Record/FILE ON DEMAND U.S.P.S Tracking No.: EE 332 880 865 US

No. 20-6159

IN THE
SUPREME COURT OF THE UNITED STATES

Nelson L. Bruce, *Petitioner,*

v.

PENTAGON FEDERAL CREDIT UNION (PENFED), *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CASE NO. 20-1183

PETITION FOR REHEARING

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February 4, 2021

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Petitioner respectfully petitions for rehearing of the Court's denial issued on January 11, 2021. Petitioner moves this Court to grant this petition for rehearing and reconsider his case as Petitioner, **Nelson L. Bruce** respectfully prays that a writ of certiorari issue to review and reverse the judgment of appellate court as the courts decision conflicts with the precedent of this court in ***Henry Schein, Inc. v. Archer and White Sales, Inc., No. 17-1272 (U.S. Sup. Ct. Jan. 8, 2019)***. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.

REASONS FOR GRANTING THE PETITION

Since the unanimous decision by this court in ***Henry Schein, Inc. v. Archer and White Sales, Inc.,*** **No. 17-1272** courts have been refusing to follow the act as written and the direction of this courts precedent and failing to address the delegation provision in an arbitration agreement under the arbitration clause. This case presents a straightforward decision as the decision of the lower courts, conflicts with this courts precedent. In light of this court's recent unanimous decision in ***Henry Schein, Inc. v. Archer and White Sales, Inc.*****, No. 17-1272 (U.S. Sup. Ct. Jan. 8, 2019),** finding when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract....according to its terms, therefore the petitioner is entitle to have the matter as it relates to the agreement with an arbitration clause compelled to arbitration based of the terms and delegation provision under the agreements **"ARBITRATION CLAUSE"**

(See...Doc. 75... Exhibits/Evidence Set - C- U.S. District Court Case No.: 2:17-cv-02170-BHH).

The agreement/contract presented before this court evidences and incorporates within it an **"ARBITRATION CLAUSE"** which "Clearly And Unmistakably" Delegates Arbitrability Questions to an arbitrator, not the court as it relates to the agreement/contract such as whether the contract is valid or not which district court took it upon itself to decide by making false statements such as, "there is no applicable arbitrations clause" when their clearly is a visible arbitration clause in the contract. The lower courts failed to address the delegation doctrine. There is no exception under the FAA as it is currently written that allows a court to create their own exceptions under the FAA to override a party's arbitration clause in a contract. Majority courts including this court has stated that the courts must interpret the **Federal Arbitration Act** as written, and interpret the contract as written which requires the court to enforce the arbitration contract, the arbitration clause, and the written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract according to its terms. By this court denying the writ of certiorari in this case, it leaves lower courts open to make decisions and create exceptions which conflict with the **Federal Arbitration Act (FAA)** as written, and this courts precedent in ***Henry Schein v. Archer*** which override a private party's agreement which incorporate a delegation doctrine under the arbitration clauses of agreements.

The Respondent by their attorneys has provided nothing but hearsay. The

Respondent has not produced any evidence on the record that clearly and sufficiently evidences a rejection of the offer of petitioner in the 10-20 calendar day rejection period nor have they produce any evidence documenting they responded in full to the proof of claims requested and therefore, as clearly and unmistakably expressed in the agreement and the arbitration clause constituted their tacit acquiescence, their acceptance by performing an act specified in the agreement that constituted acceptance, their assent to the agreement its terms and provisions. The contract has an offer, acceptance and consideration and involves commerce in fact, which covers all the required elements of a valid and enforceable contract as prescribed by the **FAA, 9 U.S.C. § 2** and should be placed on an equal footing with other contracts and enforce them according to their terms, ***Rent-A-Center*, 561 U.S. at 67.** Therefore is valid and enforceable.

