No. 18-520

IN THE

Supreme Court of the United States

WECONNECT, INCORPORATED,

Petitioner,

v.

BROOKS GOPLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

DAVID C. ZOELLER
Counsel of Record
CAITLIN M. MADDEN
HAWKS QUINDEL, S.C.
409 East Main Street
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

Counsel for Respondent

284806

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Federal Rules of Evidence 201, 901, and 902 are implicated where a district court judge reviews information identified by counsel in briefing and presented on a party's website and where the website information was not relied upon by the court in making its determination.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

PETITION FOR A WRIT OF CERTIORARI

For the reasons detailed below, Respondent, Brooks Goplin ("Respondent"), requests that this Court deny Petitioner's, WeConnect, Inc.'s ("Petitioner" or "WeConnect"), petition for a writ of certiorari ("Petition") and that the lower court's decision be permitted to stand.

INTRODUCTION

WeConnect's Petition repeatedly misstates both the record below and the appealed decision by the Seventh Circuit. Contrary to Petitioner's representations, the district court judge did not issue a decision relying on internet resources accessed *sua sponte*. Rather, in response to Petitioner's motion to dismiss a complaint and enforce an arbitration agreement that did not purport to bind Petitioner, the district court found that Petitioner had failed to meet its burden to demonstrate that it was a party to the arbitration agreement. In Respondent's briefing, he identified Petitioner's own website as demonstrating that Petitioner was not a party to the arbitration agreement it sought to enforce. Petitioner failed to address its website in its reply brief or provide any additional information supporting its argument that an arbitration agreement that did not name Petitioner as a party could be enforced by the Petitioner. The district court relied on the plain text of the agreement and a bare-bones declaration submitted by the Petitioner in finding that Petitioner could not enforce an agreement that did not name it as a party. The website was not the sole basis for the district court's decision, nor was Petitioner blindsided by the court's viewing of that website. This case does not present due process concerns, nor is it a proper vessel for considering

how internet resources may be properly utilized by the courts.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Respondent, Brooks Goplin, was hired by WeConnect in March 2017 and required to sign a document entitled "AEI ALTERNATIVE ENTERTAINMENT, INC. OPEN DOOR POLICY AND ARBITRATION PROGRAM." This agreement does not identify WeConnect as a party to the agreement nor as Respondent's employer; rather, the agreement purports to bind Respondent and Alternative Entertainment, Inc. ("AEI"). Kevin LeCloux, WeConnect's Director of Human Resources, stated in a declaration filed with the district court that WeConnect was "formerly known as Alternative Entertainment, Inc." but provided no other information as to the relationship between the companies. (App. 37.) The language of the agreement does not bind successor organizations, nor was it countersigned by any representative of either AEI or WeConnect. (App. 47.)

On October 10, 2017, Respondent filed a wage and hour action on behalf of himself and putative FLSA collective and Rule 23 classes. Petitioner sought to dismiss this complaint and compel arbitration.[1] In his brief opposing Petitioner's motion, Respondent relied on the express language of the arbitration agreement, which purports

1. Importantly, Petitioner did not submit with this motion evidence it now provides the Court with its petition for certiorari. (Decl. of Brick N. Murphy, App. 34-36.)

to bind AEI, not WeConnect, as well as noting that WeConnect's website states that WeConnect formed when AEI and WeConnect Enterprise Solutions combined. (App. 22.) On December 28, 2017, the district court denied Petitioner's motion, determining that Petitioner failed to meet its burden to establish that it could enforce the agreement between Respondent and AEI because Petitioner is not a signatory to the agreement. (App. 16-24.) The district court observed, "there is no indication that WeConnect is a party to the arbitration agreement. 'WeConnect' does not appear anywhere in the arbitration agreement; rather, the agreement purports to bind Goplin and AEI." (App. 21-22.)

Petitioner appealed this decision to the Seventh Circuit on January 25, 2018. On January 30, 2018, Petitioner filed a motion for reconsideration in the district court, submitting with this motion additional information, including declarations from Petitioner's attorney and CEO. The district court denied Petitioner's motion for reconsideration on March 14, 2018, observing that the new evidence supporting the motion "could have been produced in support of WeConnect's original motion," but even with the new evidence, Petitioner still failed to demonstrate that it should be permitted to enforce AEI's agreement because "by the time Goplin signed the AEI arbitration agreement in March 2017, his employer's name was WeConnect, not AEI." (App. 8-15.)

