

NO. 09-0432

In The
SUPREME COURT OF TEXAS

***IN RE: OLSHAN FOUNDATION REPAIR COMPANY, LLC AND
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD.***

REAL PARTIES IN INTEREST: KENNETH & VICKIE KILPATRICK

**OLSHAN'S REPLY TO THE
KILPATRICKS' BRIEF ON THE MERITS**

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ARGUMENT

A. **THE COURT SHOULD ADHERE TO ITS HOLDING IN *L&L KEMPWOOD* THAT PARTIES MUST SPECIFICALLY EXCLUDE THE FAA IF THEY WISH TO AVOID ITS APPLICABILITY**

In *In re L&L Kempwood Associates, L.P.*, 9 S.W.3d 125 (Tex. 1999), this Court held that if the parties to a transaction affecting interstate commerce wish to exclude the FAA from governing arbitration of disputes arising from the transaction, they must “specifically exclude the application of federal law.” *Id.* at 127-28. Thus, a mere reference to state law, without a specific exclusion of federal law, is not sufficient to overcome the strong federal presumption in favor of arbitration.

The Kilpatricks, however, contend in their Brief on the Merits that the choice of law clause in the parties’ Agreement can have no other purpose than to exclude federal law, so it should be viewed as tantamount to a specific exclusion of federal law. Kilpatricks’ Brief on the Merits, at 37-38, 32-34. The Kilpatricks go even further, suggesting that parties should be required to expressly invoke the FAA in a contract if they wish it to apply, in effect a presumption *against* arbitration. *Id.* at 29, 36. These arguments stand *L&L Kempwood* on its head, and they should be rejected.

In *L&L Kempwood*, this Court made clear that a choice of law provision that invokes the law of the place of performance does not exclude federal law, since federal law applies in the states just as much as state law does. 9 S.W.3d at 127 (“Houston, where the apartment renovation project was located, is subject to federal law as well as Texas

law.”); *Capital Income Properties v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (per curiam) (“the Federal [Arbitration] Act is part of the substantive law of Texas”); *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 338 n.8 (5th Cir. 2004). When parties agree to be bound by the law of the place of performance, they are presumably submitting themselves to all the laws—state and federal—applicable in that location. Absent a clear statement of intent to the contrary, the courts will not infer an intent to exclude federal law.

The same logic applies to the choice of law provision in this case, which states that the arbitration shall be conducted “pursuant to the arbitration laws in your state.” Where a transaction affects interstate commerce, the FAA applies in the State of Texas just as much as Texas arbitration law does. Thus, this language gives no indication that the parties agreed to exclude the federal arbitration laws. *See Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 289-90 (3rd Cir. 2001) (“choice-of-law clause sheds little, if any, light on the parties’ actual intent”), *overruled on other grounds, Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

Another reason why a reference to state arbitration law does not imply an exclusion of federal arbitration law is that state and federal regulation of arbitration proceedings are not mutually exclusive; quite the contrary, concurrent state and federal control is very common. The FAA guarantees the right to arbitrate, but the substantive rights of the parties and the procedures related to arbitration are usually supplied by state law. *See, e.g., Porter Hayden Co. v. Century Indemnity Co.*, 136 F.3d 380, 383 & n.5 (4th

Cir. 1998) (choice of law provision referring to Maryland law construed to mean only that Maryland substantive law would be used to decide claims arising out of the parties' contractual relationship, federal law applied to construction of arbitration clause). The FAA does not "occupy the field" of arbitration so as to leave no role for state law; state law is preempted only where it interferes with the goals of the FAA.¹ *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477 (1989); *Freudensprung*, 379 F.3d at 338 n.8.

