No. 19-963

In The
Supreme Court of the United States

HENRY SCHEIN, INC.,
Petitioner,

v.

ARCHER AND WHITE SALES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF BENCO DENTAL SUPPLY COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Benco Dental Supply Company ("Benco") is a privately-held distributor of dental supplies and equipment operating throughout the United States.[1] Benco competes with Petitioner, Henry Schein, Inc., and Respondent, Archer and White Sales, Inc. Like many distributors of dental supplies and equipment—including the parties to the case before the Court—Benco has entered into distribution agreements with manufacturing companies operated by Dental Equipment LLC, d/b/a Pelton & Crane, previously a defendant in this case. Benco's agreement with Pelton & Crane contains the same arbitration clause at issue in this case:

> *Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties' blanket consents to *amicus* briefs have been filed with the Clerk's office.

> *arbitration shall be in Charlotte, North Carolina.*[2]

As a sophisticated commercial business that contracts with other sophisticated commercial businesses, Benco relies on the arbitration provisions in its commercial contracts to quickly and efficiently resolve disputes. Specifically, Benco relies on its clear and unmistakable delegation of arbitrability questions to an arbitrator.

Although Benco is not a party to the matter before the Court, Benco remains a co-defendant, along with Petitioner, in the underlying lawsuit. Moreover, the Court's decision here as to Petitioner will have equal force and effect for Benco in what remains of Respondent's lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

In August of 2012, Respondent filed its original complaint alleging a conspiracy to boycott it by Petitioner, Danaher Corporation and several related Danaher Corporation entities, and non-party Burkhart Dental Supply. J.A. 16. But that complaint did not name Benco. Defendants, including Petitioner, moved soon thereafter to stay the proceedings before the trial court and compel arbitration, based on Respondent's distribution agreement with Dental Equipment LLC, d/b/a Pelton & Crane, a former defendant in this case (the "Dealer Agreement"). J.A. 16-17, 114. The assigned

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[2] Benco's contract with Penton & Crane was produced in this litigation and Bates numbered BDS00001848.

magistrate judge ruled in favor of Petitioner and other defendants, compelling arbitration and staying the litigation. Pet. App. 37a-41a. More than three years after the magistrate judge entered a report and recommendation in favor of granting Defendants' motion to compel arbitration, the district court vacated the magistrate judge's order and denied the motion to compel arbitration. Pet. App. 17a-36a. In December of 2016, Petitioner and other defendants appealed the trial court's order to the Fifth Circuit Court of Appeals. J.A. 24-25.

Only after this case was before the court of appeals did Respondent amend its complaint to add Benco. Benco was first named as a defendant in this case on August 1, 2017, by way of Respondent's First Amended Complaint, which alleges that Benco was a party to a purported antitrust conspiracy. Respondent filed its Second Amended Complaint on October 30, 2017.

On December 21, 2017, the court of appeals affirmed the ruling of the trial court denying Petitioner's motions to compel arbitration and stay proceedings. 878 F.3d 488 (5th Cir. 2017). The Court unanimously vacated the judgment of the court of appeals. On remand, the court of appeals once again affirmed the trial court's denial of the motion to compel arbitration, and subsequently denied rehearing *en banc*. Pet. App. 1a-16a, 42a-43a. Petitioner applied to the Court for a stay of further proceedings in the district court. The case was stayed by the Court on January 24, 2020.

The parties to the underlying arbitration agreement here clearly and unmistakably delegated

the question of arbitrability to the arbitrator. As is the case with any other contract, the parties' intentions should be given force and effect. Where parties agree to arbitrate claims under a contact, and agree to arbitrate disputes over arbitrability, a court should not step in and override that delegation of authority. Indeed, courts are foreclosed from considering the merits of questions of arbitrability when such a delegation to an arbitrator has been made.

When Benco enters into arbitration provisions that contain a delegation of arbitrability to an arbitrator—like the one in its contract with Pelton & Crane, which is identical to the provision in the Dealer Agreement at issue here—Benco expects that the delegation will be honored. Arbitration provisions allow Benco to efficiently resolve commercial disputes, invest in its future growth, and avoid frivolous claims like the one brought by Respondent. Where Benco's intentions are thwarted, on the other hand, Benco can find itself mired in lengthy and costly litigation that frustrates Benco's ability to plan and invest for the future and to operate efficiently. It is critically important that businesses like Benco are assured that their arbitration provisions will be enforced.