Although courts, not arbitrators, presumptively resolve gateway disputes, parties may supersede that general rule by "clear(ly) and unmistakab(ly)" agreeing to "arbitrate arbitrability." ***First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995).** One way for parties to accomplish that result is by including a so-called "delegation provision" in their arbitration agreement. A delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce"; the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." ***Henry Schein*, 139 S. Ct. at 529 (citation omitted).** When parties include such a provision in their arbitration agreement, the delegation of authority to the arbitrator applies to virtually all gateway disputes,

including disputes over "whether their (arbitration) agreement covers a particular controversy and or whether the contract is valid or not. The validity of the contract is a clear arbitrability question as it pertains to the contract and as clearly expressed under the arbitration clause of the above referenced contract, has been delegated to an arbitrator to decide, not the court (Emphasis Added).

An agreement incorporating rules that themselves assign questions of arbitrability to the arbitrator, such as the rules of the American Arbitration Association (AAA), clearly and unmistakably indicates that the parties intend for an arbitrator, not the courts, to resolve questions of arbitrability. See, ***e.g.*, *Belnap* v. *Iasis Healthcare*, 844 f.3d 1272, 1283-1284 (10th Cir. 2017) (collecting cases);**

This court has repeatedly made clear that an agreement to arbitrate arbitrability *is* like any other arbitration agreement: the arbitration act "operates" on those antecedent arbitration agreements "just as it does on any other." ***New prime, INC.* v. *OLIVEIRA*, 139 s. Ct. 532, 538 (2019)** (internal quotation marks and citation omitted); see ***Henry Schein*, 139 s. ct. at 529; *Rent-a-Center*, 561 U.S. at 70.**

Congress has expressed their intent in **private law 114-31** in regards to such an agreement which they passed in **September 28, 2016** when the Senate and the House had overrode the president's veto of the bill as congress decided under **section 2** of this private law, in regards to the same type of unilateral performance contract presented in this case which was presented before congress is valid and enforceable according to its terms and by the parties to the agreements performance which constituted acceptance is valid and enforceable as prescribed under the **FAA, 9 U.S.C.**

§ 2 which this court may have overlooked, **See...Appendix F.** A presidential veto can be overridden by a two-thirds vote in both the Senate and the House. When Congress overrides a veto, the bill becomes law without the president's approval.

Petitioner is simply asking the court to review the conflict and enforce their unanimous decision in ***Henry Schein, Inc. v. Archer and White Sales, Inc.*** The Court's precedents, disputes about arbitrability must be decided by an arbitrator whenever the parties have delegated that issue to an arbitrator, regardless of the court's views about the merits of the arbitrability issue.

The petition for a writ of certiorari should therefore be granted and the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Consistent with this Court's precedent in ***Henry Schein, Inc. v. Archer and White Sales, Inc.***, there is a clear and unmistakable delegation of arbitrability present here which should be compelled to arbitration. Parties, especially sophisticated parties like the ones here are assumed to have understood the contract and any incorporated terms and provisions as they have had knowledge of it as the have been in possession of it

Numerous contracts incorporate an arbitration clause, an delegation clause, and the parties to those contracts have every reason to believe that such incorporation validly delegates arbitrability. The Appellate court and district court ruling would upset that settled understanding, the FAA as written and have sweeping implications for the many contracts that have been formed in reliance on it and the aggrieved party

who wants to petition the courts to compel arbitration.

I. Did the District Court have Jurisdiction (subject matter or otherwise) to decide the any Arbitrability issue related to the contract that has been delegated?

Respondents are in default and in breach of the agreement which invoked tacit acquiescence, their consent to the agreement/contract, its terms and provisions and to arbitration which is only applicable upon a parties (the respondents) default and their conduct, a failure to respond with specificity and facts and conclusions of common law, failure to provide the requested proof of claims, remaining silent, providing a general response, constituted a failure and a deliberate and intentional refusal to respond and as a result thereby and or therein, expressing the defaulting party's consent and agreement, tacit acquiescence which is a performance of a provision clearly and unmistakably specified in the contract which constitutes acceptance, their assent which there is evidence of **(See...Doc. 75... Exhibits/Evidence Set – C and D, U.S. District Court Case No.: 2:17-cv-02170-BHH**). United States District Court, did not have jurisdiction to decide the arbitrability question as it related to the arbitration contract and violated all petitioners' rights to grievance, right to arbitration.

