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COURT OF APPEALS

STATE OF NEW YORK

CUSIMANO, ET AL.,

Respondent,

-against-

No. 200

SCHNURR, ET AL.,

Appellant.

20 Eagle Street
Albany, New York 12207
November 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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Appearances:

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1 CHIEF JUDGE LIPPMAN: We'll go now to 200,
2 Cusimano v. Schnurr.

3 Counsel, would you like any rebuttal time?

4 MR. HELLER: Yes, Your Honor. I'd like one
5 minute, please.

6 CHIEF JUDGE LIPPMAN: One minute; go ahead.

7 MR. HELLER: May it please the court, my
8 name is Alan Heller. I'm from the firm of Garvey
9 Schubert Barer, and I represent all the appellants
10 except for Appellant Bernadette Strianese. We were
11 asked by the chief clerk to split our argument in
12 two, so I'm going to handle the waiver argument while
13 Mr. McCormick is going to handle the FAA argument.

14 CHIEF JUDGE LIPPMAN: All right, let's talk
15 about the waiver argument. Go ahead.

16 MR. HELLER: Okay. So the Cusimanos
17 charted their own - - - charted - - - charted their
18 own course, and that's why, as a result, they waived
19 their right to have the arbitrators determine
20 limitation.

21 CHIEF JUDGE LIPPMAN: If - - -

22 JUDGE STEIN: If - - - if - - - I'm sorry.
23 If it's under the federal standard, is that enough?

24 MR. HELLER: Absolutely, because there - -
25 - there was prejudice here. There was extreme

1 prejudice. There's - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but there's a -
3 - - there's a very strong presumption, right, under
4 the FAA that - - - that, you know, you're going to
5 have the terms of that arbitration agreement carried
6 out and you really have to have a pretty strong case
7 to get away from that.

8 MR. HELLER: Well, assuming the FAA
9 applies, but - - -

10 CHIEF JUDGE LIPPMAN: Assume it applies for
11 the sake of this.

12 MR. HELLER: Assuming it applies for this -
13 - - for this argument, the problem is is that there
14 could be a waiver - - -

15 CHIEF JUDGE LIPPMAN: What's the test if
16 the FAA applies?

17 MR. HELLER: The FAA is that if there's
18 prejudice. The test if the FAA applies, that is - -
19 - Mr. McCormick is going to deal with that issue and
20 that is the Allied-Bruce and the progeny - - -

21 CHIEF JUDGE LIPPMAN: Right, okay.

22 MR. HELLER: So for my argument, we're
23 going to assume it applies, okay. But I'm going to -
24 - -

25 CHIEF JUDGE LIPPMAN: Okay, go ahead.

1 MR. HELLER: But I'm going to show that
2 there was waiver, because there was substantive
3 waiver here, and the substantive waiver is that they
4 put the issue of limitations before Justice Ramos,
5 and let - - - let's even go back to the beginning.
6 They were the plaintiffs here. They filed this case.
7 It's not like we were a defendant - - - they were a
8 defendant that was answering a complaint and did some
9 preliminary discoveries and some preliminary
10 discussions. They were the plaintiff and - - -

11 JUDGE PIGOTT: Could you - - - could you
12 have moved to dismiss the complaint saying that the
13 FAA applied?

14 MR. HELLER: Could we have moved to
15 dismiss? We did not believe the FAA applies, so we
16 would not have done that. What we were going to do -
17 - - and we let the court know on day one when we
18 appeared when there was a motion to disqualify us as
19 counsel - - - in the record, we said we're here to
20 deal with disqualification and we are going to move
21 to dismiss on limitations and send this to
22 arbitration. We wanted to arbitrate from day one,
23 but we - - -

24 CHIEF JUDGE LIPPMAN: So would you - - -
25 would you say that - - - that the other side was

1 trying to avoid arbitration?

2 MR. HELLER: Absolutely.

3 CHIEF JUDGE LIPPMAN: Was that the tenor -

4 - -

5 MR. HELLER: Absolutely.

6 CHIEF JUDGE LIPPMAN: - - - of the

7 litigation?

8 MR. HELLER: Absolutely. Look at the

9 record. Let's - - - let's start from day one.

10 CHIEF JUDGE LIPPMAN: What - - - what - - -

11 gives us the - - - the high points that it - - - that

12 demonstrate that they were trying to avoid

13 arbitration.

14 MR. HELLER: Let's start - - -

15 CHIEF JUDGE LIPPMAN: And that their

16 actions were inconsistent - - -

17 MR. HELLER: Okay, so I - - -

18 CHIEF JUDGE LIPPMAN: - - - with

19 arbitration.

20 MR. HELLER: - - - I will start with the

21 two lawsuits - - -

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 MR. HELLER: - - - they commenced in Nassau

24 County. There was one lawsuit on a company called

25 Berita and one lawsuit on a - - -

1 CHIEF JUDGE LIPPMAN: Right.

2 MR. HELLER: - - - company called the FLIP.
3 Each of them had arbitration clauses. Our clients
4 were forced to move to compel arbitration in each of
5 those cases. Those pre-dated this case, but involved
6 the same entities at issue. After losing the motion
7 to compel arbitration with the Berita case, they
8 continued to appeal that case through the date that
9 the statement of claim was filed by them in this
10 case.

