No. 19A766

IN THE SUPREME COURT OF THE UNITED STATES

HENRY SCHEIN, INC., APPLICANT

v.

ARCHER AND WHITE SALES, INC.

ON APPLICATION FOR A STAY OF PROCEEDINGS
PENDING A PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S OPPOSITION TO THE APPLICATION FOR A STAY

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CORPORATE DISCLOSURE STATEMENT

Respondent Archer and White Sales, Inc., has no parent company, and no publicly held company holds 10% or more of its stock.

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INTRODUCTION

Arbitration -- and therefore delegation -- is a matter of contract. The courts below interpreted the "unique" contract at issue here and determined that it did not clearly and unmistakably delegate arbitrability to the arbitrators. But to delay trial yet again, applicant Henry Schein, Inc. -- a nonparty to the arbitration agreement -- attempts to manufacture a split of authority that does not exist, and asks this Court to undertake the fact-bound task of interpreting the specific arbitration clause at issue here. A stay is not warranted, because this case presents no cert-worthy issue.

First, contrary to applicant's contention, there is no split of authority. Delegation, like all arbitration, is a matter of contract, requiring interpretation of the specific language the parties chose. Each case applicant cites turned on the specific text of the arbitration and delegation clauses at issue in those cases. Because each case presented different contractual language, the lower courts (unsurprisingly) reached different results based on differing language.

Even if a split over "carve-outs" existed, this case would be a poor vehicle for resolving it. As the district court noted, "[t]he arbitration clause in this case is unique." Dist. Ct. Dkt. No. 63, at 9. The language "differs from the standard arbitration clause suggested by the American Arbitration

Association." Ibid. And its language and syntax also differs dramatically from the language used in other "carve-out" cases applicant cites. The import of any interpretation of the clause at issue here therefore is limited.

Second, there is no significant possibility that this Court will reverse the Fifth Circuit's decision. To order arbitration here, a court must find that the parties "clearly and unmistakably" delegated arbitrability questions to the arbitrator. The agreement does no such thing. In fact, the agreement does not reference delegation at all; it is unlike other cases in which the parties agreed to an express delegation clause. What is more, in the very sentence applicant claims shows "clear and unmistakable" delegation, the parties carved out certain suits, including the type at issue here. That plain language shows the parties did not intend any delegation to extend to disputes in the carve-out. The Fifth Circuit's fact-bound determination correctly respects the parties' intent, as expressed in the words of the contract. Applicant's interpretation, by contrast, would ignore the parties' intent by ignoring the carve-out entirely.

Third, applicant suggests that an emergency stay is essential to avoid irreparable harm. But applicant's delay belies that claim. Applicant has known since August 2019 that the Fifth Circuit rejected its argument and that trial would be

in early 2020. Yet applicant did not seek a stay from the district court until the end of December. Applicant should not be able to point to self-created allegedly irreparable harm to justify the heavy costs and disruption of a stay simply because it neglected to take available steps to seek relief sooner, which could have avoided many of the harms it now claims are impending.

Finally, the equities do not favor a stay. Applicant is not even a party to the arbitration agreement, and a stay would cause significant disruption. Jury notices have been sent. Pretrial preparations are nearly complete. Respondent has been waiting for its day in court for over seven years. Archer has spent immense amounts of time and money pursuing its claims, while continuously subject to applicant's ongoing anticompetitive conduct. Delaying the trial date yet again would flip any ordinary concept of equity on its head.

STATEMENT

1. In 2012, Archer sued applicant Henry Schein, Inc., a dental products distributor, and several dental equipment manufacturers associated with Danaher Corporation (the "Manufacturer Defendants"). App. 2a-3a.[1] Archer alleged that

[1] The Manufacturer Defendants recently settled and are no longer parties to this appeal. See Dist. Ct. Dkt. No. 497.

Schein conspired with other large dental distributors to maintain supracompetitive margins by agreeing to threaten manufacturers (such as the Manufacturer Defendants), thus preventing them from selling to low-margin dental distributors such as Archer and causing them to join the conspiracy. See ibid. They enforced their margin-fixing conspiracy by boycotting low-margin distributors like Archer. Ibid. As remedies for the defendants' antitrust violations, Archer demands damages and "also seeks injunctive relief," because "[t]he violations . . . are continuing and will continue unless injunctive relief is granted." C.A. App. 35.

