Civil No. 19-2058

In the
United States Court of Appeals for the Third Circuit

CHRISTINA WILLIAMS, *ET AL.*,

Appellees,

v.

MEDLEY OPPORTUNITY FUND II, LP, *ET AL.*,

Appellants.

On Appeal from the
United States District Court for the Eastern District of Pennsylvania

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF DEFENDANTS SEEKING REVERSAL

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in arbitration generally, commercial arbitration, and commercial law. Furthermore, this *amicus curiae* has represented parties in arbitration proceedings, frequently chairs arbitrations for the Financial Industry Regulatory Authority and other bodies, and regularly lectures on the arbitration-related questions implicated in the pending controversy. This case addresses the interpretation of the Federal Arbitration Act, the enforcement of agreements to arbitrate, and the conduct of arbitration proceedings in a wide variety of fora. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

QUESTION PRESENTED

This *amicus curiae* brief is limited to addressing the lower court's resolution of the Defendants' Motions to Compel Arbitration. *See Williams v. Red Stone, Inc.*, ___ F.Supp.2d ___, ___, *slip op*. at 6 (No. 18-cv-2747) (E.D. Pa. June 3,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Federal Rule of Appellate Procedure 29(a). Plaintiffs and Defendants both consented to the filing of this *amicus curiae* brief.

2019) (Goldberg, J.) ("*Williams*"). This *amicus curiae* expresses no opinion as to any other substantive or procedural holdings made by the court below.

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth by the Defendants herein.

SUMMARY OF ARGUMENT

Reversal should be granted for reason that the lower court erred in denying the Defendants' Motions to Compel Arbitration. That portion of the decision below is unsupported by the text of the Federal Arbitration Act, a statutory regime which empowers arbitration. The district court's holding nullifies contractual terms calling for arbitration, and so deprives the parties of the benefit of their bargain. The lower court's ruling frustrates the strong federal policy favoring arbitration, and cannot be reconciled with longstanding Supreme Court jurisprudence, which for decades now has vigorously upheld the enforceability of agreements to arbitrate. Therefore, and with respect, the decision below must be reversed with regard to its resolution of the arbitration question, and remanded for further proceedings consistent with that reversal.

ARGUMENT

I. REVERSAL SHOULD BE GRANTED FOR REASON THAT THE DECISION BELOW IS CONTRARY TO THE TEXT OF THE FEDERAL ARBITRATION ACT.

The decision below invalidating the parties' agreement to arbitrate is in direct conflict with the plain text of the Federal Arbitration Act, as well as the plenitude of robust Supreme Court precedents upholding that same statutory scheme. This *amicus* therefore respectfully joins in the call for reversal.

Since 1925, arbitration has been regulated, and, moreover, encouraged, by the Federal Arbitration Act. 9 U.S.C. § 1, *et seq.* (the "FAA"). As recently and clearly postulated by the Supreme Court, "[t]he Federal Arbitration Act requires courts to enforce private arbitration agreements." *New Prime Inc. v. Oliveira*, 586 U.S. ___, ___ *slip op*. at 1 (No. 17-340) (January 15, 2019) (Gorsuch, J.). Now approaching its centennial, the FAA assures that "the enforceability of agreements to arbitrate remains indefatigable." Anthony M. Sabino, "Supreme Court Illuminates Enforceability of Arbitration Agreements," 262 *New York Law Journal* at p. 4, cl. 4 (July 3, 2019) (analyzing *Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (No. 17-988) (April 24, 2019) (Roberts, C.J.)).

Section 2 is the "primary substantive provision of the Act," and thereby enjoys primacy in the statutory regime. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983). The statute mandates that a written provision in a contract which calls for the arbitration of controversies "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis supplied). *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989). It is noteworthy that this key component of the FAA is stated in the imperative "shall," and not the permissive "may" or similar.

Subsequent portions of the federal arbitration law also unmistakably work towards the goal of enforcing agreements to arbitrate. *See* 9 U.S.C. § 3 (providing for a stay of proceedings for a matter referable to arbitration), § 4 (supplying jurisdiction to compel arbitration), and § 9 (establishing a mechanism for confirming and enforcing an arbitration award). *See also Volt*, *supra*, 489 U.S. at 474 (analyzing Sections 2 and 4). In sum and substance, every aspect of the statutory scheme supports the enforcement of agreements to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("*Concepcion*").