11 CHIEF JUDGE LIPPMAN: But didn't in the end
12 - - - didn't - - - in the end, weren't they okay with
13 arbitration?

14 MR. HELLER: They were only okay with
15 arbitration because Justice Ramos told them that
16 their case was going to be dismissed. He already
17 dismissed parts of it.

18 CHIEF JUDGE LIPPMAN: So it was a last
19 resort for them to go to arbitration?

20 MR. HELLER: Absolutely. Because what
21 happened was they - - - they were given two chances
22 by Justice Ramos to go to arbitration. The first
23 chance was when Mr. Calica, prior counsel, showed up
24 in court in the motion to disqualify and Justice - -
25 -

1 JUDGE RIVERA: Well, he actually asked and
2 the judge actually asked - - -

3 MR. HELLER: He asked them. He asked them.

4 JUDGE RIVERA: - - - and then he said - - -

5 MR. HELLER: He said - - -

6 JUDGE RIVERA: - - - you don't want to go
7 to arbitration? Correct, Your Honor.

8 MR. HELLER: Yeah, correct, Your Honor.

9 And then Mr. Pegno was asked the same question during
10 oral argument before Justice Ramos has told him that
11 his claims were time barred, they said Mr. Pegno, why
12 don't you go to arbitration? He says, I - - - why
13 should I go to arbitration? Just because Mr. Heller
14 wants me to?

15 So they didn't want to go to arbitration.
16 The only reason why they went to arbitration is
17 because Judge Ramos said, I think your claims are
18 friv - - - frivolous. I am going to dismiss them.
19 I'm going to give you an opportunity to amend the
20 complaint to fix the pleading deficiencies in the
21 breach of fiduciary duty and the fraud claims, but
22 once you fix those up, I am going to let the
23 defendants make a motion for summary judgement to
24 dismiss those claims. He said that in the record.

25 JUDGE STEIN: This would have been a

1 different case if they brought the action here and
2 then the statute of limitations was raised and at
3 that point they said no, Judge, we don't want you to
4 decide statute of limitations, that should go to
5 arbitration, we changed our mind. Would - - - would
6 it be a different case then?

7 MR. HELLER: Would it be - - -

8 JUDGE STEIN: Is the time - - - in other
9 words, is the timing of it - - - is the fact that
10 they then - - - that they fully litigated the issue
11 in Supreme Court before they said they wanted
12 arbitration?

13 MR. HELLER: Well, that - - - that is a big
14 problem.

15 JUDGE STEIN: Well, I'm - - - I'm saying,
16 is that the - - - is that the determinative issue?

17 MR. HELLER: Well, that's the substantive
18 prejudice issue, that's the substantive prejudice
19 argument, because they put the issue before the court
20 and then didn't like what the court said and then
21 they said okay, goodbye, we're going to arbitration.
22 That - - - that's a big problem for them.

23 Now, if they did not - - - if they just
24 filed the - - - the complaint and then they said you
25 know what, Mr. Heller's right - - -

1 JUDGE RIVERA: No, let's go back. What's
2 the prejudice? The prejudice is the loss of time and
3 money, which I'm not trying to trivialize or
4 minimize.

5 MR. HELLER: That's not what I'm saying
6 because that's a separate prejudice. There are two
7 types of prejudice.

8 JUDGE RIVERA: Okay.

9 MR. HELLER: There's substantive prejudice
10 and then there's the prejudice of loss of time and
11 money. There's clearly prejudice loss of time and
12 money, but I'm going even further than that. Where
13 the substantive prejudice is is they had an
14 opportunity - - -

15 JUDGE RIVERA: To re-litigate it again?

16 MR. HELLER: - - - to - - - and they get -
17 - - they get a do-over.

18 CHIEF JUDGE LIPPMAN: Is this consistent -
19 - - your position consistent with the federal
20 prejudice analysis?

21 MR. HELLER: Absolutely, because federal
22 prejudice - - -

23 JUDGE FAHEY: Well, when you look at - - -
24 what is it Leadertex?

25 MR. HELLER: Leadertex, the - - - the - - -

1 the case was actually - - - they ruled a waiver.
2 They - - - they cite Leadertex, but they said it was
3 waiver on the loss of time and money reason.

4 JUDGE FAHEY: Well, and I'm talking about
5 comparing Leadertex with - - - I think the New York
6 case is Stark, and - - - and the fact - - - the
7 factor seems stronger for you under New York law than
8 they do under federal law.

9 MR. HELLER: But if you look at the
10 Louisiana Stadium case - - -

11 JUDGE FAHEY: Um-hum.

12 MR. HELLER: - - - which is a Second
13 Circuit case, that case is almost on all fours with -
14 - - with our case. That - - - that is a very - - -

15 CHIEF JUDGE LIPPMAN: This - - - your view
16 is forum shopping, is that what's going on here?

17 MR. HELLER: Absolutely.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. HELLER: And they - - - they con - - -
20 it's consistent. They've forum shopped their way up
21 to here.

22 CHIEF JUDGE LIPPMAN: All right. Let's
23 hear - - - let's hear from your colleague and we'll
24 go from there.

25 Counsel, you want any rebuttal time?

1 MR. MCCORMICK: Yes, one minute please,
2 Your Honor.

3 CHIEF JUDGE LIPPMAN: One minute; go ahead.

4 MR. MCCORMICK: May it please the court, my
5 name is Patrick McCormick from Campolo, Middleton &
6 McCormick, and as you know, I represent the
7 appellant.

