No. 17A859

IN THE SUPREME COURT OF THE UNITED STATES

HENRY SCHEIN, INC.; DANAHER CORPORATION; INSTRUMENTARIUM DENTAL INC.; DENTAL EQUIPMENT LLC; KAVO DENTAL TECHNOLOGIES, LLC; AND DENTAL IMAGING TECHNOLOGIES CORPORATION, APPLICANTS

v.

ARCHER AND WHITE SALES, INC.

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF PROCEEDINGS PENDING A PETITION FOR A WRIT OF CERTIORARI

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STATUTE AND RULE

The court of appeals nullified the delegation provision in the parties' arbitration agreement solely because the court concluded that applicants' argument for arbitration was "wholly groundless." That decision deepens an entrenched circuit conflict; cannot be reconciled with the Federal Arbitration Act (FAA) or this Court's numerous opinions interpreting it; threatens to strip applicants of their right to arbitration; and calls out for this Court's immediate review. A stay of further proceedings is warranted pending applicants' forthcoming petition for certiorari, and respondent's arguments to the contrary are insubstantial.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

1. Respondent's denial that a circuit conflict exists over the validity of the "wholly groundless" exception strains credulity. According to respondent, the disagreement on that issue is merely "theoretical," Opp. 10, because the Tenth and Eleventh Circuits, in the decisions creating the conflict, were not "confronted with an arbitrability argument that actually is wholly groundless," Opp. 12. But those courts did not simply "cast doubt on" the application of the "wholly groundless" exception in particular factual circumstances, ibid.; they categorically rejected the exception as a matter of law. See Belnap v. Iasis Healthcare, 844 F.3d 1272, 1286 (10th Cir. 2017) (stating that "we decline to adopt the 'wholly groundless' approach"); Jones v. Waffle House, Inc.,

866 F.3d 1257, 1269 (11th Cir. 2017) (stating that "[w]e join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception"). The decisions of the Tenth and Eleventh Circuit are thus squarely in conflict with decisions from the Fourth, Fifth, Sixth, and Federal Circuits embracing the "wholly groundless" exception. See Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 528 n.5 (4th Cir. 2017) (recognizing conflict).

Faced with this clear and acknowledged circuit conflict, respondent is left to argue that the Eleventh Circuit's rejection of the "wholly groundless" exception in Jones was dictum. That gets the court's reasoning in Jones exactly backward. As the Eleventh Circuit explained, its refusal to adopt the "wholly groundless" exception meant that it "need not examine whether [the defendant's] arguments are wholly groundless." Jones, 866 F.3d at 1271. To the extent the Eleventh Circuit nevertheless went on to address the issue in a footnote, it is that later determination that is dictum; the court's earlier statement of the correct interpretation of the FAA plainly constituted its holding.

2. This Court's immediate review is required because continued acceptance of the "wholly groundless" exception will lead to the nullification of innumerable valid delegation provisions in arbitration agreements. Respondent's suggestion that the "wholly groundless" exception will be invoked only in cases in which the

claim for arbitration is "frivolous or otherwise illegitimate" is belied by the facts of this case. As applicants explained below, where an arbitration provision contains a carveout for injunctive relief, courts routinely read the exception to permit injunctive relief from a court (1) as a preliminary matter to preserve the status quo pending arbitration or (2) on a permanent basis after the plaintiff secures an arbitration award in its favor. See, e.g., Lawrence v. Comprehensive Business Services, 833 F.2d 1159, 1163 (5th Cir. 1987); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983). Consistent with those cases, the magistrate judge in this case determined that, notwithstanding the presence of the carveout, there were numerous legitimate and plausible arguments in favor of arbitration. Yet applicants were still denied their right to arbitration by the district court and the court of appeals, even though their argument for arbitration was far from frivolous. If the decision below is allowed to stand, the number of cases in which parties similarly lose their bargained-for right to arbitration will only continue to grow.[1]

[1] Respondent's claims about the narrowness of the "wholly groundless" exception are further undermined by the court of appeals' rejection of the applicants' argument that the exception should be

Moreover, even the supposedly "narrow" version of the "wholly groundless" inquiry hypothesized by respondent would threaten the core purposes of arbitration by requiring parties to engage in costly and protracted litigation simply to determine arbitrability. Like applicants, other parties will inevitably be forced to spend significant time and money litigating the question whether the claim for arbitration is sufficiently colorable to warrant ignoring an otherwise clear delegation provision.

By contrast, effectuating the parties' intent in a valid delegation clause promotes efficiency by allowing the matter to be referred quickly to the arbitrator for resolution of arbitrability. Preventing the needless waste of resources is another important reason for the Court to grant review, as this case starkly demonstrates: had the magistrate judge's order been followed, the arbitrator could have resolved arbitrability and then the merits of the dispute years ago. Instead, the case has wended its way through multiple layers of the federal court system, with arbitrability still left unresolved nearly six years on. The "wholly groundless" exception thus undermines efficiency; it does not promote it.[2]

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confined to those cases where the arbitration agreement has "nothing to do with" the dispute before the court. See Appl. App. 10a-11a.