Because the federal guarantee of the right to arbitrate readily meshes with state regulation of the parties' substantive legal rights and procedural aspects of the arbitration process, a reference to the "arbitration laws in your state" in no way rules out the concurrent application of federal and state arbitration laws.² Indeed, this type of choice of law provision is best read as the selection of one state's laws over another, without any preference expressed concerning how federal law will interact with state law. *Porter Hayden Co.*, 136 F.3d at 383 n.5 (quoting *Volt*, 489 U.S. at 468, 489-90 (Brennan, J., dissenting) (choice of law provision is normally intended to "determine that the law of one State rather than that of another State will be applicable; they simply do not speak to any interaction between state and federal law.")); *Sovak v. Chugai Pharmaceutical Co.*,

¹ For example, the attorney-signature requirements the Kilpatricks invoke in this case to nullify the parties' arbitration agreement. *See In re Nexion Health*, 173 S.W.3d 67 (Tex. 2005).

² This is true whether the choice of law provision is located within the arbitration clause itself, or elsewhere in the contract. One applies specifically to the arbitration clause, the other applies to the entire agreement including the arbitration clause. In either case, the choice of law provision applies to the arbitration clause.

280 F.3d 1266, 1270 (9th Cir. 2002); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (choice of law provision read as incorporating only New York substantive law, not the allocation of power between court and arbitrator).

Finally, if a mere reference to state law were sufficient to wall off the FAA, this would “effectively emaciate the Act” because so many contracts contain choice of law clauses invoking the law of a particular location or state. *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 938 (6th Cir. 1998); *Precision Press, Inc. v. MLP U.S.A., Inc.*, 620 F. Supp. 2d 981, 992 (N.D. Iowa 2009).

L&L Kempwood was correctly decided and is in accord with most of the other courts that have considered the issue.³ If parties to a contract that affects interstate commerce wish to exclude the FAA, they must say so specifically, so that their intentions are “abundantly clear.”⁴ *See Puerto Rico Telephone v. U.S. Phone Manufacturing Corp.*,

³ The Kilpatricks argue that the Court should construe the Agreement against Olshan since Olshan drafted it. The doctrine of *contra proferentem* does not help the Kilpatricks here because there is no ambiguity to construe against Olshan—as just discussed, a choice of law provision referencing state law is no indication that the parties intended to exclude the FAA. Moreover, this case does not involve an ambiguity relating to the arbitration process, such as the question of whether the arbitrator could award punitive damages in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (resolving ambiguity concerning scope of available relief against drafter). The Kilpatricks are asking this Court to infer that the parties intended to exclude the FAA, and avoid arbitration altogether based on state law that would otherwise be preempted, on the basis that the Agreement refers to the “arbitration laws in your state.” Presuming an intent to exclude the FAA, regardless of who drafted the Agreement, would contradict *L&L Kempwood* and the strong federal presumption in favor of arbitration.

⁴ The contrary cases cited by the Kilpatricks conflict with *L&L Kempwood*, and evidence a lingering hostility to arbitration, a hostility the FAA was intended to neutralize. *E.g.*, *Glazer’s Distributors v. NWS-Illinois*, 876 N.E.2d 203 (Ill. Ct. App. 2007); *Bishop v. We Care Hair Development*, 738 N.E.2d 610 (Ill. Ct. App. 2000); *Owens v. National Health*, 263 S.W.3d 876 (Tenn. 2007).

427 F.3d 21, 27 (1st Cir. 2005), *overruled on other grounds*, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Freudensprung*, 379 F.3d at 338 n.8; *Porter Hayden Co.*, 136 F.3d at 383 & n.5; *Sovak*, 280 F.3d at 1270; *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *Precision Press*, 620 F. Supp. 2d at 991; *Khan v. Parsons Global Services, Ltd.*, 480 F. Supp. 2d 327, 337-38 (D.C. 2007).⁵ Only a clear statement of intent to exclude the FAA is enough to overcome the “strong default presumption” that the FAA governs an arbitration affecting interstate commerce. *Sovak*, 280 F.3d at 1269-70; *see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *Puerto Rico Telephone*, 427 F.3d at 27.⁶

In this case, the choice of law provision in the Agreement does not exclude federal law, and therefore the FAA applies and preempts the state law grounds asserted by the Kilpatricks for nullifying the parties’ agreement to arbitrate.