8 CHIEF JUDGE LIPPMAN: So what issue are you
9 going to deal with?

10 MR. MCCORMICK: The FAA issue. It's an
11 easy issue, in our view. The contracts at issue here
12 between individuals do not in any way evidence a
13 transaction involving interstate commerce.

14 CHIEF JUDGE LIPPMAN: Is that consistent
15 with the purpose of - - - of the FAA, that - - - that
16 this is as simple as what you say that there's - - -

17 MR. MCCORMICK: Well, that's - - -

18 CHIEF JUDGE LIPPMAN: - - - this is a what,
19 a family dispute, nothing to do with interstate
20 commerce?

21 MR. MCCORMICK: Well, you don't necessarily
22 have to look at whether it's a family dispute. You
23 look at the purpose and the transaction at issue in
24 the contract.

25 CHIEF JUDGE LIPPMAN: If it impacts it,

1 that's the test, right?

2 MR. MCCORMICK: If it - - - the test is - -

3 -

4 CHIEF JUDGE LIPPMAN: It's not what the
5 intention was, it's what the impact is, right?

6 MR. MCCORMICK: Absolutely. Contemplation
7 is not relevant.

8 CHIEF JUDGE LIPPMAN: Okay, so tell us why
9 there - - - there's no impact, particularly on two of
10 the three that does have properties outside the
11 state. How could there be no impact on interstate
12 commerce?

13 MR. MCCORMICK: Your question, Your Honor,
14 respectfully, is looking at the wrong time period.

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MR. MCCORMICK: The issue is the
17 transaction at issue, the transaction evidenced by
18 the contracts, the formative contracts, are the
19 formation of the entities, Berita, the LLC, and the
20 partnership.

21 CHIEF JUDGE LIPPMAN: What are the entities
22 designed to do?

23 MR. MCCORMICK: Well, the stated purpose
24 was a general stated purpose, unlike the N.J.R. case
25 where there was a specific purpose. It was a general

1 formation of two business entities.

2 CHIEF JUDGE LIPPMAN: To do what?

3 JUDGE STEIN: So we don't look at what the
4 - - - yeah, we don't look at what those entities are
5 supposed to do?

6 MR. MCCORMICK: No, because the entities
7 are not parties to the agreement that was between two
8 individuals. The arbitration agreement is contained
9 in the formation documents - - -

10 CHIEF JUDGE LIPPMAN: That - - - is that in
11 touch with reality, that they're not going to look at
12 what they do?

13 MR. MCCORMICK: I - - - I - - -

14 CHIEF JUDGE LIPPMAN: Does that make any
15 sense?

16 MR. MCCORMICK: I hear the chuckling but
17 yes, that is absolute - - -

18 CHIEF JUDGE LIPPMAN: In an analysis as to
19 whether you come under FAA, we don't look at what
20 these entities are designed to do and what they in
21 fact do do?

22 MR. MCCORMICK: The entities - - -

23 CHIEF JUDGE LIPPMAN: That's a hard - - - a
24 hard row to hoe.

25 MR. MCCORMICK: I - - - I don't believe it

1 is. The entities are not parties to the agreement.
2 The individuals are parties to the agreement. The
3 individuals in these - - - in this case, in each of
4 the - - -

5 CHIEF JUDGE LIPPMAN: And your argument is
6 that the individuals don't impact in interstate
7 commerce and that's the end of the story?

8 MR. MCCORMICK: It - - - it's not relevant
9 that the individuals may, because here the
10 individuals don't, the entities do. What the
11 entities did afterwards is separate and independent
12 from the formation, which is the transaction the
13 contracts evidence to - - - to - - -

14 JUDGE RIVERA: What's the point of the
15 contract?

16 MR. MCCORMICK: To form the entity and to -
17 - -

18 JUDGE RIVERA: To - - - to do what? What
19 did the - - - they form the entities to?

20 MR. MCCORMICK: To - - -

21 JUDGE RIVERA: Finish it off.

22 MR. MCCORMICK: It - - - it was a broad - -
23 - it was a - - - it was a nonspecific - - - unlike
24 N.J.R., a nonspecific purpose - - -

25 JUDGE RIVERA: Or to form the entities to

1 participate in interstate commerce.

2 MR. MCCORMICK: There's no - - -

3 JUDGE RIVERA: Does that work?

4 MR. MCCORMICK: No, I don't know that I
5 would say it that far. I will certainly agree with
6 what you are trying to drag out of me that the
7 business entities were - - -

8 JUDGE RIVERA: By kicking and screaming,
9 apparently.

10 MR. MCCORMICK: Well, the - - - I'm not
11 going to sit here and - - - and lose credibility by
12 saying the business entities were not going to engage
13 in business. That was in all likelihood what was
14 intended. They didn't have to.

15 JUDGE RIVERA: Um-hum.

16 MR. MCCORMICK: They could have - - - and
17 it happens very often, they could have been formed
18 and sat dormant for - - - for years.

19 CHIEF JUDGE LIPPMAN: Isn't the test what
20 ultimately happens, whether there is an impact?
21 Isn't that what all the cases seem to say?