II. Appellate Court Decision

The Seventh Circuit heard argument on Petitioner's appeal on May 24, 2018 and issued its decision affirming the district court on June 21, 2018. (App. 1.) The court

noted that while Respondent raised the issue of the name of the parties in the agreement and Petitioner's website language describing the founding of WeConnect in his response brief, Petitioner gave "very little attention" to this issue in its brief in reply. (App. 3-5.) The court applied a "clearly erroneous" standard of review and considered only the evidence in the record for Petitioner's initial motion, observing that the district court properly excluded the new evidence submitted with Petitioner's motion for reconsideration as it was "neither newly discovered nor unknown" and could have been produced with its initial motion. (App. 5.) The Seventh Circuit rejected Petitioner's argument that the district court's finding was incorrectly premised upon review of the WeConnect website, stating "the website was not the determinative factor in the district court's decision." (App. 6.) The Seventh Circuit noted that the only evidence provided by Petitioner to support its claim that WeConnect and AEI were different names for the same entity was "one sentence in an affidavit from its Director of Human Resources," and that while the district court viewed Petitioner's website to confirm its understanding of the relationship between AEI and WeConnect, "it would have reached the same result even without the website" because Petitioner "simply hadn't introduced enough evidence to show that it had an enforceable agreement with Goplin." (App. 6.)

The Seventh Circuit also directly refutes Petitioner's main argument for seeking certiorari, noting "the district court did not violate the rules of judicial notice by reviewing WeConnect's website" as the court was directed by Respondent to the website and Petitioner failed to respond to this issue in its reply briefing or seek any opportunity to be heard. (App. 6.) In addition, the

Seventh Circuit noted that the website reviewed by the district court contained "WeConnect's own assertions, not potentially unfamiliar information posted on third-party websites." (App. 6.) As the district court's decision was not shown to be clearly erroneous, the Seventh Circuit affirmed the judgment.

REASONS TO DENY THE PETITION

This case is an inappropriate vehicle for addressing the issue of whether a court may consider internet sources in making its decisions and what degree of notice is due to the parties when a court reviews such information. There is no circuit split requiring resolution on this issue, and the cited decisions demonstrate that lower courts are properly applying the rules of evidence to internet information relied upon by litigants. As detailed below, certiorari is not warranted in this case.

I. This Issue is Not Ripe for Supreme Court Consideration

Petitioner maintains that certiorari should be granted to resolve a question of whether it is appropriate for a court to consider internet information in making a decision and cites to decisions by the Third and Sixth Circuits to demonstrate a purported circuit split. The decision below does not divert from the cited appellate court decisions, and the dearth of district court cases cited demonstrates that this issue is not yet ripe for this Court's consideration.

Petitioner discusses two circuit court decisions that it claims conflict with the Seventh Circuit's decision below, *Victaulic Co. v. Tieman* from the Third Circuit

and *Cary v. Cordish Co.* from the Sixth Circuit. These cases involve specific requests by a party to take judicial notice of online information. In both cases, the appellate courts decided after applying Fed. R. Evid. 201 that judicial notice was not appropriate. In *Victaulic Co. v. Tieman*, the Third Circuit considered a case in which the district court took judicial notice of representations on a company's website to make a determination about the reasonableness of a restrictive covenant. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236-37 (3d Cir. 2007). In *Cary v. Cordish Co.*, after failing to present sufficient evidence to the district court that an individual was the COO of the defendant corporation, the plaintiffs asked that the Sixth Circuit take judicial notice of this fact based on the individual's LinkedIn page. 731 Fed.Appx. 401, 406 (6th Cir. 2018). The Sixth Circuit refused to take such notice of the online resource. *Id.*[2]

The instant case does not conflict with either *Victaulic Co.* or *Cary*. The district court in this case did not premise its ruling on facts deduced from internet resources; rather, the district court determined that Petitioner had failed to meet its burden to show it could enforce AEI's agreement