⁵ A similar line of cases holds that parties who wish to exclude the United Nations Convention on International Sale of Goods, and opt instead for domestic law, must do so in explicit language. *See BP Oil Int’l v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003); *American Mint LLC v. GOSoftware, Inc.*, 2006 WL 42090 (M.D. Pa. 2006).

⁶ Most of the cases discussing this issue fall into four categories: (1) cases where a party wishes to invoke a state law procedure affecting the course of an arbitration, such as the stay of arbitration pending resolution of related proceedings in *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); (2) cases where a party wishes to invoke a state law restriction on the remedies available in arbitration, such as *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); (3) cases where a party argues state law provides different standards for review of arbitral awards, such as *Puerto Rico Telephone v. U.S. Phone Manufacturing Corp.*, 427 F.3d 21 (1st Cir. 2005), *overruled on other grounds*, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that parties may not modify review standards specified in FAA); and (4) cases where state law is invoked as a *bar* to arbitration even taking place, such as *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266 (9th Cir. 2002) (waiver through conduct in litigation), and the instant case. The force of the federal presumption in favor of arbitration should be at its zenith when state law is claimed to defeat the right to arbitrate altogether.

**B. THE COURT SHOULD REJECT THE
KILPATRICKS' ATTACK ON AAA ARBITRATION**

The Kilpatricks' arguments concerning unconscionability boil down to two related contentions: (1) that the American Arbitration Association ("AAA") charges so much money for its services that it would be unfair to enforce the Kilpatricks' agreement to arbitrate their dispute with Olshan; and (2) that the plaintiffs in the *Ayala* case proved that the AAA was unreasonably expensive, and this holding should be extended to any other case that is claimed to be "similar" to *Ayala*. *Olshan Foundation Repair Co. v. Ayala*, 180 S.W.3d 212 (Tex. App.—San Antonio 2005, pet. denied)

As discussed in Olshan's Petition for Mandamus, speculation about what AAA arbitration might cost is not enough to justify abrogation of an arbitration agreement, particularly one that is governed by federal law. Arbitration agreements are of course not inherently unconscionable; on the contrary, arbitration agreements are presumed to be valid and enforceable under both Texas and federal law. *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 301 n.5 (5th Cir. 2004) (citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999)).⁷

⁷ The Kilpatricks suggest that arbitration can be even more expensive than litigation, seeking to undermine the positive view of arbitration as an economical alternative to litigation. Kilpatricks' Brief on the Merits, at 17. According to this Court, arbitration is a "rapid, inexpensive alternative to traditional litigation" *In re Prudential Insurance Co.*, 148 S.W.3d 124, 138 (Tex. 2004). Olshan has found no case authorities disagreeing with this view of arbitration, nor does there appear to be any movement afoot in Congress or the Texas Legislature to abolish the policy favoring enforcement of arbitration agreements. The United States Supreme Court recently disallowed parties from agreeing to expand upon the limited scope of review of arbitral decisions under the FAA, in part to "maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008)

The Kilpatricks presented no evidence that they will not be able to afford AAA arbitration in this case. There is no evidence of their financial circumstances. There is no evidence they asked the AAA for an estimate or statement of anticipated fees (that would require them to estimate the amount of damages they are seeking, which they obviously would rather not do). There is no evidence they asked the AAA to accommodate their financial situation (whatever it may be), as allowed by AAA rules. There is no evidence that AAA arbitration would be significantly more expensive than litigation. There is no evidence they will not have the opportunity to recover their costs in the arbitration.

Clearly, playing the “*Ayala* card” and asserting without proof that a case is similar to *Olshan Foundation Repair Co. v. Ayala*, 180 S.W.3d 212 (Tex. App.—San Antonio 2005, pet. denied), is not enough to obviate an arbitration agreement. But in the interest of providing guidance to the courts below, the Court may wish to address the question of what type of evidence is required to defeat an arbitration agreement on the basis that it will be prohibitively expensive.

Olshan submits that a party seeking to defeat arbitration on the basis of prohibitive cost should be required, at the very least, to produce probative evidence of the likely cost of the arbitration and to show that this cost will produce substantial hardship to the party.

