No. 19A766

IN THE SUPREME COURT OF THE UNITED STATES

HENRY SCHEIN, INC., APPLICANT

v.

ARCHER AND WHITE SALES, INC.

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

PAUL F. SCHUSTER
CYNTHIA KEELY TIMMS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201

RICHARD C. GODFREY
BARACK S. ECHOLS
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654

KANNON K. SHANMUGAM
Counsel of Record
MASHA G. HANSFORD
STACIE M. FAHSEL
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

The court of appeals held that it had to determine whether the underlying dispute is arbitrable in order to decide whether the parties agreed to delegate that very question to an arbitrator. That entirely circular reasoning deepens an entrenched conflict and threatens to strip parties of their right to arbitrate questions of arbitrability. A stay of further proceedings is warranted pending applicants' forthcoming petition for certiorari, especially given that Judge Gilstrap has now moved the trial date forward to January 29. Respondent offers a series of arguments as to why a stay is not warranted, but each is insubstantial.

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

This case presents the important and recurring question whether, under the Federal Arbitration Act, a court may decline to enforce a clear and unmistakable agreement delegating questions of arbitrability to an arbitrator when the arbitration agreement contains a carve-out exempting certain claims from the scope of the agreement. The Court has expressly reserved that question; there is an entrenched conflict on it; and this case is an optimal vehicle in which to resolve the conflict. Respondent's contrary arguments are unavailing.

1. Respondent first argues (Opp. 11-16) that the courts that have addressed the question presented "reached different conclusions" on the effect of a contractual carve-out on a delegation

of questions of arbitrability to an arbitrator because the contracts at issue contained "different language." Opp. 10-11. "The[] reasoning" of those courts, respondent argues, is "consistent." Id. at 11. Quite the opposite: those courts reached different outcomes because they disagreed on the appropriate legal analysis and have expressly recognized the existence of a conflict.

In the first of those decisions, James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76 (2006), the Delaware Supreme Court addressed an arbitration agreement that incorporated the AAA rules but permitted the parties to seek injunctive relief or specific performance in court. The court agreed that "reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." Id. at 80. But it then determined that, because the arbitration agreement did not "generally refer all controversies to arbitration" -- that is, because it contained a carve-out for equitable relief -- the agreement did not in fact clearly and unmistakably delegate questions of arbitrability to an arbitrator. Id. at 81. The court reasoned that, in the presence of a carve-out, "something other than the incorporation of the AAA rules" was "needed to establish that the parties intended to submit arbitrability questions to an arbitrator." Ibid. The Delaware Supreme Court's reasoning thus did not turn on the nuances of the particular language in the parties' contract; it hinged on a determination that the presence of a

general carve-out from the broader arbitration agreement necessarily negated an otherwise clear and unmistakable delegation.

The Ninth Circuit rejected that approach in Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069 (2013). Addressing James & Jackson directly, the Ninth Circuit observed that the Delaware Supreme Court had "relied on the arbitration agreement's carve-out provision to decide that questions of arbitrability would be decided by the court." Oracle, 724 F.3d at 1076. But, the Ninth Circuit noted, the Delaware Supreme Court's conclusion -- that the presence of a general carve-out negated the otherwise clear and unmistakable delegation -- "does not follow from the cases the court cited," and the Ninth Circuit was aware of "no other authority supporting th[at] proposition." Id. at 1076-1077. Regarding the arbitration clause at hand, the Ninth Circuit reasoned not from the specific language in the contract, but instead from the principle that, "when a tribunal decides that a claim falls within the scope of a carve-out provision, it necessarily decides arbitrability." Id. at 1076. To treat the carve-out as negating an otherwise clear and unmistakable delegation, the court reasoned, "conflates the scope of the arbitration clause, i.e., which claims fall within the carve-out provision, with the question of who decides arbitrability." Ibid.

The Kentucky Supreme Court relied on that same basic reasoning in Ally Align Health, Inc. v. Signature Advantage, LLC, 574 S.W.3d

753 (2019). There too, the parties' arbitration agreement incorporated the AAA rules but also preserved the parties' ability to seek equitable relief in court. See id. at 755. And there too, the court rejected the Delaware Supreme Court's reasoning in James & Jackson. The Kentucky Supreme Court concluded that "[a] carve-out provision * * * does not negate the clear and unmistakable mandate of the AAA's [r]ules that the arbitrability of claims is to be decided by an arbitrator," because to "[h]old[] the opposite would conflate the two separate and distinct questions of (1) who decides what claims are arbitrable with (2) what claims are arbitrable." Id. at 758. The Delaware Supreme Court had made just that "mistake" in James & Jackson, the Kentucky Supreme Court reasoned. See ibid. The appropriate analysis, the court continued, treats the carve-out provision as simply requiring "the arbitrator to refer [a] claim to a court" if the claim falls within the scope of the carve out. Ibid. Nothing in that analysis suggests that the court disagreed with James & Jackson merely because the language in the two agreements differed.