2. After Archer filed its original complaint, defendant Dental Equipment moved to compel arbitration based on its Pelton & Crane brand distribution agreement with Archer (the "Agreement"). The Agreement provided:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating 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.

App. 3a (emphasis added). The other Manufacturer Defendants joined Dental Equipment's motion. Applicant Schein filed its own motion to compel arbitration, arguing that under the doctrine of equitable estoppel, Archer also must arbitrate its claims against all of the defendants, even though it had an arbitration

agreement only with Dental Equipment. The Manufacturer Defendants recently settled, removing the only defendant who was a party to the arbitration agreement. See Dist. Ct. Dkt. No. 497.

The magistrate judge ordered arbitration, but the district court vacated that order and denied the motions to compel arbitration. The district court ruled that the parties had not clearly and unmistakably agreed to delegate arbitrability to the arbitrator. It observed that "[t]here is no express delegation clause in the [A]greement." Dist. Ct. Dkt. No. 63, at 13. And in light of the carve-out for actions seeking injunctive relief, said the court, there was no reason to believe that the parties' adoption of the AAA Rules expressed intent to delegate the arbitrability of such actions. Id. at 14. "[T]he present action falls squarely within the terms of an express carve-out," the court explained, and "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." Ibid. The court also held that even if the agreement delegated arbitrability disputes, Appellants' arbitrability argument was "wholly groundless." Id. at 16.

3. On appeal, Archer urged affirmance both because "[t]he parties did not delegate the question of arbitrability to the arbitrator" and because, even if they had, the defendants'

"arbitrability argument is 'wholly groundless.'" C.A. Br. 17, 26.

The Fifth Circuit affirmed. On delegation, the court said: "It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language." 878 F.3d 488, 494 (5th Cir. 2017). Rather, said the court, "the interaction between the AAA Rules and the carve-out is at best ambiguous." Id. at 494-95. It therefore observed that "[t]here is a strong argument that the Dealer Agreement's invocation of the AAA rules does not apply to cases that fall within the carve-out" for "actions seeking injunctive relief." Id. at 494. The Court did not decide the delegation issue, however, because it affirmed on the alternative ground that Appellants' arbitrability argument was wholly groundless. Id. at 495.

This Court granted certiorari to decide the viability of the wholly groundless exception, held that the exception was inconsistent with the Federal Arbitration Act, and vacated the the Fifth Circuit's decision. But it "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 531 (2019). Instead, this Court remanded for the Fifth Circuit to "address that issue in the first instance," with a reminder that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless

there is clear and unmistakable evidence that they did so.'" Ibid. (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

4. On August 14, 2019, after supplemental briefing and oral argument, the Fifth Circuit issued its decision on remand. The court recognized that arbitration is a matter of contract formation and interpretation. App. 4a-5a. It therefore reviewed the specific language of the arbitration clause at issue and concluded that "the placement of the carve-out here is dispositive." Id. at 9a. "We cannot rewrite the words of the contract," the court explained, and "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." Ibid. Accordingly, "[t]he plain language incorporates the AAA rules -- and therefore delegates arbitrability -- for all disputes except those under the carve-out." Id. at 9a-10a. "Given that carve-out," the Fifth Circuit concluded, "we cannot say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability." Id. at 10a.

The Fifth Circuit noted that it was "mindful of th[is] Court's reminder that '[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.'"

Ibid. (quoting Henry Schein, 139 S. Ct. at 531). But it also needed to "heed [this Court's] warning that 'courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."'" Ibid. (quoting Henry Schein, 139 S. Ct. at 531). "The parties could have unambiguously delegated this question," the Fifth Circuit explained, "but they did not, and we are not empowered to re-write their agreement." Ibid.

The Fifth Circuit then held that this case is not arbitrable because it falls outside the scope of what the parties agreed to arbitrate. Id. at 12a-13a. Accordingly, it affirmed the district court's decision.

5. On August 28, 2019, the defendants filed a petition for rehearing en banc with the Fifth Circuit. Respondent filed a response on September 26.