2. Petitioner suggests that the Ninth Circuit decision *Mendler v. Winterland Production, Ltd.* is in conflict with *Victaulic Co.* and *Cary*, but a comparison of the decisions reveals that this is not the case. *Mendler* concerned a copyright claim and a digitally manipulated image, and the court reviewed certain background information on photography in the process of making its decision. 207 F.3d 1119 fn. 4, 7, 9-11 (9th Cir. 2000). But the court made no determination as to the propriety of relying upon internet information to establish facts in a case, the position rejected in *Victaulic Co.* and *Cary*. Again, Petitioner fails to demonstrate a split that requires resolution.

based on the information submitted by Petitioner. (App. 21-22.) Nor does this involve a party attempting to circumvent the rules of evidence, as happened in *Cary*. Petitioner misstates the ruling below by claiming "the Seventh Circuit concluded that WeConnect's website…was appropriate for judicial notice because WeConnect was a party." (Pet. 9.) The Seventh Circuit's affirmation of the district court recognized that review of the WeConnect website was not dispositive and that Petitioner had failed to make any statement about the authenticity or accuracy of the website, though Petitioner had the opportunity to do so in its reply brief. (App. 5-6.) These factual dissimilarities from *Victaulic Co.* and *Cary* demonstrate that no circuit split has been created by the Seventh Circuit's ruling, and as such, certiorari is inappropriate.[3]

Nor do the cited district court cases show a circuit split that requires the intervention of this Court. (Pet. 16-18.) In *University of Kansas v. Sinks*, the district court considered a motion to strike certain internet evidence as inadmissible hearsay, determining that the evidence would be considered to prove the state of mind of the declarants but not the truth of the matter asserted. 565 F.Supp.2d 1216, 1231 (D. Kan. 2008). In *Fenner v.*

3. Petitioner's citation to *In the Matter of Lisse* for the conclusion that federal courts are confused "on the subject of judicial notice of Internet resources" is peculiar as this in-chambers decision pertaining to a request that the court take judicial notice of four documents does not involve *any* internet resources. In addition, at no point did Respondent ask the court to take judicial notice of Petitioner's website, nor did the district court do so. Again, Petitioner had ample opportunity to tell the district court to disregard the website in its reply brief and declined to do so.

Suthers, the court declined to take judicial notice of facts cited on a National Institute of Health website where the prisoner plaintiff was unable to access or respond to the facts stated therein, and the facts appeared to be hearsay lacking in foundation. 194 F.Supp.2d 1146, 1149 (D. Colo. 2002). And in *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, the only evidence provided by plaintiff that the defendant owned the ship on which plaintiff sustained an injury was information from the U.S. Coast Guard's online database. 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999).

In the cases cited by Petitioner as ones in which courts have "turn[ed] to Internet sources outside the court's record," courts took judicial notice of information from the parties' own websites or government sources, such as the Drug Enforcement Agency's website. *See Mundo Verde Public Charter School v. Sokolov*, 315 F.Supp.3d 374, 381, n. 3 (D.D.C. 2018); *Ayala v. County of Imperial*, 2017 WL 469016, at *2 (S.D. Cal. Feb. 3, 2017); *Florida Evergreen Foliage v. E.I. Dupont De Nemours and Co.*, 336 F.Supp.2d 1239, 1262, n. 21 (S.D. Fla. 2004).

Contrary to Petitioner's claim, these cases show district courts are developing an appropriate approach to internet resources, by reviewing the reliability of the source and properly applying Fed. R. Evid. 201 to determine whether judicial notice is appropriate. In situations where judicial notice is not appropriate, such as those where one party has been unable to review the information (*Fenner v. Suthers*) or where the internet resource was not authenticated (*Cary v. Cordish Co.*) , courts have refused to base rulings on internet information. Petitioner has failed to demonstrate a meaningful split that requires resolution by this Court. Rather, these cases show that

the lower courts are capably applying the rules of evidence to internet resources. Perhaps more importantly, because this case does not involve a district court taking judicial notice but a Petitioner's failure to meet its burden to show it was party to an agreement, this case would be a poor vessel to consider this issue even if such consideration were warranted.