In the case of the AAA, this proof should include evidence that the AAA will not accommodate the party's financial situation, as allowed by various AAA rules.⁸

The Kilpatricks have done none of these things, so they argue that the burden should be shifted to Olshan to show that the arbitration will *not* be prohibitively expensive. Kilpatricks' Brief on the Merits, at 11-12. The Court should reiterate that the party resisting arbitration has the burden of proof, and hold that the Kilpatricks did not meet their burden.

C. THE KILPATRICKS' VOID CONTRACT CLAIM MUST BE ARBITRATED

The Kilpatricks acknowledge that existing federal law requires them to submit their void contract claim to the arbitrator. Kilpatricks' Brief on the Merits, at 19-21. They then proceed to ask this Court to ignore this law and take the void contract issue away from the arbitrator, on the basis that involving the arbitrator would be a waste of time.

The United States Supreme Court specifically addressed this issue in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006):

⁸ The Kilpatricks complain that Olshan did not introduce the AAA rules in the trial court. The Agreement refers to the "commercial arbitration rules of the AAA," so the trial court was certainly on notice that the rules exist. The AAA rules are also germane in this Court as legislative facts bearing on the legal issue of what evidence should be required to prove that an arbitration agreement will be unconscionably expensive. *See In re Sigmar*, 270 S.W.3d 289, 302-03 (Tex. App.—Waco 2008, orig. proceeding). The AAA rules are easily verifiable by reference to the AAA website, a source whose accuracy cannot reasonably be questioned, and the Kilpatricks do not dispute the substance of the rules. *See, e.g., Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987) (taking judicial notice of AAA rules); *Barbieri v. K-Sea Transportation Corp.*, 2006 WL 3751215, n.5 (E.D.N.Y. 2006) (same); *Century Satellite, LLC v. Echostar Satellite, LLC*, 395 F. Supp. 2d 487, 493 (S.D. Tex. 2005) (same).

It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum — and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Id. at 448-49 (discussing *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Thus, the Kilpatrick's void contract claim must be submitted to the arbitrator, not the court. Under the severability rule established over 40 years ago in *Prima Paint*, the arbitration clause retains its vitality even if the contract as a whole is void.

Finally, the Kilpatricks contend that Olshan does not dispute their void contract claim, but this is not correct. Olshan will present its defenses to the claim in the arbitral forum; it is not required to prove that it has bona fide defenses as a condition to enforcing an arbitration agreement under the FAA.

D. OLSHAN DID NOT WAIVE ITS RIGHT TO ARBITRATE

The Kilpatricks suggest that Olshan waived its right to arbitrate the dispute pursuant to the parties' Agreement. The Kilpatricks previously raised this issue in their Response to Olshan's Motion for Temporary Relief, and Olshan incorporates herein its Reply to that Response, including the affidavits and exhibits attached thereto. (A copy of the Affidavits of Roderick MacRae is attached under Tab 1.)

Olshan promptly asked the trial court to compel arbitration after the suit was filed, has consistently sought to exercise its right to arbitration, and has done nothing at any point to indicate any intent to abandon that right. To briefly reprise what happened time-wise (explained in more detail in Olshan's Reply): This case is one of seven similar lawsuits that were filed by the Kilpatricks' attorneys against Olshan. In October 2008, shortly after the court of appeals denied Olshan's mandamus petition in this case, one of the Kilpatricks' attorneys, Steven Thornton, called Olshan's counsel and suggested mediating the seven cases.⁹ He said he would provide a list of suggested mediators and a proposed order in which the cases would be mediated.

Counsel for Olshan did not hear back from Mr. Thornton for three months, so counsel called him on January 22, 2010 to follow up. Thornton apologized for the delay and explained that his father had died recently (his grandmother had also recently died). He called back the next day and proposed that the *Romans* case be mediated first. Olshan agreed, and the *Romans* case was mediated on February 12, 2009, but it did not settle.