On October 1, 2019, the district court lifted the stay that had been in place since this Court granted certiorari on the wholly groundless issue and scheduled trial for February 3, 2020.[2]

On December 6, 2019, the Fifth Circuit denied the petition, noting that no judge had requested a vote. App. 24a.

[2] On January 13, 2020, the district court rescheduled trial to begin on January 29, 2020 to accommodate the amount of trial time the parties requested. See Dist. Ct. Dkt. No. 485.

On December 27, 2019, applicant moved the district court to stay proceedings pending a petition for writ of certiorari. On January 3, 2020, the district court denied that motion. App. 21a-22a. On January 6, 2020, applicant asked the Fifth Circuit to recall its mandate and stay district court proceedings pending a petition for writ of certiorari. On January 7, 2020, the Fifth Circuit denied that motion. App. 23a.

On January 8, 2020 -- nearly five months after the Fifth Circuit issued its decision on remand, and over three months after the district court set a trial date, applicant filed with this Court its application to stay pending a petition for writ of certiorari. To date, it still has not filed that petition.

ARGUMENT

Applicant asks this Court to again take the extraordinary step of halting an imminent trial pending applicant's (still-forthcoming) petition for a writ of certiorari. "Denial of . . . in-chambers stay applications is the norm," however, and "relief is granted only in 'extraordinary cases.'" Conkright v. Frommert, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., in chambers) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). Applicant has not carried its heavy burden of showing an "extraordinary" entitlement to a stay.

I. THERE IS NO REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

"[A]rbitration is simply a matter of contract between the parties." First Options, 514 U.S. at 943. In each case, whether a court orders arbitration for the arbitrator to decide arbitrability "turns upon what the parties agreed about that matter." Ibid. Unsurprisingly, in different cases, the parties will have agreed to different things, so courts will reach different results based on different language.

Applicant manufactures a purported split of authority by reading the cited decisions far more broadly than the courts themselves. It claims that there is "entrenched conflict on the question whether a court may decline to enforce a clear and unmistakable agreement delegating questions of arbitrability to an arbitrator whenever the arbitration agreement contains a carve-out exempting certain claims from the scope of the agreement." App. 13.[3] But no court has held such a thing. Far from holding that the existence of a carve-out either always or never controls the delegation question, each of the cited decisions properly recognizes that delegation (like arbitration) is a matter of contract, so the specific language at issue matters. Those courts reached different conclusions, because

[3] Applicant's phrasing also wrongly assumes there is a clear and unmistakable agreement delegating questions of arbitrability, when the very question before the Court is whether there is such a delegation in the first place.

they were interpreting different language. Their decisions -- and their reasoning -- are consistent.

Even if they were not, this case is an exceptionally poor vehicle for deciding the question presented. The language of the arbitration clause in this case is "unique," so whether the language here clearly and unmistakably delegates arbitrability has little import beyond this case. Accordingly, there is little prospect of further review.

A. No Conflict Exists

The cases on which applicant relies for evidence of a split create no such thing. In fact, each case stands for the consistent and unremarkable proposition that courts must examine the particular contractual language at issue and determine whether that language "clearly and unmistakably" delegates arbitrability to the arbitrator. That outcomes in different cases differ is not evidence of a split; it is evidence that different people agree to different words and different contracts, leading to different meanings.

1. Applicant relies on Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069 (9th Cir. 2013), in which the Ninth Circuit held that the parties had clearly and unmistakably delegated arbitrability of the dispute at issue despite the existence of an alleged carve out from arbitration. But applicant overreads that case as holding that a carve-out can

never indicate that the parties did not clearly and unmistakably delegate arbitrability. It did no such thing. To the contrary, rather than drawing the bright line that applicant ascribes to it -- a rule that analyzing the scope of a carve-out is impermissible -- the Ninth Circuit analyzed the specific language of the clause at issue and limited its holding to that language.

