TABLE OF AUTHORITIES

Decisional Authority Page

Benedict v. Pensacola Motor Sales, Inc.
846 So. 2d 1238 (Fla. 1st DCA 2003) 12

Dade County School Board v. Radio Station WQBA
731 So. 2d 638 (Fla. 1999) 3

E.E.O.C. v. Waffle House, Inc.
534 U.S. 279 (2002) 9

GE Life & Annuity AsSurety Co. v. Vogel
849 So. 2d 330 (Fla. 2d DCA 2003) 12

Jensen v. Rice
809 So. 2d 895 (Fla. 3d DCA 2002) 11

Mastrobuono v. Shearson Lehman Hutton
514 U.S. 52 (1995) 10, 11

McKee v. Home Byuers Warranty Corp.
45 F.3d 981 (9th Cir. 1995) 8

Moses H. Cone Memorial Hospital v. Mercury Construction Corp.
460 U.S. 1 (1983) 9, 11

Prima Paint Corp. v. Flood & Conklin Manufacturing Co.
388 U.S. 395 (1967) 9

Seifert v. U.S. Home Corp.

750 So. 2d 633 (Fla. 1999) 13

Shearson/American Express, Inc. v. McMahon
482 U.S. 220 (1987) 8

Sovak v. Chugai Pharm. Co.
280 F.3d 1266 (9th Cir. 2002)
as amended 289 F. 3d 615 (9th Cir. 2002)
cert den. 537 U.S. 825 (2002). 12

Volt Information Sciences v. Boardd of Trustees
489 U.S. 468 (1989) 10, 11

Wilko v. Swan
346 U.S. 427 (1953) 8

Statutory Authority

9 U.S.C. § 2 11