22 MR. MCCORMICK: All - - - all the cases say
23 the test is you look at whether the transaction that
24 is evidenced by the contract involves or affects, the
25 two words are interchangeable under the Supreme Court

1 rulings, interstate commerce.

2 CHIEF JUDGE LIPPMAN: So?

3 MR. MCCORMICK: So you look at the
4 contracts, the formation documents, and what - - -
5 what do they evidence? They evidence the formation
6 of the entities. The - - - that contract, the - - -
7 the limited liability company operating agreement,
8 the limited partnership agreement, does not involve a
9 contract, an agreement, or any other type of - - - of
10 - - - of agreement to do anything.

11 JUDGE FAHEY: What you're saying is they
12 weren't - - - they weren't agreements to do anything,
13 they were agreements to exist - - -

14 MR. MCCORMICK: They were - - -

15 JUDGE FAHEY: - - - in a certain form.

16 MR. MCCORMICK: They were absolutely
17 agreements to exist.

18 JUDGE FAHEY: Right.

19 MR. MCCORMICK: And in order for something
20 else to happen - - -

21 JUDGE RIVERA: Agreements to create
22 companies that are authorized to participate in
23 interstate commerce?

24 MR. MCCORMICK: They're authorized to do
25 anything. They were - - - they were broad - - -

1 JUDGE RIVERA: Including participate in
2 interstate commerce.

3 MR. MCCORMICK: Absolutely. Absolutely
4 including but - - -

5 JUDGE FAHEY: So - - - so let me ask this.
6 They - - - they were authorized to conduct real
7 estate transactions, right, to acquire property, to
8 do those things?

9 MR. MCCORMICK: Yes, yes.

10 JUDGE FAHEY: So - - -

11 MR. MCCORMICK: Well, if - - - if I may, I
12 apologize. When you say "they", you're referencing
13 the entities, yes.

14 JUDGE FAHEY: The entities, yes.

15 MR. MCCORMICK: Yes.

16 JUDGE FAHEY: So doesn't that get you back
17 around to Russell and then real estate transactions
18 are inherently interstate commerce?

19 MR. MCCORMICK: Let me answer it in parts.

20 JUDGE FAHEY: However you want.

21 MR. MCCORMICK: Real estate contracts, in
22 all likelihood - - - there can be some that aren't,
23 but in all likelihood will involve - - - because
24 there's probably some type of financing involving
25 banks, et cetera - - -

1 JUDGE FAHEY: Um-hum.

2 MR. MCCORMICK: - - - there's no doubt
3 about that. However, the real estate contract here -
4 - - to the extent there were contracts not in the
5 record, but even if we assume that - - - were entered
6 into by the entity, not the individuals. It's the
7 rights and obligations of the individuals here that
8 is at - - - that's at issue. That's what - - -

9 JUDGE PIGOTT: In your - - - in your - - -
10 if I understand it, let's assume you got - - - you
11 and I form a - - - form an agreement and we're going
12 to open donut shops and - - - and it's only - - -
13 only in - - - in the Albany area, all right, no
14 interstate commerce. But then we decide we're going
15 to form - - - we're going to get fifty more, we'll
16 put one in every state. Are we still not an
17 interstate commerce because you and I are sitting
18 here talking about what we're going to do?

19 MR. MCCORMICK: If we are - - - well, if -
20 - - if the - - - the premise of your question is that
21 was the stated purpose of the entity, to open up the
22 donut shop.

23 JUDGE PIGOTT: Donut shops, yeah.

24 MR. MCCORMICK: And in that case, because
25 it's a stated purpose, it inches closer to the

1 possibility because the purpose of the entity, the
2 purpose of the - - -

3 CHIEF JUDGE LIPPMAN: You mean, if you did
4 a - - - if you did an entity and you didn't say that
5 they were going to be open up donut shops, you're
6 okay, they're not interstate comm - - - and then you
7 go and open them, it doesn't matter?

8 MR. MCCORMICK: I didn't say you're okay, I
9 said you're inching closer. It depends on other
10 facts. Was there financing - - -

11 CHIEF JUDGE LIPPMAN: But isn't it in the
12 end - - - what Judge Pigott is asking - - - in the
13 end, it's what you do. It doesn't matter what you
14 intended to do, it's what you do. Isn't that what
15 the federal cases say about the - - - the FAA?

16 MR. MCCORMICK: They say it, but I believe
17 your - - - your premise is being misapplied here. In
18 - - -

19 JUDGE STEIN: You're trying to draw - - -
20 are you trying to draw a line between the - - - the
21 formation of - - - of this entity and - - - and apart
22 from that, if the entity then goes and enters into a
23 contract to - - - to actually open up the Dunkin'
24 Donuts, that, you say, would be affecting interstate
25 commerce?

1 what is the - - -

2 MR. PEGNO: The argument that you just look
3 at the face of the contract, that's fundamentally
4 what their argument is, to - - - to determine whether
5 interstate commerce is implicated just doesn't get
6 off the ground.