In Oracle, the parties had agreed to arbitrate "any claim arising out of the Source License." Id. at 1071. The agreement also carved out disputes relating to intellectual property or compliance with the TCK license. Ibid. But the arbitration agreement and the carve-out were circular. As the Ninth Circuit explained, "[e]nforcement of Myriad's intellectual property rights is restricted by the Source License. And the TCK License is part of the Source License." Id. at 1076. So "by definition," the court said, "the claims excepted from arbitration by the carve-out clause are claims 'arising out of or relating to' the Source License," i.e., arbitrable claims. Ibid.; see also App. 8a n.30 (recognizing the circularity, which is absent here).

Because of that circularity, "Oracle's argument conflate[d] the scope of the arbitration clause, i.e., which claims fall within the carve-out provision, with the question of who decides arbitrability." Id. at 1076. Applicant takes that sentence out of context to suggest the Ninth Circuit established it as a

bright-line rule. But read in context, that sentence is sandwiched between descriptions of the specific clauses and language at issue, reinforcing that the court's decision was based on the specific facts (and circular language) of the case.

Later opinions in the Ninth Circuit reinforce that Oracle did not set out the bright-line rule that applicant ascribes to it. For example, in Mohamed v. Uber Technologies, Inc., 848 F.3d 1201 (9th Cir. 2016), the Ninth Circuit held that the delegation provisions at issue in that case "clearly and unmistakably delegated the question of arbitrability to the arbitrator for all claims except challenges to the class, collective, and representative actions waivers," i.e., the carve-out there. Id. at 1209. If applicant were correct that Oracle stands for the proposition that delegation is all-or-nothing -- that carve-outs have no bearing on delegation -- that holding would make no sense.[4]

[4] District courts in the Ninth Circuit have the same understanding of Oracle's limited holding. For example, in Han v. Synergy Homecare Franchising, LLC, the district court distinguished Oracle based on the fact that the arbitration provision and delegation provision in that case were in separate sentences. 2017 U.S. Dist. LEXIS 15021, at *15-16 (N.D. Cal. Feb. 2, 2017) (explaining that, unlike in Oracle, "the parties use a single sentence, such that the carve outs appear to apply to both the arbitration and delegation provisions"). Again, if carve-outs have no effect on delegation, as applicant argues, the carve-out's position would make no difference.

2. Applicant also claims a conflict with Ally Align Health, Inc. v. Signature Advantage, LLC, 574 S.W.3d 753 (Ky. 2019), which relied heavily on Oracle. But again, that decision turns on the language of the arbitration agreement at issue. There, the arbitration and delegation clause and the carve-out were in different sections of the agreement. Id. at 756. That was important because, as the court below explained, "the placement of the carve-out" is "dispositive" in determining the parties' intent. App. 9a. Where the delegation clause and the carve-out are in separate sections -- as in Ally Align -- there is no reason to believe the carve-out applies to delegation. But where, as here, the delegation provision and the carve-out are in the same sentence, "[t]he most natural reading" of that language is that the carve-out applies to delegation. Ibid.[5] Ally Align and the decision below are consistent.

3. Oracle and Ally Align also square with case law in the Second Circuit and the State of Delaware.

In NASDAQ OMX Group, Inc. v. UBS Securities, LLC, 770 F.3d 1010 (2d Cir. 2014), the Second Circuit held that the contract at issue in that case did not show a clear and unmistakable intent to delegate arbitrability. The dispute there arguably

[5] See also Han, 2017 U.S. Dist. LEXIS 15021, at *15-16 (distinguishing Oracle because the carve-out and delegation were in separate sentences in that case).

fell within the scope of the agreement's carve-out, so the court found "clear and unmistakable" evidence lacking. "[W]here a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute," the court explained, "we have identified ambiguity as to the parties' intent to have questions of arbitrability -- which would include whether a dispute falls within or outside the scope of the qualifier -- decided by an arbitrator." Id. at 1031. The agreement did "not clearly and unmistakably direct that questions of arbitrability be decided by AAA rules," the court said; "rather, it provides for AAA rules to apply to such arbitrations as may arise under the Agreement." Id. at 1032. Because the dispute at issue fell within the scope of the carve-out, there was no arbitration arising under the agreement to which the AAA rules would apply, so there was no delegation. See ibid. Again, the court's interpretation turned on the specific language of the contract at issue and whether the parties' dispute fell within the scope of the particular carve-out at issue.