[2] Respondent also asserts that the "wholly groundless" exception "impacts few cases," citing three decisions from the courts of

3. Further percolation will not assist this Court in determining whether the "wholly groundless" exception is consistent with its own decisions interpreting the FAA. The arguments for and against recognizing such an exception have been "thoroughly considered" by the appellate courts, Belnap, 844 F.3d at 1286, including in a vigorous dissent in the Fifth Circuit decision adopting respondent's position, Douglas v. Regions Bank, 757 F.3d 460, 464 (5th Cir. 2014) (Dennis, J. dissenting). And given the depth of the conflict, there is no realistic probability that the continuing division between the courts of appeals will resolve itself without this Court's intervention.

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appeals in which a claim for arbitration was deemed wholly groundless. But respondent's tally of cases conspicuously ignores the numerous district court decisions that have denied motions to compel arbitration in whole or in part based on the "wholly groundless" exception. See, e.g., Andrio v. Kennedy Rig Services, LLC, Civ. No. 17-1194, 2017 WL 6034125 (S.D. Tex. Dec. 6, 2017); Mr. Rooter LLC v. Akhoian, Civ. No. 16-433, 2017 WL 5240886 (W.D. Tex. Jan. 30, 2017); In re FBI Wind Down, Inc., 557 B.R. 310, 325 (Bankr. D. Del. 2016), aff'd, 252 F. Supp. 3d 405 (D. Del. 2017); ASUS Computer Int'l v. InterDigital, Inc., Civ. No. 15-1716, 2015 WL 5186462 (N.D. Cal. Sept. 4, 2015); Bazemore v. Jefferson Capital Systems, LLC, Civ. No. 14-115, 2015 WL 2220057 (S.D. Ga. May 11, 2015), aff'd, 827 F.3d 1325 (11th Cir. 2016); Imperial Valet, Inc. v. Woodard, Civ. No. 14-1585, 2015 WL 13158506 (D.D.C. Mar. 24, 2015); Marriott Ownership Resorts, Inc. v. Flynn, Civ. No. 14-372, 2014 WL 7076827 (D. Haw. Dec. 11, 2014); Matson Terminals, Inc. v. Insurance Co. of North America, Civ. No. 13-5571, 2014 WL 1219007 (N.D. Cal. Mar. 21, 2014); Cornett v. Cmco Mortgage, LLC, Civ. No. 12-169, 2012 WL 12925599 (E.D. Ky. Nov. 9, 2012); Ellsworth v. U.S. Bank, N.A., Civ. No. 12-2506, 2012 WL 4120003, at *7 (N.D. Cal. Sept. 19, 2012).

4. Respondent contends that this case is a poor vehicle for resolving the circuit conflict over the "wholly groundless" exception. That argument is unpersuasive and only illustrates the flaws in respondent's position.

To begin with, respondent is incorrect in asserting that addressing the question presented would require the Court first to decide whether the applicable agreements contained a clear and unmistakable delegation provision. Opp. 17-18. The court of appeals declined to resolve that question in the decision below, relying instead on the "wholly groundless" exception. Appl. App. 8a-9a. This Court can do the same. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and there is no obstacle to reviewing and resolving that question in this case.

In any event, respondent's argument that no clear and unmistakable delegation exists is incorrect. The arbitration clauses in question expressly incorporated the rules of the American Arbitration Association (AAA). AAA Rule 7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." C.A. App. 118 (emphasis added). And as applicants noted in their application (at 5-6), every court of appeals to consider the question has accordingly held that incorporation of AAA rules is sufficient

clearly and unmistakably to evince an intent to delegate questions of arbitrability to an arbitrator. See Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069, 1074–1075 (9th Cir. 2013) (collecting cases). Whether this case involves an "express" or "implicit" delegation of authority to the arbitrator is of no significance to the Court's analysis; both types of delegation are equally valid, and both require courts to defer to arbitrators on questions of arbitrability.

Respondent disputes the application of that well-established rule here, claiming that the arbitration clauses' incorporation of AAA rules should be interpreted as applying only to cases outside the carveout for "actions seeking injunctive relief." That circular argument cannot be correct. When parties agree to delegate questions of arbitrability to the arbitrator, they also delegate the power to determine "whether their agreement covers a particular controversy." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68–69 (2010). That delegation of authority necessarily includes the ability to define the scope of any carveouts or limitations on the scope of the arbitration clause. See, e.g., Oracle, 724 F.3d at 1075 (ordering the arbitration of arbitrability despite a carveout for "any dispute" related to intellectual-property rights); Crawford Professional Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 256 (5th Cir. 2014) (ordering the arbitration of arbitrability

despite a carveout for actions "seeking injunctive relief"); Brennan v. Opus Bank, 796 F.3d 1125, 1131 (9th Cir. 2015) (holding that arbitrator must decide arbitrability despite a carveout for "any claim for equitable relief").