The Supreme Court has repeatedly pronounced that the aim of the FAA is to ensure private agreements to arbitrate are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quotation omitted). The high bench has frequently held that the Act places agreements to arbitrate on "an equal footing with other contracts." *Concepcion*, *supra*, 563 U.S. at 339 (quotations omitted), *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Volt*, *supra*, 489 U.S. at 474, 478.

Recently, the Court declared that the FAA safeguards arbitral accords from "judicial interference." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ___, *slip op.* at 3 (No. 16-285) (May 21, 2018) (Gorsuch, J.). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (the plain language of the Act evinces a clear legislative intent to prohibit judicial obstructionism to arbitration).

As one of the more recent additions to the Supreme Court's pantheon of arbitration jurisprudence, *Epic* confirms that the statutory components of the FAA constitute a cohesive scheme which "require[s] courts to respect and enforce agreements to arbitrate." *Epic*, *supra*, 584 U.S. at ___, *slip op.* at 5. Quite telling is the closing paragraph of *Epic*, wherein the Court characterizes the statutory

regime as a solemn command from Congress "that arbitration agreements…must be enforced as written." *Id.*, 584 U.S. at ___, s*lip op.* at 25.

One final aspect of the FAA must be considered for purposes of the case at bar. Section 2 of the Act contains a "savings" clause, which can render an agreement to arbitrate unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This subpart leaves intact generally applicable defenses to contract enforcement, such as fraud, duress, and unconscionability, as proper grounds for declining to uphold an arbitration agreement. *Concepcion*, *supra*, 563 U.S. at 339 (quotation and citation omitted). The savings clause is consistent with the law's intent to place arbitral accords on the same footing as ordinary contracts. *See id*.

To be certain, the Supreme Court has carefully cabined Section 2's savings clause, ruling that it does not evince any intent to preserve judicial interpretations "that stand as an obstacle to the FAA's objectives." *Id.* at 343 (invalidating a state law rule purporting to make agreements to arbitrate unenforceable). Therefore, judicial constructs which confound agreements to arbitrate are not salvaged by this statutory subcomponent. *Id.* at 339. *See also Epic*, *supra*, 584 U.S. at ___, *slip op.* at 1-2 (Thomas, J., concurring) (the sole basis for setting aside an agreement to

arbitrate are those defenses concerning the formation of the underlying arbitral accord).

In consideration of all the above, the decision below is unsustainable, and, accordingly, must be reversed. The district court's rationale is unmoored from the statutory text. It is furthermore antithetical to the statutory regime, for it undercuts the overriding legislative command that agreements to arbitrate *shall* be valid, irrevocable, and enforceable.

Nor does the reasoning of the court below find support within the Supreme Court's landmarks expounding upon the text of the FAA. Quite to contrary: the district judge's resolution of the instant case more closely resembles holdings propounded by the lower courts during the era of judicial hostility to arbitration, outcomes now prohibited by the statutory scheme, and banished by unequivocal Supreme Court decisions interpreting the Act.

Furthermore, it is significant that the district court did not invalidate the arbitration agreement at issue here on the basis of fraud, duress or unconscionability, the three principal defenses preserved by the savings clause of Section 2, and acknowledged by high Court precedent, *Concepcion* being foremost

in those teachings. Thus, such grounds for refusing recognition of an arbitral pact are inapplicable to the matter at hand.

For all these reasons, this *amicus* respectfully submits that the lower court's ruling is contrary to the statutory regime which has compelled the enforcement of arbitral accords for nearly a century. Respectfully, the decision below should be reversed, and the parties directed to proceed to arbitration, pursuant to their agreement.

II. REVERSAL SHOULD BE GRANTED FOR REASON THAT THE DECISION BELOW NULLIFIES CONTRACTUAL TERMS, AND DEPRIVES PARTIES OF THE BENEFIT OF THEIR BARGAIN.

The decision below nullifies the contractual terms entered into by the parties prior to the instant controversy, and deprives them of the benefit of their original bargain. Accordingly, the lower court's ruling should be reversed, and the parties directed to return to the arbitral forum.

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). *See also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). Thus, arbitral pacts, "like other contracts, are enforced according to their terms." *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (quotations and citations omitted) (1995). *See also id*. at 943 ("arbitration is simply a matter of contract").

In one of its most recent iterations of the foregoing precept, a unanimous Supreme Court postulated that, pursuant to the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. ___, ___, *slip op*. at 4 (No. 17-1272) (January 8, 2019) (Kavanaugh, J.) (citation omitted).