The Delaware Supreme Court in James & Jackson, LLC v. Willie Gary, 906 A.2d 76 (Del. 2006), took the same approach. It examined the language of the specific agreement at issue and held that the language was not clear and unmistakable evidence

of delegation. Id. at 81.[6] It did not establish a bright-line rule that all carve-outs defeat arbitrability. Rather, later cases in Delaware courts have emphasized "[t]he contextual nature of the inquiry." Redeemer Comm. of the Highland Crusader Fund v. Highland Cap. Mgmt., L.P., Civ. Action No. 12533-VCG, 2017 Del. Ch. LEXIS 30, at *17-18 (Feb. 23, 2017). That is exactly as it should be. Arbitration is a matter of contract. First Options, 514 U.S. at 943. Thus, it depends on the language and context evidencing the parties' intent.

In short, there is no split. No courts have come to different conclusions about whether the same language delegates arbitrability. Rather, courts have come to different conclusions because of differing language. That is not creating or deepening a split; that is applying this Court's instruction to examine the parties' particular agreement for clear and unmistakable evidence of delegation.

[6] To be sure, Oracle disagreed with James & Jackson regarding the breadth of the carve-out in the latter case. Oracle, 724 F.3d at 1076 (disagreeing with the Delaware court, writing, "[i]n fact, the parties' agreement in James & Jackson did generally refer all controversies to arbitration"). But two courts' disagreement about the breadth of a carve-out in a particular agreement is not the type of question that merits this Court's attention, particularly when that language is not at issue here.

B. The Unique Language of the Arbitration Clause Here Makes the Question Presented Unimportant and This Case a Poor Vehicle

Far from presenting a "pure question of law," (App. 22), this case involves interpreting the unique syntax of the parties' agreement. The district court recognized that the arbitration clause here is "unique," Dist. Ct. Dkt. No. 63, at 9, and the Fifth Circuit described the particular "syntax" of the clause as "dispositive," App. 9a. So this case does not present the broad, far-reaching questions about arbitration writ large that applicant suggests. Whether the language the parties agreed to in this particular case clearly and unmistakably delegates arbitrability has little importance outside this specific case.

Applicant makes much of the importance of arbitration writ large and this Court's previous grants of certiorari in arbitration cases. But many of those previous cases presented questions of law with widespread effect, not questions turning on the particular syntax of the parties' underlying arbitration agreement. E.g., Henry Schein, 139 S. Ct. at 528 (whether the wholly groundless exception is consistent with the FAA); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 65 (2010) (whether the court or the arbitrator decides unconscionability where the parties delegated arbitrability); First Options, 514 U.S. at 940 (proper standard of review to apply). Moreover, applicant's argument assumes the parties agreed to delegate arbitrability.

For example, applicant laments that the Fifth Circuit's approach "disserves the interest in efficiency that leads parties to select arbitration in the first place." App. 20. But that assumes the parties chose to delegate arbitrability in the first place. If the parties did not agree to delegate such questions, efficiency concerns cannot overcome the parties' intent. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) (holding that courts must enforce arbitration agreements as written, even if the result is inefficiency).

Applicant also protests that "a court could preclude arbitration whenever it concludes, based on its own parsing of the arbitration agreement, that the parties' dispute falls outside the scope of the delegation provision." App. 20. That is exactly what courts are supposed to do: determine what the parties intended. See First Options, 514 U.S. at 943 ("[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."). If the dispute falls outside the scope of the delegation provision -- i.e., the parties did not agree to delegate arbitrability of disputes of that type -- the court should preclude arbitration. Applicant complains that this would lead parties to "ignore [their] agreement to issues of arbitrability and bring claims in court instead." App. 20. But again, that assumes there is an agreement to arbitrate arbitrability. Affirming the decision

below would not "unleash a wave" of disputes. Id. at 21. Courts would continue doing exactly what they do now: examining the language of the parties' agreement to identify whether clear and unmistakable evidence of intent to delegate exists.