ARGUMENT

A. The Court Should Enforce the Unmistakable Delegation of Authority to the Arbitrator

The last time this matter was before the Court, the Court was clear in unanimously holding that "when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 526 (2019). When parties agree to delegate the authority to decide arbitrability to the arbitrator, the arbitrator is authorized to decide whether a particular dispute falls within the range of disputes that the parties agreed to arbitrate. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). The merits of the claims do not factor into the analysis. *See AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649-650 (1986).

Once a determination has been made that there is clear and unmistakable evidence of the parties' intent to arbitrate arbitrability questions, the court is foreclosed from any consideration of the merits of arbitrability questions. Interpretation of a carve-out provision regarding the scope of the parties' arbitration agreement is a merits determination on arbitrability. Therefore, under the Court's prior opinion, such determination must only be made by the arbitrator—not a court. *Henry Schein*, 139 S. Ct. at 531. The Court should reverse the court of appeals.

The Court remanded this case to the court of appeals to determine, in the first instance, whether the parties' arbitration agreement included a clear and unmistakable delegation of arbitrability. *See id.*

The court of appeals accepted that the arbitration agreement at issue contained the requisite clear and unmistakable evidence that the parties had agreed to a delegation of arbitrability. Pet. App. 8a. Nonetheless, the court of appeals went on to analyze and decide the merits of those underlying arbitrability issues. Specifically, the court of appeals decided which claims may be arbitrated and which may not.

The court of appeals made the same mistake it had made in its 2019 opinion, which was vacated by the Court. Instead of applying a so-called "wholly groundless" exception, the court of appeals fashioned a new, unnamed exception to thwart the clear and unmistakable evidence of the parties' intent to have an arbitrator decide arbitrability of disputes under the contract. The court of appeals conflated the question of "who decides" arbitrability issues with the question of whether the dispute is arbitrable. In doing so, the court of appeals ignored the Court's clear instruction that the two questions are analytically distinct. *See Henry Schein*, 139 S. Ct. at 529-530. As the Court made clear, "a court possesses no power to decide the arbitrability issue" if "the parties' contract delegates the arbitrability question to an arbitrator." *Id.*

B. The Federal Arbitration Act Mandates that Courts Honor the Parties' Delegation of Questions of Arbitrability to an Arbitrator

The Federal Arbitration Act reflects the fundamental principle that "arbitration is a matter of contract." *Rent-A-Center*, 561 U.S. at 67 (citing

9 U.S.C. § 2). As such, arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010). Precisely for these reasons, the Court has held that, when it comes to arbitration agreements, "the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). As with any other contract, the parties' intentions control. The proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleaned from the arbitral accord. *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 479 (1989).

The court of appeals accepted that the arbitration agreement at issue contained the requisite clear and unmistakable evidence that the parties had agreed to a delegation of arbitrability. Pet. App. 8a. Clear and unmistakable evidence of a delegation of arbitrability demonstrates that the parties considered the question of "who decides" arbitrability and selected the arbitrator. The same is true for Benco. It was Benco's intention to delegate arbitrability to an arbitrator. It was Benco's expectation that a court would give effect to that intention. The court of appeals decision does not.

C. Benco Expected that Issues of Arbitrability Arising Under its Contract with Pelton & Crane Would be Decided by an Arbitrator when Benco Entered into the Contract

From its Pennsylvania headquarters, Benco enters into commercial contracts with sophisticated commercial businesses in every region of the United

States. Counterparties to these agreements are often manufacturers of dental supplies and equipment and, like Benco, prefer the efficiency and predictability that arbitration clauses provide. The shared expectation of both Benco and its manufacturer counterparties is that questions of arbitrability will be decided by an arbitrator. The alternative—protracted and expensive litigation over the delegation of the "who decides" question—defeats the reasons that sophisticated commercial businesses include arbitration clauses in their agreements. Benco urges the Court to give force and effect to its intentions, and the intentions of the parties in the underlying Dealer Agreement, and affirm that all questions of arbitrability here are properly delegated to an arbitrator.

Benco entered into a distribution agreement with a manufacturing company operated by Dental Equipment LLC, d/b/a Pelton & Crane, previously a defendant in this case. Benco's agreement contains the same arbitration clause as the Dealer Agreement at issue in this case:

> *Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of*

> *arbitration shall be in Charlotte, North Carolina.*

When parties, as they have here, delegate questions of arbitrability to an arbitrator, the reasonable expectation of the parties is that an arbitrator—not a court—will rule on issues of arbitrability and jurisdiction. Benco's expectation under its contract was, and continues to be, that any dispute under this contract, or contracts with similar provisions, would be resolved via arbitration. Moreover, Benco's expectation was, and continues to be, that the clear and unmistakable delegation of the question of arbitrability would lead to an arbitrator deciding arbitrability issues. Benco never expected that its clear delegation to an arbitrator could—or would—be overcome by judicial fiat. Yet that is precisely what has happened here in the court of appeals.