In relation thereto, it has long been a bedrock principle of Supreme Court jurisprudence that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010), *quoting Volt*, *supra*, 489 U.S. at 479 (quotations omitted). The high Court's most recent proclamation on the matter irrefutably demonstrates the adamantine quality of the foregoing maxim. *See Lamps Plus*, *supra*, 587 U.S. at ___, *slip op.* at 7, *quoting Stolt-Nielsen*, *supra*, 559 U.S. at 681.

Precisely for these reasons, the Supreme Court's arbitration landmarks have consistently affirmed that "the FAA requires courts to honor parties' expectations." *Concepcion*, *supra*, 563 U.S. at 351. *Accord Henry Schein*, *supra*, 586 U.S. at ___,

slip op. at 8 ("the courts must respect the parties' decision[s] as embodied in the contract"). Equally true are the corollaries that courts must "interpret the contract as written," and that "a court may not override the contract" to arbitrate. *Henry Schein*, *supra*, 586 U.S. at ___, *slip op*. at 5.

Agreements to arbitrate must therefore be rigorously enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). As with any other contract, the parties' intentions control. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Thus, the proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleaned from the arbitral accord. *Volt*, *supra*, 489 U.S. at 479.

It is well known that parties may categorize the controversies they wish to submit to arbitration. *See generally Mitsubishi Motors*, *supra*, 473 U.S. at 628 (parties may choose to include or exclude statutory claims from arbitration, but, once made, are bound to that choice). For decades, the Supreme Court has endorsed entrusting arbitrators with the authority to decide issues arising under solemn and complex statutory schemes, such as the federal securities laws, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987), the

Racketeer Influenced and Corrupt Organizations Act, *id.* at 242, and the federal antitrust laws. *American Express*, *supra*, 570 U.S. at 233-34.

Furthermore, given that arbitral pacts are just like ordinary contracts, the high Court has steadfastly acknowledged that signatories are also at liberty to shape their arbitration protocols as they see fit. *Mastrobuono*, *supra*, 514 U.S. at 57, *quoted by Stolt-Nielsen*, *supra*, 559 U.S. at 683 (the parties' ability to customize the arbitration process "[u]nderscor[es] the consensual nature of private dispute resolution"); *Lamps Plus, supra*, 587 U.S. at ___, *slip op.* at 7 ("Parties may generally shape [arbitration] agreements to their liking by specifying…the issues subject to arbitration, [and] the rules by which they will arbitrate."). *See also Concepcion*, *supra*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes" is to allow the contracting parties to devise arbitration mechanisms they deem best suited to their particular needs.).

In accord with the foregoing, reversal of the decision below is appropriate for reason that the lower court's holding failed to rigorously enforce the terms of the parties' agreement to arbitrate, and denied the parties the benefit of their bargain.

In the instant case, the district court acknowledged the salient language of the underlying agreement to arbitrate. Notably, the opinion reproduced, at length, the dispositive portion of the arbitral pact. *Williams*, *supra*, ___ F.Supp.2d at ___, *slip op*. at 2, 3.

Yet the court below failed to give the parties the benefit of the terms which they had bargained for, and which they deemed worthy of heavy emphasis in the physical solemnization of their agreement.

In addition, certain aspects of the arbitral accord described above are likely beyond question. The first is that the agreement to arbitrate was arrived at by consent; it was not imposed by coercion. Second, the signatories contracted to arbitrate any controversy pursuant to specified bodies of law. Third and last, no doubt the parties expected a court to honor the terms of their arbitral pact.

The lower court's decision confounds both the terms of the agreement to arbitrate, and the parties' expectations. The decision below sets aside the words agreed to, and imposes new terms, hitherto unknown to the parties. The district court's ruling reinvests a court with adjudicative power, contrary to the more limited role for the judicial branch which was apparently contracted for and

expected by the parties. In sum, the lower court's adjudication usurps the terms of the relevant accord, and frustrates the expectations of the parties.

For all these reasons, it is respectfully submitted by this *amicus* that the decision below contradicts long and well established principles providing that arbitration is a matter of contract, that agreements to arbitrate must be enforced according to their terms, and that the expectations of the contracting parties are to be honored. Respectfully, the holding below should therefore be reversed, and the parties directed to proceed to arbitration, as their comprehensive agreement specifies.

III. REVERSAL SHOULD BE GRANTED FOR REASON THAT THE DECISION BELOW CONTRADICTS THE STRONG FEDERAL POLICY FAVORING ARBITRATION.

The lower court's decision should be reversed because it frustrates the strong federal policy favoring arbitration.