Finally, there is no genuine concern of forum shopping. As explained above, the law is the same in every court: interpret the arbitration agreement at hand in search of clear and unmistakable evidence of delegation.[7] Additionally, many agreements containing arbitration clauses also contain forum selection clauses mandating that any arbitration or court proceeding be filed in a specific venue, which further undercuts applicant's alleged forum shopping concern of "forum shopping."

II. THERE IS NO SIGNIFICANT POSSIBILITY THAT THIS COURT WILL REVERSE THE COURT OF APPEALS' DECISION

1. The decision below was correct. Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there

[7] The Fifth Circuit properly stated that rule of law. See App. 5a, 10a ("We are mindful of the Court's reminder that '[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.' But we must also heed its warning that 'courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."'" (quoting Henry Schein, 139 S. Ct. at 531, 544)). Even if this Court disagrees with the Fifth Circuit's application of that rule of law to the facts of this case, that is not the type of question that merits certiorari. See Sup. Ct. R. 10.

is 'clea[r] and unmistakabl[e]' evidence that they did so." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)). "The question whether parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). There is a "strong pro-court presumption as to the parties' likely intent." Id. at 86. A party seeking to compel arbitration can overcome that presumption only with "clear[] and unmistakabl[e]" evidence. AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). Requiring the proponent of arbitration to identify such evidence is important, because the issue of who should decide arbitrability is "rather arcane," and failure to meet that standard "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945.

Applicant has not carried that burden here.

2. The agreement at issue here does not expressly delegate arbitrability. It is far different from other agreements that this Court has found sufficient to delegate arbitrability. For example, the arbitration agreement in Rent-A-

Center stated: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void." 561 U.S. at 66. This Court held that such language delegated arbitrability. See id. at 67.

Here, by contrast, the Agreement says nothing about who decides arbitrability. The Agreement does not state that the arbitrators will have authority to resolve arbitrability disputes, much less that they will have the exclusive authority to do so. Instead, applicant hangs its hat on a provision stating that any arbitration between the parties will be governed by AAA rules, and AAA rules give the arbitrators authority to decide their own jurisdiction -- "implied delegation."[8] The agreement does not incorporate AAA rules for

[8] While this Court has never addressed the validity of implied delegation, there is good reason to doubt that incorporation of AAA Rules alone is enough to show clear and unmistakable delegation. Many courts -- including the court below -- recognize the concept, but the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration examined those decisions and determined that they are misguided. Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015), *approved* http://2015annualmeeting.org/actions-taken. First, it makes little sense to think that parties who agreed to apply AAA rules to arbitration also agreed to apply AAA rules to issues they did not agree to arbitrate. This is exactly the kind of "rather arcane" issue that "[a] party might not focus upon," and

all purposes, however. In the same sentence that applicant says delegates arbitrability, the agreement carves out "actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane." C.A. App. 92. The structure and language of the carve-out removes such disputes not only from arbitration, but also from incorporation of AAA rules:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall

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therefore "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945. Second, even if they did expect arbitration rules to apply to non-arbitrable disputes, such rules do not give arbitrators the exclusive right to determine their own jurisdiction. See Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015). So even by incorporating those rules, the parties did not agree to allow only the arbitrators to decide arbitrability. Finally, most sets of arbitration rules give arbitrators authority to decide their own jurisdiction, and most arbitration agreements choose a set of arbitration rules to govern their disputes. Holding that mentioning a set of arbitration rules in an arbitration agreement is clear and unmistakable evidence of delegation would flip the presumption against delegation on its head. See generally Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent, Henry Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272 (2019).

This Court need not reach the implied delegation issue now, however, because the courts below reached the same result even without rejecting implied delegation. But this analysis is all the more reason that there is no significant possibility that this Court would reverse. Without implied delegation, there is no evidence at all that the parties here intended to delegate arbitrability.

> be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

App. 3a (emphasis added).