7 CHIEF JUDGE LIPPMAN: So what is the test?
8 What's the test?

9 MR. PEGNO: The - - - the test in Allied-
10 Bruce is whether the - - - the contract in fact, as
11 carried out, involved interstate commerce - - - which
12 is a very, very broad standard, and I'm going to
13 disagree with the - - - with the - - - the
14 hypothetical about the donut shop. You open up a
15 donut shop, you would have to look at - - - at that
16 type of activity as it's done across the country in
17 the aggregate, and that's interstate commerce. But -
18 - -

19 CHIEF JUDGE LIPPMAN: What - - - what if
20 the contract doesn't say you're going to open up
21 donut shops?

22 MR. PEGNO: If it just says there's going
23 to be a formation, you look at what in fact happened.

24 CHIEF JUDGE LIPPMAN: And then - - - and
25 then they open up donut shops, right.

1 MR. PEGNO: You - - - you look at what - -
2 -

3 CHIEF JUDGE LIPPMAN: That - - - that are
4 all over the country.

5 MR. PEGNO: What - - - what Justice
6 Breyer's decision in Allied-Bruce, he - - - he said
7 you don't look at expectation of the parties, you
8 don't look at the objective expectation of the
9 parties; you look at whether it turns - - - it turns
10 out in fact - - - that's the language he uses - - -
11 that interstate commerce was involved. And every one
12 of - - -

13 CHIEF JUDGE LIPPMAN: So if you're just
14 saying we have a contract to form an entity - - -

15 MR. PEGNO: That's correct.

16 CHIEF JUDGE LIPPMAN: - - - doesn't say
17 anything about what you're going to do, and then you
18 go out and open whatever it is, donut shops or
19 whatever around the country, FAA?

20 MR. PEGNO: Absolutely applies. And let me
21 point out here that - - - that - - -

22 JUDGE PIGOTT: Then why - - - why did you
23 sue? I mean, if this - - -

24 MR. PEGNO: Pardon?

25 JUDGE PIGOTT: - - - was so clear, why did

1 happened. That's not remotely what happened. There
2 was a motion to dismiss that - - - that raised a
3 number of grounds - - -

4 JUDGE STEIN: That you actively opposed.

5 MR. PEGNO: - - - that we opposed.

6 JUDGE STEIN: That's right, and - - - but
7 at that point you could have said, whoa, whoa, wait a
8 minute. We don't want to get involved in all this
9 litigation here. We should just go and this should
10 be arbitrated.

11 MR. PEGNO: Your Honor - - -

12 JUDGE STEIN: To me it would have been a
13 different situation had you done it at that juncture.

14 MR. PEGNO: I - - - I understand your - - -
15 your point, but what happened was - - - you have to
16 look at - - - at exactly what happened. What
17 happened was that - - - was that Justice Ramos
18 initially dismissed the complaint, not based just on
19 the statute of limitation, there were - - - there
20 were a number of different grounds based - - - there
21 were pleadings grounds that they were based. He then
22 set up a - - - a regime - - -

23 JUDGE STEIN: I - - - I know what he did.
24 But - - - but, you know, you - - - you saw that
25 coming.

1 MR. PEGNO: But - - - but my point, Justice
2 - - - Judge Stein, is - - - is not that the - - - the
3 statute of limitations issue was not adjudicated to
4 completion. The - - - he - - - he permitted leave to
5 re-plead all the claims and - - - and it was that - -
6 - that pleading and - - - and we re-pleaded those
7 claims that - - - that then was the subject of the
8 motion.

9 JUDGE STEIN: But you don't deny that you
10 litigated that - - - that issue and I'll call - - - I
11 know it's a procedural issue, but substantively
12 litigated it.

13 MR. PEGNO: And we were - - - we were given
14 leave to re-plead that issue as well, to - - - to
15 defeat the statute of limitations as well, and we
16 will have to face that point in - - - in arbitration.

17 CHIEF JUDGE LIPPMAN: Counsel - - -
18 counsel.

19 MR. PEGNO: Yes, Judge.

20 CHIEF JUDGE LIPPMAN: Are there precedents
21 to - - - that - - - that tell us that if your actions
22 are totally inconsistent, you know, with what you're
23 doing, that - - - that if you - - - if you - - -
24 everything you did was towards litigation, you know,
25 why is that not - - -

1 MR. PEGNO: That's not - - -

2 CHIEF JUDGE LIPPMAN: - - - dispositive in
3 relation?

4 MR. PEGNO: That's not the test, Judge.
5 The test is prejudice.

6 CHIEF JUDGE LIPPMAN: What is the test?

7 MR. PEGNO: The - - - the touchstone for -
8 - - for waiver under the FAA - - -

9 CHIEF JUDGE LIPPMAN: Yes.

10 MR. PEGNO: - - - is - - - is prejudice and
11 - - - and time and delay and expense - - -

12 CHIEF JUDGE LIPPMAN: And you can't be
13 forum shopping - - -

14 MR. PEGNO: - - - are insufficient.

15 CHIEF JUDGE LIPPMAN: - - - to such an
16 extent that there's prejudice to the other side?

17 MR. PEGNO: Well, we - - - we reject the
18 notion that - - - that there's - - - there was forum
19 shopping.

20 CHIEF JUDGE LIPPMAN: What were you doing
21 if you weren't forum shopping?

22 MR. PEGNO: The - - - the point is that
23 after Justice Ramos set up this regime where - - -
24 where we'd have another pleading and no - - - and
25 then we'd have a motion - - -

1 CHIEF JUDGE LIPPMAN: And - - - and Judge
2 Ramos was making all kinds of statements about
3 frivolous litigation and that kind of thing.