II. THERE IS A SIGNIFICANT POSSIBILITY THAT THIS COURT WILL REVERSE THE COURT OF APPEALS' DECISION

Much of respondent's argument on the merits of the question presented is devoted to defending the proposition that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Opp. 20 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). But applicants do not take issue with that principle. The fundamental problem with the "wholly groundless" exception is that, by design, it allows courts to resolve arbitrability disputes even in those cases in which there is "clear and unmistakable" evidence of the parties' intention to arbitrate arbitrability. By permitting courts to disregard contractual terms in that manner, the "wholly groundless" exception contravenes the FAA's mandatory requirement that courts "shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

Respondent also contends that the "wholly groundless" exception is "necessary to effectuate the parties' intent." Opp. 22.

In making that argument, however, respondent unwittingly underscores the danger the "wholly groundless" exception poses to the enforceability of commercial arbitration agreements. Applicants' interpretation of the arbitration clauses' carveout for injunctive relief preserves the parties' right to arbitrate respondent's damages claims while also upholding the courts' role in overseeing any injunction proceedings. Under respondent's interpretation, by contrast, respondent can defeat any attempt to arbitrate by grafting a meaningless, perfunctory, and unsupported injunctive-relief demand onto what is clearly a suit for money damages.

It is implausible that the parties intended that result. But even if respondent's position were the better interpretation of the agreement, "the courts . . . have no business weighing the merits of the grievance." AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649-650 (1986). "The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." Id. at 650. The "wholly groundless" exception threatens to swallow that broader rule and upend the settled expectations of countless parties like applicants who seek to enforce bargained-for delegation provisions.

III. ABSENT A STAY, APPLICANTS WILL SUFFER IRREPARABLE HARM

1. Respondent wisely does not dispute that applicants will be harmed if they are forced to participate in the trial that is

scheduled to begin on May 14, 2018. Instead, respondent argues that a stay is unnecessary to ensure that applicants receive a decision on their forthcoming petition for certiorari prior to the beginning of trial. But that will only be possible if respondent files a brief in opposition to applicants' petition within 30 days (and even then, it is far from guaranteed that the Court will act before May 14). And respondent notably declines to make any commitment that it will not seek an extension of the time to file its brief. Nor does respondent even commit to filing a brief in opposition without one being requested by the Court. Under those circumstances, respondent can hardly complain about applicants' decision to request a stay of proceedings in order to protect its right to seek review in this Court. If the Court enters a stay, respondent should suffer little if any prejudice as long as it moves promptly to file a response to the petition.

Respondent's assertion that applicants have unduly delayed in seeking relief from this Court (Opp. 25) is baseless. Applicants timely sought a stay in both courts below, did not seek rehearing, filed their application for a stay well in advance of the deadline for a petition for certiorari, and will file their petition early as well. Those facts make this case nothing like Beame v. Friends of the Earth, 434 U.S. 1310 (1977). In contrast to the applicants here, the applicants in Beame sought rehearing in the court of appeals; waited the maximum time to seek certiorari; and did not

seek a stay in the court of appeals or the district prior to filing their application. See id. at 1313.[3]

2. In addition to depriving applicants of their ability to pursue arbitration, the denial of applicants' motion to compel arbitration threatens to expose applicants' most sensitive confidential information to their competitors and the public. Respondent suggests that this harm is overstated because "respondent's claims focus on anticompetitive conduct from 2008 to 2014," and so the information produced in this case has no current competitive value. Opp. 26.[4] Not so. Just this week, for example, Judge Gilstrap required certain applicants to produce "competitive intelligence and analysis reports," and "presentations to the Board of Directors" that post-date 2014, and that the court acknowledged was "highly commercially sensitive." Archer and White Sales, Inc. v. Henry Schein, Inc., et al., No. 12-cv-572, Dkt. 390 (E.D. Tex. Feb. 21, 2018). Public exposure of such material at trial would irreparably injure applicants and underscores the very reason the

[3] Although respondent repeatedly bemoans the length of time this case has been pending in the district court, it does not dispute that the vast majority of that delay is attributable to the three years it took Judge Gilstrap to decide respondent's motion for reconsideration of the magistrate judge's order compelling arbitration.

[4] Respondent's assertion that its suit concerns only actions occurring during the period from "2008 to 2014" is further confirmation that respondent's claim for future injunctive relief is baseless.

parties agreed to resolve disputes by arbitration in the first place.

While respondent suggests in passing that the court could prevent that harm by "sealing the courtroom or particular exhibits," Opp. 27, there are no assurances that the court would actually allow those measures. It is not even clear that respondent would agree to implement such protections, and any suggestion to that effect would be difficult to credit in light of respondent's insistence that much of the information applicants seek to protect "is not sensitive business information." Opp. 26.

CONCLUSION

The application for a stay of proceedings pending a petition for a writ of certiorari should be granted.

Respectfully submitted,

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