As the Fifth Circuit explained, "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." Id. at 9a. By placing the carve-out and the "delegation language" in the same sentence, the parties applied the carve-out to delegation. Accordingly, "[t]he plain language incorporates the AAA rules -- and therefore delegates arbitrability -- for all disputes except those under the carve-out." Id. at 9a-10a. "The parties could have unambiguously delegated this question," the Fifth Circuit explained, "but they did not, and we are not empowered to re-write their agreement." Id. at 10a.[9]

3. Applicant argues, however, that "the court of appeals once again refused to enforce the delegation at issue in this

[9] At best, the language in the arbitration clause is ambiguous regarding whether the parties intended to delegate arbitrability to the arbitrator. But "[n]either silence nor ambiguity provides a sufficient basis" to "infer consent when it comes to . . . fundamental arbitration questions," such as arbitrability. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019) (emphasis added); see First Options, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'").

case." App. 24. But that argument assumes that the parties intended to delegate issues of this type to the arbitrators. The Fifth Circuit explained that the arbitration clause's incorporation of AAA rules was evidence that parties intended to delegate arbitrability "for at least some category of cases." App. 6a-7a. But the parties' decision to use a carve-out limited that delegation. The carve-out does not "negate[]" clear and unmistakable evidence, App. 24-25; it restricts it to apply to only certain disputes.

Because arbitration is a creature of contract, the parties can agree to delegate all, none, or only some disputes. The parties chose only some here. "[P]arties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 57 (1995) (citations omitted); see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010) (explaining that parties may agree to limit the issues they arbitrate, rules under which any arbitration will proceed, who will resolve specific disputes, and with whom they will arbitrate). And so too can they limit the arbitrability disputes they want to delegate.

Adopting applicant's rule -- that carve-outs have no bearing on delegation -- would disrespect the parties' intent and limit parties' ability to structure their arbitration agreements as they choose. Because applicant says that a court cannot consider a carve-out in assessing whether there is clear and unmistakable evidence of delegation, parties could delegate only all or none of their arbitrability disputes, no matter how clear the carve-out might be. That would be inconsistent with this Court's instruction that "parties are generally free to structure their arbitration agreements as they see fit." Mastrobuono, 514 U.S. at 57.[10]

In short, it was applicant's burden to identify clear and unmistakable evidence of intent to delegate. But instead, most of applicant's argument assumes the parties intended to delegate all disputes. Adopting applicant's position would turn on its head this Court's instruction that clear and unmistakable evidence of delegation is necessary to delegate arbitrability. Rather, in applicant's view, any mention of AAA rules (or any other set of arbitration rules that give arbitrator's power to

[10] Applicant's worry that the Fifth Circuit's "reasoning renders even the clearest and most unmistakable delegation ineffective," App. 26, and attendant parade of horribles is absurd. Parties could avoid disputes over delegation by, for example, including an express delegation clause with no carve-outs in that clause, such as the delegation provision in Rent-A-Center. The parties chose not to do so here.

decide their own jurisdiction) in a contract would require delegation, even in the face of contradictory carve-out language in the agreement. That is not the law. The courts below were correct that the language at issue here does not clearly and unmistakably delegate arbitrability of disputes of this type.

III. APPLICANT HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

1. Applicant bears the burden of showing irreparable harm, and that "burden is particularly heavy when, as here, a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals." Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers). Applicant's delay in seeking a stay and writ of certiorari belies its claims of irreparable injury.

The purported emergency necessitating a stay is a problem of applicant's own making. The Fifth Circuit issued its decision on remand over five months ago, and the district court lifted the stay and scheduled trial on October 1, 2019. Had applicant sought a stay earlier, this Court could have decided whether to hear the case well before the scheduled trial. Instead, applicant chose to (again) delay its application for stay and petition for certiorari until the eve of trial.

Even after the Fifth Circuit denied applicant's petition without recorded vote, applicant continued its delay. It waited

over a month to file this application for stay and is waiting even longer to file its petition for a writ of certiorari. These delays are not the actions of a litigant facing irreparable harm. See Beame, 434 U.S. at 1313 ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."). Applicant has known since August 2019 that the Fifth Circuit rejected its position and that trial was imminent. Applicant cannot point to its self-created emergency to justify asking this Court to take the extraordinary step of halting that trial.