II. The Decision Below Does Not Conflict with Prior Seventh Circuit Decisions

Petitioner's claim that the Seventh Circuit has disregarded its own precedent also relies on a misstatement of the opinion below. Petitioner cites to *Rowe v. Gibson*, in which the Seventh Circuit considered the propriety of utilizing internet resources from the National Institute of Health and the Mayo Clinic to gather information about the medical condition of the appellant, a prisoner alleging deliberate indifference to his medical needs. 798 F.3d 622 (7th Cir. 2015). The Seventh Circuit noted that while judges may conduct "web searches for mere background information," this is distinct from facts of which the court can take judicial notice. *Id.* at 628. In *Rowe*, while the court conducted some web searches, the internet evidence found was not deemed "conclusive" but used only "to underscore the existence of a genuine dispute of material fact," one which the court notes was "already in the record." *Id.* at 629-30.

The Seventh Circuit's holding here is in line with *Rowe*. In *Rowe*, the court's review of internet resources was background research to confirm the plaintiff's assertions that he was in pain, which were alone sufficient to create a factual dispute when considering a motion for summary

judgment. Here, the district court had the plain language of the arbitration agreement that did not name WeConnect as a party and a conclusory sentence in a declaration to support Petitioner's motion. This was insufficient to meet Petitioner's burden to enforce the arbitration agreement. Like the panel in *Rowe*, the district court's review of Petitioner's website was for background information that only confirmed the facts in the record, not judicial notice of any central, contested fact. This case also differs from *Rowe* as Respondent cited to Petitioner's own website in his response brief and Petitioner failed to controvert the representations made in that brief or the authenticity of its website in its reply brief. This is a failure of Petitioner, not an error of the district court. There is no conflict with *Rowe* and nothing this Court needs to resolve.[4]

III. Neither the District Court Nor the Appellate Court Took Judicial Notice of Any Information on Petitioner's Website

This case is improper for establishing when judicial notice of information available on a public website is appropriate because neither the district court nor the Seventh Circuit took judicial notice of any fact from Petitioner's website in its decision. Petitioner claims

4. Petitioner's citation of *Pickett v. Sheridan Health Care* is similarly inapposite. In that case, the district court had *sua sponte* used the Consumer Price Index and Laffey Matrix to reduce counsel's hourly rates in deciding on a fee petition without giving the parties an opportunity to debate application of those measures. 664 F.3d 632 (7th Cir. 2011). Here, Petitioner had notice that the district court might review its website because Respondent referred to the website in his brief in opposition, though Petitioner chose not to respond to the website in its reply brief.

that "it was the district court…that initially invoked judicial notice, and it was the district court that refused WeConnect's request for an opportunity to be heard on the issue of judicial notice when its conduct came to light." (Pet. 14, *citing* App. 8-15.) Nowhere did the district court take "judicial notice" that AEI and WeConnect were separate entities in its initial denial of Petitioner's motion to dismiss; rather, the court noted that Petitioner had not placed sufficient evidence in the record that WeConnect could enforce an agreement that named AEI. (App. 16-23.)[5] Petitioner's claim that it requested the opportunity to be heard on judicial notice is also false. After losing its motion, Petitioner filed a motion for reconsideration claiming "manifest error" but made no request to be heard on an issue of judicial notice. (App. 9-13.) Since the lower court did not take judicial notice of any fact, and Petitioner did not make a "timely request" per Fed. R. Evid. 201(e) to be heard on any purported judicial notice, this case cannot be used to resolve any question of the propriety of taking judicial notice of information on a publically available website.[6]

---

5. Petitioner's claim that the district court ran afoul of the American Bar Association Model Code of Judicial Conduct is not a reason for granting certiorari and again misstates the action taken by the district court in this case. (Pet. 15.) The district court did not "investigate facts in a matter independently" but looked at the only evidence presented by the Petitioner, a conclusory sentence in a declaration, and found it insufficient to enforce the agreement.

6. For the same reasons, Petitioner's claim that Fed. R. Evid. 901 and 902 have been violated is unsupported as the statements on WeConnect's website were not facts upon which the district court relied in rendering its decision. (Pet. 14.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David C. Zoeller
Counsel of Record
Caitlin M. Madden
Hawks Quindel, S.C.
409 East Main Street
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

Counsel for Respondent

November 2018