A long and unbroken line of Supreme Court landmarks informs us that, well into the opening decades of the Twentieth Century, there was widespread judicial hostility towards arbitration as an alternative to traditional litigation. More recently, the Court reminds that once upon a time "courts routinely refused to

enforce agreements to arbitrate" or found other means to reduce their effectiveness. *Epic*, *supra*, 584 U.S. at ___, *slip op.* at 5.

The strong federal policy validating arbitration closed that unfortunate chapter in American law. *Moses H. Cone*, *supra*, 460 U.S. at 24. *See also* Anthony M. Sabino, "Awarding Punitive Damages in Securities Industry Arbitration: Working For A Just Result," 27 *U. of Richmond L. Rev.* 33, 34-39 (1992) (summarizing existing landmarks announcing the strong federal policy favoring arbitration). Consonant with that mandate, for many decades now the Supreme Court has repeatedly and consistently put aside obstacles to the fulfillment of the robust policy favoring arbitration. *See generally Epic*, *supra*, 584 U.S. at ___, *slip op.* at 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes.").

Notwithstanding that the strong federal policy favoring arbitration has prevailed for nearly a century, "remnants of [a] 'litigation only' ideology occasionally crop up." *See* Anthony M. Sabino & Michael A. Sabino, "Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements, Despite State Court Resistance," 61 *Nassau Lawyer* at p. 3, cl. 2 (December 2011). As point in fact,

even now, in the Twenty First Century, the Supreme Court continues to warn that judicial hostility towards arbitration "manifest[s] itself in a great variety of devices and formulas." *Concepcion*, *supra*, 563 U.S. at 342 (quotations and citations omitted). This readily explains why the high bench, even in its newest arbitration holdings, has explicitly reaffirmed its obligation to guard against "new devices" intended to defeat agreements to arbitrate. *Epic*, *supra*, 584 U.S. at ___, *slip op.* at 9, *quoted by* Michael A. Sabino & Anthony M. Sabino, "'Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 *New York Law Journal* at p. 4, cl. 4 (June 6, 2018).

In light of the foregoing, the district court's decision should be reversed.

First, the lower court's reasoning cannot be reconciled with the strong federal policy favoring arbitration. In diverting the instant controversy from the arbitration forum, and redirecting it towards the courtroom, the ruling below contravenes the legislative mandate first embodied by the FAA nearly one hundred years ago. The outcome now under review is more redolent of judicial hostility towards arbitration than it is compliant with the vigorous national policy favoring this medium of dispute resolution.

Second, it is of paramount significance that the rationale of the lower court here more closely resembles the very devices and formulas long disfavored by the Supreme Court as contradictory to the strong federal policy favoring arbitration, contrivances which a legion of high Court precedents have consistently prohibited as grounds for denying the enforcement of an arbitral accord. Fidelity to the high bench's many remonstrations that such artifices are not to be tolerated compels reversal of the district court's holding.

For all these reasons, this *amicus* respectfully submits that the decision below is inconsistent with the strong federal policy favoring arbitration, and thereby contradicts a legislative choice made into an imperative nearly a century ago. Respectfully, the lower court's ruling should be reversed, and the parties directed to proceed to arbitration, as contemplated by their agreement.

CONCLUSION

Respectfully, and for all the reasons set forth herein above, the decision below should be reversed, and the parties directed to proceed to arbitration, pursuant to the terms of their contract.

Respectfully submitted,

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COMBINED CERTIFICATIONS

BAR MEMBERSHIP

Pursuant to Third Circuit L.A.R. 28.3(d), I, Anthony Michael Sabino, certify that I am a member of the Bar of this Court, having been admitted on April 24, 1991.

WORD COUNT AND TYPEFACE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) because it contains **3,980** words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionately-spaced typeface using Microsoft Word in 14-point Times New Roman font.

IDENTICAL COMPLIANCE OF BRIEF AND VIRUS CHECK

Pursuant to Third Circuit L.A.R. 31.1(c), I certify that the foregoing E-Brief and the hard copies of the Brief have identical text. I also certify that the file has no viruses.

Dated: September 16, 2019

By: /s/ *Anthony Michael Sabino*
Anthony Michael Sabino
Amicus Curiae

CERTIFICATION OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing Brief of *Amicus Curiae* Anthony Michael Sabino with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that seven (7) paper copies of the foregoing Brief of *Amicus Curiae* shall be filed by hand delivery to the Office of the Clerk, United States Court of Appeals for the Third Circuit, within five days of the date of electronic filing of the Brief.

Dated: September 16, 2019

By: /s/ *Anthony Michael Sabino*
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