2. Setting aside that any harm is self-inflicted, applicant's description of the "severity of the harm" is overblown. It claims that its "most sensitive business documents and data" and "most valuable secrets" will be exposed during trial. App. 28-29. Applicant again fails to acknowledge, however, that respondent's claims focus on anticompetitive conduct from 2008 to 2014, meaning much of the evidence is many years old and is unlikely to have any current competitive value. Additionally, the crux of the respondent's claims -- and therefore the bulk of the evidence -- concerns manufacturers yielding to the defendant distributors' threats to stop dealing with low-margin competitors. Evidence of threats or coordination among the defendant distributors simply is not sensitive business information.

What is more, much of that evidence is already available in redacted filings in this case, public documents in other cases, or even an FTC decision involving the same alleged conspiracy. See, e.g., Dist. Ct. Dkt. No. 361 (redacted summary judgment response and exhibits); Initial Decision, In re Benco Dental Supply Co., No. 9379 (F.T.C. Oct. 16, 2019).[11] To the extent that truly sensitive information is presented at trial, the district court has options to protect that information, such as sealing the courtroom or particular exhibits. See Nixon v. Warner Commc'ns, 435 U.S. 589, 598 (1978).

Because it is applicant's burden to show irreparable harm, it must do more than make generalizations about allegedly confidential information and the district court's supposed inability to protect it. Indeed, applicant's admission that the district court has adequately protected confidential information thus far undercuts its claim that a trial will reveal truly sensitive information. See App. 30. Without a specific showing of irreparable harm, beyond general assertions that protection during trial "is necessarily far more limited," this Court (and applicant) should trust the district court to impose appropriate safeguards to keep truly confidential information confidential, just as it has done throughout this case.

[11] https://www.ftc.gov/system/files/documents/cases/d09379bencoinitialdecisionpublic.pdf.

IV. THE EQUITIES DO NOT FAVOR A STAY

As with the irreparable-harm inquiry, applicant bears the burden of showing that the equities favor a stay, and that burden is particularly heavy where the district court and court of appeals denied a stay. Beame, 434 U.S. at 1312. Again, applicant failed to carry that burden.

First, applicant's claims of inequity ring hollow given that applicant is not even a party to the arbitration agreement at issue. The only reason that applicant could request arbitration at all was the fortuity that one of its previous co-defendants had an arbitration agreement with respondent. In these circumstances, it is not inequitable to allow trial to proceed against a defendant that had no independent right to arbitrate.

Second, the long delay since respondent filed this case in 2012 weighs against a stay. Respondent is a small, family-owned discount distributor of dental products, and it has spent an enormous amount of time and money pursuing its claims. To take its trial date away yet again at the very last moment -- while it continues suffering the effects of defendants' anticompetitive boycott -- is incredibly unfair. Indeed, respondent's case already has been harmed by defendants' repeated delays. For example, since the time of the events at issue, at least two crucial witnesses have died, respondent's

founder (another critical witness) developed Alzheimer's disease and is unable to testify, and other witnesses cannot be located. Of the witnesses available, many have had trouble remembering events that occurred twelve years ago. Delaying trial even longer risks losing even more evidence to the passage of time -- an indisputable irreparable harm.

What is more, respondent has been and continues to be the victim of defendants' anticompetitive conduct, as respondent still cannot obtain access to the products necessary to allow it to compete. That it did not seek preliminary injunctive relief does not "confirm[]" that it faces no prospect of irreparable injury. The standard for obtaining preliminary injunctive relief is high, and irreparable harm is only one of the factors considered. That respondent has not sought preliminary relief is unrelated to whether it would be prejudiced by a stay on the eve of trial. More relevant is the fact that respondent continues to seek permanent injunctive relief and made that exact request in the recently filed Joint Pretrial Order, Dist. Ct. Dkt. No. 462, at 6, 16, 29, which applicant fails to mention.

Nor does the public interest weigh in favor of a stay. It would be an extraordinary step to intrude on the district court's ability to control its own docket. Such an intrusion is unwarranted here, especially where the district court rejected

applicant's request for a stay pending appeal. See Beame, 434 U.S. at 1312.

The parties have nearly finalized their trial preparations. The jury panel has been noticed. Witnesses have rearranged their schedules to attend trial. Those efforts will be wasted with a stay. Worse, applicant could have avoided this situation by requesting a stay or filing its petition for certiorari more promptly. See supra. The equities weigh against a stay.

CONCLUSION

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

Respectfully submitted.

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