In late February 2009, the parties agreed to continue this case and the *Tisdale* case (No. 09-0433). The Agreed Motion for Continuance¹⁰ referenced the parties' plan to

⁹ The Kilpatricks state that Mr. Thornton was not their lead counsel (Response to Brief on the Merits, at 40), but do not suggest that he did not have authority to represent them or propose the mediation process. He is still representing the Kilpatricks, and his name appears on their briefing in this Court.

¹⁰ Exhibit A to Affidavits of Roderick MacRae, attached to Olshan's Reply to Response to Motion for Temporary Relief.

mediate the seven cases, and stated that the parties had been working together cooperatively to move the cases forward.

Ultimately, however, the parties did not carry out their plan to mediate all seven cases, and Olshan proceeded with its mandamus filings in this Court. Olshan filed its mandamus petitions in this case and the *Tisdale* case on May 22, 2009, followed by the *Waggoner* petition (No. 09-0474) on June 9, 2009, and the *Tingdale* petition (No. 09-0703) on August 21, 2009.

The timeline for this case is as follows:

Trial court denied plea in abatement:	July 31, 2008
Mandamus petition filed in court of appeals:	August 20, 2008
Court of appeals denied petition:	October 2, 2008
Plaintiffs' attorney proposes mediation in 7 cases:	October 22, 2008
Olshan's attorney calls back for status:	January 22, 2009
Plaintiffs' attorney proposes mediation in <i>Romans</i> :	January 23, 2009
<i>Romans</i> case mediated, does not settle:	February 12, 2009
Parties agree to continue <i>Kilpatrick</i> and <i>Tisdale</i> :	February 23, 2009
Mandamus petition filed in Supreme Court:	May 22, 2009

There is no unexplained lengthy period of delay here, and no indication of lack of diligence on Olshan's part. Nor is there any evidence that the Kilpatricks were prejudiced in any way by delay. The Kilpatricks claim their "homeowner's expert" (actually one of three construction-related experts they designated in this case) may not be able to work on this case due to a "medical complication," referring presumably to the affidavit of Ron Tallent attached to their Brief on the Merits. *See* Kilpatricks' Brief on the Merits, at 40. In the affidavit Tallent says he has problems with

his eyesight, and has trouble walking. However, there is nothing in the affidavit that explains why he would be unable to function as an expert in this case.

Further, the Kilpatricks' attorneys have made no effort to designate another expert to testify in Mr. Tallent's place. They designated their experts on May 29, 2009 (see the designations attached to the Affidavit of Jeffrey D. Janota, attached hereto under Tab 2), and surely would have designated another expert to replace Mr. Tallent by now, if they thought it was necessary.

Finally, the Kilpatricks designated another expert (Peter De La Mora) who has served as an expert on construction repair costs in other cases, and presumably would be available to give opinions based on the information assembled by Mr. Tallent.¹¹ See Affidavit of Jeffrey D. Janota (Tab 2) (citing *Allison v. Fire Insurance Exchange*, 98 S.W.3d 227, 255 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m.) (finding De La Mora competent to act as appraiser in construction repair case)).

There is thus no showing of unreasonable or unexplained delay, no showing of prejudice caused by delay, and no evidence that Olshan intended to abandon its arbitration rights. See *In re International Profit Associates, Inc.*, 274 S.W.3d 672, 676-77 (Tex. 2009) (no showing defendant “lacked interest or did not intend to press its motion to dismiss”); *Rivercenter Associates v Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (mandamus denied where party failed to explain four-month delay in filing motion to

¹¹ Of course, the underlying data must be reliable and support the opinions given. See *State Farm Lloyds v. Blacklock*, 2005 WL 2155635 (Tex. App.—Waco 2005, pet. denied) (under heading “Pennington’s Report,” citing *Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)).

quash jury demand based on contractual jury waiver); *see also Perry Homes v. Cull*, 258 S.W.3d 580, 584, 594-95 (Tex. 2008) (recognizing strong presumption against waiver of arbitration rights under Texas law, particularly if there has been a timely demand for arbitration; waiver of arbitration rights requires showing of prejudice).

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I hereby certify that on this 21st day of December, a true and correct copy of the above and foregoing document has been forwarded in accordance with the Texas Rules of Appellate Procedure on the following counsel of record:

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