While the Second Circuit did not expressly follow James & Jackson in NASDAQ OMX Group, Inc. v. UBS Securities, LLC, 770 F.3d 1010 (2014), its reasoning tracks the Delaware Supreme Court's. The Second Circuit concluded that the "broad arbitration clause" in the parties' agreement did not provide clear and unmistakable evidence of their intent to delegate questions of arbitrability to

an arbitrator, despite the incorporation of the AAA rules, because "the parties subjected [the clause] to a carve-out provision." 770 F.3d at 1032. The presence of the carve-out, the court explained, "delays application of AAA rules until a decision is made as to whether a question does or does not fall within the intended scope of arbitration, in short, until arbitrability is decided." Ibid. As with the other courts in the conflict, the Second Circuit reasoned from legal principles regarding the effect of the presence of a carve-out, not from the specific language in the particular agreement before the court.

In sum, respondent is incorrect that "there is no split" because courts have only "come to different conclusions because of differing language." Opp. 16. The courts involved in the conflict are fundamentally and irreconcilably divided on the effect of the presence of a carve-out provision on the evidence necessary to demonstrate a clear and unmistakable delegation. That question goes to the burden imposed by federal law on parties seeking to compel the arbitration of questions of arbitrability, and it warrants this Court's review.

2. Respondent also contends that the question presented is unimportant, on the theory that it turns on "the particular syntax of the parties' underlying arbitration agreement" and thus does not have "widespread effect." Opp. 17. But as just shown, the conflict regarding the question presented concerns a broader legal

principle. In all of those decisions, as in the decision below, the agreements at issue incorporated arbitration rules that themselves assigned questions of arbitrability to the arbitrator. See also p. 8, infra. Every court of appeals to have addressed the question has concluded that such an incorporation clearly and unmistakably indicates that the parties intended for an arbitrator, not the court, to resolve questions of arbitrability. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1283-1284 (10th Cir. 2017) (collecting cases). Accordingly, the question presented presumes that, but for the presence of a general carve-out exempting certain claims from arbitration, the party seeking to compel arbitration can carry its burden to provide clear and unmistakable evidence of a delegation.

The question, then, is what is the effect of the presence of such a carve-out? Like the Second Circuit and the Delaware Supreme Court, the court of appeals below held that, when a general carve-out is present, it negates otherwise clear and unmistakable evidence of a delegation and thus requires the party seeking to compel arbitration to make an even more onerous showing. By contrast, the Ninth Circuit and the Kentucky Supreme Court concluded that the mere presence of a general carve-out did not negate otherwise clear and unmistakable evidence of a delegation. Under that ap-

proach, once a party carries its burden to demonstrate a delegation, something clearer than a general carve-out is necessary to defeat the delegation.

The question presented therefore does not focus on the particular language in a given agreement; instead, it concerns the effect of the presence of a general carve-out on what is otherwise a clear and unmistakable delegation. And that explains why respondent misses the point when it protests that applicant "assumes the parties agreed to delegate arbitrability." Opp. 17. The question that has divided the lower courts and will be presented by the petition is what effect the presence of a carve-out has when there is clear and unmistakable evidence that the parties agreed to arbitrate at least some questions of arbitrability. Given that arbitration agreements routinely contain such carve-outs, see Appl. 20, that question is undeniably important and warrants the Court's review.

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

Should the Court grant review, there is a high likelihood that the Court will reverse the court of appeals' decision. The court of appeals accepted that the incorporation of the AAA rules in the parties' arbitration provision provided the requisite clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to an arbitrator. See Appl. App. 6a-

7a. Yet the court determined that, because the agreement contained a general carve-out, it had to assess the very question that parties agree to arbitrate when delegating questions of arbitrability: namely, whether the plaintiff's claim falls inside or outside the scope of the arbitration agreement. See, e.g., Ally Align Health, 574 S.W.3d at 758. That reasoning renders even the clearest and most unmistakable delegation ineffective: no matter how plain the contractual language, a court facing a carve-out provision would need to determine whether the dispute was arbitrable before determining whether to send the question of arbitrability to the arbitrator. Respondent defends the court of appeals' decision on several bases, but each lacks merit.