4 MR. PEGNO: He did not make a statement as
5 - - - as it related to the amended pleading. That
6 was - - - that was the - - - the prior pleading. But
7 what he set up a regime that would have a motion - -
8 -

9 JUDGE RIVERA: What about the resp - - -
10 what about the response, "you don't want to go to
11 arbitration; correct, Your Honor." What - - -

12 MR. PEGNO: Absolutely. That's - - -
13 that's absolutely the case. But what happened was
14 after Justice Ramos came up with this regime and we -
15 - - we determined to bring in other parties into the
16 case where there had been motions to compel,
17 successful motions to compel arbitration, we decided
18 if you can't beat them, join them, let's go to
19 arbitration, rather than having a motion for summary
20 judgment - - -

21 JUDGE RIVERA: So you got beaten down.

22 MR. PEGNO: Pardon me?

23 JUDGE RIVERA: You got beaten down.

24 MR. PEGNO: No, well, Your Honor - - -

25 JUDGE RIVERA: You were correct and then

1 you feel like you're losing and you say - - -

2 MR. PEGNO: Not - - -

3 JUDGE RIVERA: - - - I'm going to take my
4 papers with me and go to arbitration.

5 MR. PEGNO: Not at all, Your Honor. The -
6 - - the point was that we would face, after dealing
7 with the - - - the statute of limitations issue, a
8 motion to - - - to compel arbitration. And all of
9 that litigation and associated appeals could take
10 literally years and they determined, after they
11 decided to - - - to add additional parties who had
12 already successfully moved to compel arbitration, to
13 go to arbitration for the whole dispute and - - -

14 JUDGE STEIN: But now if you go to
15 arbitration - - -

16 MR. PEGNO: Yes, Judge.

17 JUDGE STEIN: - - - don't those same issues
18 have to be resolved?

19 MR. PEGNO: The - - - the statute of
20 limitations issue has to be resolved. And let me
21 just point out there - - - there - - -

22 JUDGE STEIN: And so what - - - you know,
23 what are you saving, you know, maybe a little bit of
24 time?

25 MR. PEGNO: Well, Justice Ramos never

1 should have decided the - - - the statute of
2 limitations issue in the first place on this - - - on
3 the - - -

4 JUDGE STEIN: Yeah, but you - - - you - - -

5 MR. PEGNO: - - - amended pleading.

6 JUDGE STEIN: - - - you let him. You
7 didn't - - - you didn't argue that when he - - - when
8 you knew he was going to do it.

9 MR. PEGNO: Not with respect to the amended
10 pleading, Judge. That - - - that - - -

11 JUDGE FAHEY: The thing - - - the thing
12 that jumps out - - - as a judge, the thing that jumps
13 out at - - - if it had gone the other way, would you
14 be asking for arbitration. That's what jumps out at
15 me in this.

16 MR. PEGNO: Your Honor, if he had - - - if
17 he had set up - - - well, we - - - you know, we will
18 never what - - - what exactly would happen if he - -
19 - if we, you know, went back in time - - -

20 JUDGE FAHEY: It's all right. Just answer
21 my question. Don't worry about that.

22 MR. PEGNO: If he had set up a regime - - -

23 JUDGE FAHEY: Um-hum.

24 MR. PEGNO: - - - whereby there had been a
25 - - - a motion for summary judgment without discovery

1 and then we'd have to face a - - - a motion to compel
2 arbitration, whatever the remaining plead - - -
3 claims had been, we very well may have gone to
4 arbitration rather than - - -

5 JUDGE FAHEY: So you're saying even if you
6 had won that motion, you would have - - - you would
7 still be in arbitration?

8 MR. PEGNO: We very well may have - - - may
9 have opted out of the - - - the lengthy and expensive
10 regime. And let me - - -

11 JUDGE STEIN: What was it about the fact of
12 the two prior actions - - - which were very
13 strenuously argued - - - to go to arbitration, made
14 you think that that wouldn't happen in this action?

15 MR. PEGNO: Well, the - - - the action as
16 it was originally constituted involved - - -

17 JUDGE STEIN: I know. The accountants
18 only, right.

19 MR. PEGNO: - - - again, the accountants
20 who - - -

21 JUDGE STEIN: Right, but they - - - but
22 they were kind of - - - you know, they were closely
23 related.

24 MR. PEGNO: It's a - - - it's a different
25 issue in terms of arbitration whether it's a

1 signatory or not signatory.

2 JUDGE STEIN: So you didn't expect - - -
3 you didn't expect - - - okay, I understand.

4 MR. PEGNO: We would have - - - we
5 certainly would have faced it an - - - an arbitration
6 issue. And let me just point out that the - - - the
7 key is - - - is not an intent to - - - to invoke
8 litigation or not; it is prejudice and delay and
9 expense standing alone - - -

10 JUDGE PIGOTT: But you knew that when you
11 started. I - - - I worried, you know, that - - -
12 that you didn't like what the judge was doing and you
13 said, let's - - - let's - - - normally, if somebody
14 begins a lawsuit and then - - - and there's an
15 affirmative defense that the contract calls for
16 arbitration you go, whoops, they're right, you know,
17 we got to go arbitration. You don't, you know,
18 resist, resist, resist, and then say oh, wait a
19 minute, you know, we're going to go through this what
20 you call regime and that's going to be time and
21 expensive and so we're leaving.