Benco knowingly and intentionally contracted that any disputes arising from its agreement would be resolved via arbitration. Benco also knowingly and intentionally decided the "who decides" question by contracting that an arbitrator would resolve arbitrability issues. If a plaintiff, like Respondent in this case, chose to ignore the clear contractual delegation and attempt an end-run around the arbitration provision by bringing an action in court, Benco expected that a court would honor Benco's contractual intention. In such an instance, a court should properly grant a motion to compel arbitration and send the case to an arbitrator to decide arbitrability questions. The court of appeals failed to do so.

D. That Arbitration Clauses are Interpreted Consistent with the Public Policy in Favor of Arbitration, and with the Intent of the Contracting Parties, is of Critical Importance to Commercial Distributors like Benco

The distribution of dental supplies and equipment is a highly-specialized and unique business. It includes the distribution of specialized products that need to be shipped and handled in a specific manner from a narrow group a distributors to a specific category of clientele. There are few distributors, like Benco, who are able to perform this function effectively nation-wide. Benco seeks to include arbitration clauses in dealer agreements precisely because of the nature of the dental distribution market and Benco's place in it.

Arbitration clauses, like the one at issue here, provide Benco with assurances that it will have some control over the identity of the fact finder who will resolve the dispute. Ensuring that an arbitrator with subject-matter expertise, rather than a jury, will resolve a dispute is important to Benco, as many disputes require knowledge of the dental supplies and equipment distribution business. Benco's conduct in the market is better understood by an arbitrator who is steeped in the intricacies of the relevant market. What would be understandable to an arbitrator as reasonable and acceptable conduct, like a manufacturer choosing of its own volition to terminate a small, regional dealer that did not follow the terms of a contract, may be seen by a jury with little commercial experience as condemnable.

As a private company, the relatively low cost of arbitration and the speed by which disputes are resolved through arbitration are key reasons why Benco includes arbitration provisions in its commercial contracts. The dental supplies and equipment distribution business is a low-margin business. Minor disruptions and unexpected expenses can quickly turn a profitable year into an unsuccessful one. Similarly, on-going legal disputes that can take years to resolve hamstring Benco's ability to make strategic decisions about the future of its business or invest in its growth. Arbitration clauses allow Benco to avoid the expense of trial, and better predict the final cost to resolve a legal dispute.

Benco is able to avoid lengthy litigation in court by quickly moving to arbitration on a more limited record. The finality of arbitration benefits Benco as well. The lack of appellate review means that Benco can move on from commercial disputes quickly and focus on growing its business. The delegation of arbitrability to an arbitrator is a necessary pre-requisite for Benco to enjoy the benefits of an arbitration provision. Were companies like Benco forced to litigate arbitrability before a court, they would incur the precise expense and delay that arbitration clauses were designed to avoid. This case serves a perfect example.

Benco had nothing to do with this case when it started in 2012. Benco was only added as a defendant in 2017 after Respondent switched counsel. Since that time, Benco has been stuck litigating in court over an agreement whereby Benco expressed its clear intention that disputes would be resolved in arbitration. During that time, the case has devolved

into litigation seeking to enforce an arbitration clause that had been properly decided in the first instance by a magistrate judge years earlier. Pet. App. 41a-42a. Benco has already spent more—likely multiple times more—than the cost of resolving Respondent's dispute in arbitration. The resulting expense and delay has harmed Benco. But it has also harmed all parties in the case by greatly increasing the time and expense of resolving frivolous claims that could have been ended much more quickly in arbitration.

Arbitration clauses also help Benco avoid frivolous litigation. The nature of the dental supplies and equipment market creates a situation where Benco may be subject to baseless accusations. The high cost of litigation today can create scenarios where companies choose to pay settlements to avoid the expense of protracted litigation, even when a defendant is not culpable. Should a matter proceed to trial, even a plaintiff with a weak case can have the good fortune of a favorable jurisdiction and a favorable jury, and can ultimately prevail. The high level of risk that defendants face in court increases the likelihood that defendants will pay monetary settlements regardless of culpability. When arbitration clauses are properly enforced, however, parties are less likely to bring frivolous litigation.

The change from an arbitrator deciding if the dispute, in whole or in part, is arbitrable to a court deciding arbitrability issues negates "the principal advantage of arbitration—informality, economy and expedition—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility*, 563 U.S. at 348. Such is true for Benco here.

CONCLUSION

For the foregoing reasons, Benco urges the Court to vacate the judgement of the court of appeals and remand this case for further proceedings.

Respectfully submitted,

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