1. Respondent begins by asserting that the agreement here "says nothing about who decides arbitrability" and in turn challenging applicant's reliance on the agreement's incorporation of the AAA rules. Opp. 21-22 & n.8. But as respondent concedes, "[m]any courts" -- indeed, every federal court of appeals to have addressed the issue, see Belnap, 844 F.3d at 1283-1284 -- have agreed that "incorporation of AAA [r]ules alone is enough to show clear and unmistakable delegation." Opp. 21 n.8. Accordingly, even respondent recognizes that "[t]his Court need not reach the implied delegation issue" to resolve the question presented. Ibid.

2. Respondent next defends (Opp. 23) the court of appeals' attempt to cabin its decision to the facts of this case by focusing

on the particular "ordering of words" in the delegation provision at issue. Appl. App. 9a. But as applicant has already explained (Appl. 26-27), the court of appeals' reasoning is entirely circular and far more sweeping. A party resisting arbitration could always argue that, because certain claims fall outside the scope of the agreement, the delegation does not apply to those claims, and thus questions concerning arbitrability as to those claims have not been delegated to the arbitrator. If that reasoning were correct, courts faced with a carve-out of certain claims from the arbitration agreement would always have to determine the primary question of arbitrability delegated to an arbitrator in order to determine who should decide that very question of arbitrability. In effect, that is simply an expanded version of the "wholly groundless" exception that this Court rejected in its earlier decision in this case. See 139 S. Ct. 524, 529-530 (2019); Appl. 27.

3. Respondent further asserts (Opp. 23-25) that applicant's supposed rule -- that "carve-outs have no bearing on delegation," Opp. 25 -- conflicts with the principle that arbitration is a matter of contract and that parties can agree to delegate only some questions of arbitrability to an arbitrator. But applicant's position is more modest than that.

The usual presumption is that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.

614, 625 (1985) (citation omitted). But in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), the Court determined that the presumption should be flipped with respect to questions of arbitrability, such that clear and unmistakable evidence of an intent to arbitrate questions of arbitrability is necessary. See id. at 944-945. The Court justified that difference in treatment based on inferences about the parties' intent: "when the parties have a contract that provides for arbitration of some issues," the Court reasoned, "the parties likely gave at least some thought to the scope of arbitration." Id. at 945. But "[a] party often might not focus upon" the "arcane" question of who decides arbitrability "or upon the significance of having arbitrators decide the scope of their own powers." Ibid. The Court therefore imposed a heightened burden on parties seeking to compel arbitration of questions of arbitrability. See id. at 944-945.

As explained above, see p. 7, the question presented here arises in a context in which the contract indicates the parties did consider the question of who decides arbitrability and chose an arbitrator for that task, at least with respect to some category of arbitrability issues. And in those situations, the primary issue of arbitrability that parties seek to delegate is whether the plaintiff's claim falls inside or outside the scope of the arbitration agreement. For that reason, it would be exceedingly

odd for parties to agree to a clear and unmistakable delegation only to carve the "scope" question out from the delegation.

In cases in which the parties did delegate at least some questions of arbitrability to an arbitrator, therefore, it best effectuates the parties' intent to conclude that limitations on the scope of an arbitration agreement do not act on the delegation absent clear language to that effect. Put another way, once there is clear and unmistakable evidence of an intent to delegate questions of arbitrability to an arbitrator, courts should return to the general presumption in favor of arbitrability, and should compel arbitration of all issues of arbitrability except for those clearly reserved by the parties for determination by a court.

The Ninth Circuit's decision in Mohamed v. Uber Technologies, Inc., 848 F.3d 1201 (2016), cited approvingly by respondent (Opp. 13), demonstrates the foregoing principle in action. There, the parties' arbitration agreement contained language clearly and unmistakably delegating questions of arbitrability to an arbitrator. See id. at 1208-1209. But it also stated that the validity of the class-action waiver -- which the court viewed as a question of arbitrability -- "may be determined only by a court of competent jurisdiction and not by an arbitrator." Id. at 1208, 1209. By expressly stating that an issue of arbitrability "may be determined only by a court," the carve-out operated directly on the delegation, as opposed to broader agreement to arbitrate certain claims.

Id. at 1209. The Ninth Circuit appropriately concluded that a court should determine that question of arbitrability. But if the language had been "ambiguous," see Opp. 23 n.9, the proper approach would be to allow the arbitrator to determine whether the class-action waivers were valid.