22 MR. PEGNO: Yeah, well, the time and
23 expense, Judge, is - - - is insufficient standing in
24 itself under the FAA.

25 JUDGE PIGOTT: Okay, I understand.

1 MR. PEGNO: You have to show prejudice and
2 - - - and - - -

3 JUDGE PIGOTT: I understand that. I'm just
4 - - - I'm just curious why this happened. I - - -

5 JUDGE FAHEY: It's - - - it's the
6 submission to a dispositive motion that disturbs me.
7 You submit yourself to a dispositive motion that
8 could go either way, and then it could settle the
9 case or it could - - - you know, or it could - - -
10 and outline the path of the case and then after
11 that's done you say no, new path.

12 MR. PEGNO: But - - - but Judge Fahey - - -

13 JUDGE FAHEY: And that - - - that's where
14 we're back to what Judge Pigott was saying, we're
15 back to the forum shopping.

16 MR. PEGNO: Judge - - - Judge Fahey, you
17 have to look at - - - at the - - - the context. It's
18 not like there was a - - - a - - - just a decision on
19 the - - - on the dispositive motion and then we went
20 to arbitration. We were given leave to re-plead and
21 that we - - -

22 JUDGE FAHEY: Right.

23 MR. PEGNO: - - - re-pled pleading would
24 have been tested in arbitration. And let me just
25 point out on - - - on the - - - on the prejudice

1 point, the - - - the Leadertex case that - - - that
2 my esteemed adversary mentioned, in that case there
3 was eight months of litigation; discovery was
4 completed, dispositive motions were filed, and at
5 that point, there - - - there was - - - there was a
6 motion - - -

7 JUDGE FAHEY: Well, that's the strongest
8 argument you have. I - - - I think the New York law
9 favors your opponents a little more than Leadertex
10 does. Leadertex is a little tougher standard. But
11 the waiver argument that you - - - is a strong
12 argument for them.

13 MR. PEGNO: Well, Your Honor, again, just
14 to - - - to finish the point about Leadertex, there
15 was a waiver considered there, but it wasn't based on
16 the litigation that had gone on; it was because of
17 the delay and the impact that that had had on the - -
18 - the party involved. If you look - - -

19 CHIEF JUDGE LIPPMAN: Counsel, this - - -
20 this is almost a classic case of waiver. I mean, in
21 terms of you look at - - - your - - - the whole
22 thrust of what you did, you know, and this whole in -
23 - - in these litigations is - - - is totally towards
24 - - - towards wanting to stay away from arbitration
25 and - - - and now, all of a sudden? I mean, I - - -

1 I - - - I don't - - - if this isn't a waiver, where
2 is there a waiver?

3 MR. PEGNO: Well, let me just address that
4 point. This - - - this, you know, classic case of
5 waiver, as you - - - as you put it. The - - - the
6 waiver argument by two of the defendants, the - - -
7 Bernadette and Bernard Strianese, just has no basis
8 whatsoever. There was - - - there was no litigation
9 in this case against them. There - - - there were -
10 - - there was attempted litigation in - - - in Nassau
11 County, but there was a motion to compel arbitration
12 and they won. The arbitration was compelled.

13 JUDGE STEIN: Well, you - - - you're not -
14 - - you wouldn't suggest that if we find waiver for -
15 - - for the accountants and not for - - -

16 MR. PEGNO: I think that that would - - -

17 JUDGE STEIN: - - - that - - - that we - -
18 - that we should split this up, are you?

19 MR. PEGNO: I think that is - - - that that
20 would be an unfortunate result, but you cannot have a
21 waiver here with respect to - - - to Bernadette and
22 Bernard Strianese.

23 JUDGE STEIN: Doesn't that go against your
24 whole argument that you're trying to promote
25 efficiency?

1 MR. PEGNO: It - - - it certainly wouldn't
2 provide a lot of efficiency, but how can you possibly
3 have a situation where you have waiver of - - - of
4 arbitration against parties who have moved to compel
5 arbitration and won? I mean, you talk about forum
6 shopping; they moved to compel arbitration. They - -
7 - they - - - they are successful and then they go to
8 Justice Ramos and - - - after we filed the
9 arbitration against them, they go to Justice Ramos
10 and say no, we want you to decide the statute of
11 limitations, all right.

12 And keep in mind, the - - - the accountants
13 here are not arguing that there was a waiver of
14 arbitration. There was a waiver of arbitration only
15 as to one issue, the statute of limitations. And
16 there is no authority for the - - - for the piecemeal
17 type of waiver that - - - that they're asserting
18 here. There's - - - there's no case that they cite
19 for - - - for that, and - - - and to Judge Stein's
20 point that would be completely inconsistent with the
21 - - - with the notions behind arbitration for there
22 to be a speedy and efficient adjudication of
23 disputes.

24 So - - - so this is - - - this would be a
25 brand new type of - - - type of waiver that has no

1 support in any of the case law.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Anything else?

4 MR. PEGNO: Well, Your Honor, I - - - I
5 would like to, you know, address the - - - the point
6 on - - - the threshold issue here - - - the threshold
7 issue of arbitrability is in fact for the arbitrators
8 under this court's decision in Life Receivables, and
9 that's because the arbitration agreements at issue in
10 this case all incorporate the - - - the rules of the
11 American Arbitration Association. Those rules
12 provide that the arbitrators have the power to deter
13 - - - determine their jurisdiction. This court in
14 Life Receivables has - - - and - - - and many other
15 courts have ruled that that means that the
16 arbitrators decide the question of arbitrability.

17 CHIEF JUDGE LIPPMAN: There - - - there are
18 instances where the court can determine that, right,
19 under - - -

20 MR. PEGNO: Well - - -

21 CHIEF JUDGE LIPPMAN: - - - under New York
22 law?

23 MR. PEGNO: Under general - - - general - -
24 -

25 CHIEF JUDGE LIPPMAN: Can determine the

1 statute of limitations issue. This is not some - - -
2 yeah, go ahead.

3 MR. PEGNO: No, Judge Lippman. It - - -
4 the - - - the usual rule is that the - - - is that
5 the court determines arbitrability.

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MR. PEGNO: That's the usual rule, but
8 what's different about this case is that the - - -
9 the - - - the parties have incorporated the AAA rules
10 into their - - - into their agreement.

11 CHIEF JUDGE LIPPMAN: Even in that
12 circumstances, there could be situations where the
13 court determines that issue?

14 MR. PEGNO: I - - - I - - -

15 CHIEF JUDGE LIPPMAN: No?

16 MR. PEGNO: I'm - - - I'm not aware of
17 those circumstances that - - -

18 JUDGE STEIN: Well, you're - - - you're
19 equating waiver with arbitrability, right?

20 MR. PEGNO: The - - - the waiver issue also
21 should - - - should be determined by - - - by the
22 arbitrators under that provision, because the
23 arbitrators - - - the parties have agreed that the
24 arbitrators are to decide the - - - the question of
25 arbitrability.

1 JUDGE STEIN: Arbitrability, but that - - -
2 that doesn't necessarily extend to the waiver
3 question.

4 MR. PEGNO: Well, waiver is just the flip
5 side of - - - of arbitrability. It's whether the - -
6 - the question is to be arbitrated or not, and it's
7 part of the jurisdiction of the - - - of the
8 arbitrators, which is what the AAA rule says.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.
10 Thanks.

11 MR. PEGNO: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: Rebuttal.

13 MR. HELLER: Just quickly.

14 CHIEF JUDGE LIPPMAN: Yes, go ahead,
15 counsel.

16 MR. HELLER: I'll just deal with the Life
17 Receivables issue and the arbitrability issue.

18 CHIEF JUDGE LIPPMAN: Yeah.

19 MR. HELLER: This is a trap, because what
20 he's trying to say is that first we have to go to the
21 arbitrators to determine whether I could go to the
22 court to determine limitations. So what will happen
23 is I go to the arbitrators, I say can I go to the
24 court to determine limitations? The arbitrators say
25 yeah, go to court. Then you go to the court and it

1 says, under 7502, you participated in the arbitration
2 so we can dismiss on limitations grounds. It's the
3 N.J.R. case.

4 So that is absolutely wrong. Arbitrability
5 is looking at the arbitration clause and determining
6 whether under that arbitration clause, the issue is
7 arbitrable, not the limitations issue. That's a
8 totally separate issue that's governed by 7502, and I
9 had every right to move under 7502; once they filed
10 the case and once they filed the arbitration, I had
11 every right to move and ask Justice Ramos to dismiss
12 those claims.

13 CHIEF JUDGE LIPPMAN: Okay, thanks,
14 counsel.

15 MR. HELLER: Thank you, Your Honor.

16 CHIEF JUDGE LIPPMAN: Rebuttal.

17 MR. MCCORMICK: Briefly, Your Honor. The
18 parties to the agreement did not engage in any
19 economic activity themselves and the contracts don't
20 evidence any general practice subject to federal
21 control. That takes it out of the discussion that
22 we've been having.

23 Allied-Bruce got brought up. Allied-Bruce
24 was a party to the agreement that had the arbitration
25 clause in it. That's not the case here. These

1 individuals did not engage in any economic activity.
2 That's the distinguishing factor. The entities at
3 issue have no contract to do anything at the time.
4 The individuals had no contract to do anything at the
5 time.

6 CHIEF JUDGE LIPPMAN: Yeah, but your
7 argument is even if you don't prevail on that issue,
8 there's waiver here, right?

9 MR. MCCORMICK: A hundred percent, there's
10 no question. They - - - they opened up themselves to
11 the judicial forum. They got a decision on the
12 statute of limitations. To suggest that there's no
13 prejudice after a year's worth of litigation is - - -
14 is - - - is - - -

15 CHIEF JUDGE LIPPMAN: So assuming, for the
16 sake of argument, that FAA applies in your view you
17 still win?

18 MR. MCCORMICK: There's no question.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. MCCORMICK: Thank you, Your Honor.

21 Thank you very much.

22 CHIEF JUDGE LIPPMAN: Thank you. Thank you
23 all.

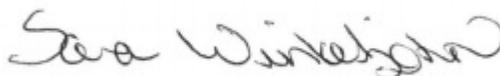
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Cusimano v. Schnurr, No. 200 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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