Respondent is therefore correct that "arbitration is a creature of contract," and that "parties can agree to delegate all, none, or only some disputes." Opp. 24. But when parties go to the trouble of clearly and unmistakably delegating questions of arbitrability to an arbitrator, it disrespects their intent to allow courts to seize on any potential ambiguity created by a carve-out as a basis to invalidate the delegation. That is especially so when the basis for the supposed ambiguity is the common occurrence that the agreement carves out certain claims from arbitration -- and when the presence of those carve-outs create the very question of arbitrability the parties likely intended for the arbitrator to resolve. The court of appeals made precisely that error, and this Court is likely to reverse its decision.

III. ABSENT A STAY, APPLICANT WILL SUFFER IRREPARABLE HARM

1. Respondent does not dispute that applicant will be harmed if it is forced to participate in the scheduled trial. Instead, respondent faults applicant for failing to seek a stay earlier, suggesting that applicant needlessly waited five months after the court of appeals' decision to file a stay motion. Opp.

26. That suggestion is baseless. In April 2019, the district court granted applicant's motion for a stay of proceedings pending the court of appeals' decision on remand from this Court. See Appl. App. 15a-18a. That stay remained in place when, on August 14, 2019, the court of appeals issued its decision. Two weeks later, on August 28, applicant filed a petition for rehearing and asked the district court to keep the stay in place until the court of appeals acted on the petition. See D. Ct. Dkt. 428, at 18. But the district court lifted the stay in October 2019 and scheduled trial for February 3, 2020. Applicant notified the court of appeals of the district court's decision to lift the stay, but the court of appeals denied the rehearing petition shortly thereafter. See Appl. App. 24a. Applicant promptly requested another stay from the district court and then the court of appeals before filing the instant application. See Appl. App. 21a, 23a. And applicant will file its petition for a writ of certiorari by the end of next week, well in advance of the deadline. From the time that the court of appeals began considering this case on remand, therefore, applicant has diligently sought a stay of the district-court proceedings while pursuing its right to arbitration in the court of appeals and now in this Court.

2. Just as when the Court granted applicant's previous stay application, a stay is warranted because the denial of applicant's motion to compel arbitration deprives applicant of its ability to

pursue arbitration and threatens to expose applicant's most sensitive confidential information. Renewing the unsuccessful arguments respondent made in opposing applicant's previous stay request before this Court, respondent suggests that applicant's harm is overstated because "respondent's claims focus on anticompetitive conduct from 2008 to 2014," and so the information produced in this case is "unlikely" to have current competitive value. Opp. 27. As applicant noted in connection with its previous stay application, however, applicant has been required to produce materials postdating 2014. See 17A859 Appl. Reply Br. 11. Public exposure of such materials would irreparably injure applicant.

Further, respondent does not dispute that at least some of applicant's confidential information is in danger of exposure at trial. Opp. 28. Respondent suggests that the district court could prevent that harm by "sealing the courtroom or particular exhibits." Ibid. But there are no assurances that the court would allow those measures or that respondent would agree to implement such protections, particularly in light of respondent's insistence that much of the information applicant seeks to protect "is not sensitive business information" in the first place. Opp. 27.

3. Respondent's suggestion that the equities weigh against a stay because applicant is not a party to the arbitration agreement is puzzling. Respondent does not argue in its opposition that applicant is not entitled to invoke the arbitration provision

in the agreement at issue. Applicant has maintained that it has a right to arbitration under the agreement, and a trial would deprive applicant of that right. Respondent also contends that it continues to suffer from alleged anticompetitive conduct (Opp. 30), but it does not dispute that the agreements at issue have terminated. See Appl. 30.

Critically, this case is in the same posture as it was when the Court granted applicant's previous motion for a stay: the court of appeals has affirmed the denial of applicant's motion to compel arbitration, and a trial is imminent. Notably, in the face of applicant's repeated requests for a stay and its stated intention to file a petition for certiorari, last week Judge Gilstrap moved the trial date forward to January 29, 2020. As was true when the Court granted a stay in the earlier stages of this case, a stay is necessary to prevent the irreparable harm to applicant of undergoing a full trial, and exposing its most sensitive business information to the public, before there has been a definitive ruling on whether applicant is required to participate in a trial in the first place.

* * * * *

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

Respectfully submitted,

PAUL F. SCHUSTER
CYNTHIA KEELY TIMMS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201

RICHARD C. GODFREY
BARACK S. ECHOLS
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654

KANNON K. SHANMUGAM
MASHA G. HANSFORD
STACIE M. FAHSEL
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

JANUARY 23, 2020