FAA's text or with its "primary purpose": namely, to "ensure that private agreements to arbitrate are enforced according to their terms." ***Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted).** As it has in many other recent cases, this Court should grant this rehearing and reconsider the petitioner's writ of certiorari filed on 9-21-2020 which is hereby reiterated and incorporated by reference in its entirety in this petition for rehearing, to correct the lower courts' and the appeal court for the fourth circuit unpublished opinion.

The district court did not have jurisdiction to determine, based on its own interpretation of "the four corners of the agreement/contract with a text order," ***(See***

Appendix – C), that "the parties did not enter into an agreement and there is no applicable arbitration clause". The FAA will apply – regardless of whether you proceed in state or federal court – so long as the underlying contract providing for arbitration evidences a transaction involving interstate commerce. ***Advantage Assets, Inc. II v. Howell*, 190 N.C. App. 443, 445–46, 663 S.E.2d 8, 9–10 (2008); *see Choice Hotels Int'l, Inc. v. Chewl's Hospitality, Inc.*, 91 F. App'x 810, 814 (4th Cir. Dec. 17, 2003).**

The Respondents in this action agreed to mediate (arbitrate) by failing to properly notify (respond) of their lack of acceptance ... that the language in the performance contract indicated a change in the terms was an offer... which was accepted by the opposing parties performance/conduct/tacit acquiescence which constituted acceptance of the agreement/contract, see..." ***Tick-Anen v. Harris & Harris, Ltd., 461 F.Supp.2d 863, 867,868 (E.D. Wis. 2006).*** Therefore the unilateral performance agreement/contract is valid and enforceable as the FAA prescribes as it involves commerce in fact **(9 U.S.C. § 2),** which is a decision delegated for an arbitrator to decide not the courts. The respondents in this case have had sufficient "reasonable notice" of the offer, its terms and provision contained within the offer, the performance agreement/contract and have failed to reject it within the 10-20 calendar days allowed thereby there is now implied acceptance to the agreement and therefore the arbitration agreement is valid and enforceable as it involves commerce in fact. ***See...Hidalgo v. Amateur Athletic Union of the United States, Inc., No. 1:19-cv-10545 (S.D.N.Y. June 16, 2020).*** The respondents did not claim they did not understand the offer and therefore they clearly understood its terms and provisions and have accepted them by their performance.

Silence or inaction generally does not constitute acceptance of an offer, unless the circumstances indicate that such an inference of assent is warranted. ***Smith v. Murray, 311***

S.W.2d 591, 595 (Tenn.1958). In this instance the acceptance, the doctrine of Estoppel is in accordance with the terms of the agreement i.e. indicated in the terms of the offer. The respondents were given a reasonable opportunity to respond and reject/disaffirm the agreement and failed to do so in the 10-20 calendar day rejection period as they were given an additional 3 days (72 hours) Notice with a notice of fault opportunity to cure and notice the respondent that they would be in default as the law requires **(See... Exhibits/Evidence Set – C and D filed on the record in district court Doc. 75)** the respondent have claimed they had no knowledge of the contract, its terms and provisions.

Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. ***Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)***. The U.S. Supreme Court has held, since ***Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967),*** that courts must enforce arbitration clauses within contracts, even if the entire contract is invalid or unenforceable. Two courts recently had an opportunity to remind litigants of the severability doctrine. In ***Rogers v. Swepi LP, 2018 WL 6444014 (6th Cir. Dec. 10, 2018),*** the Sixth Circuit reversed a district court judge who failed to apply the severability doctrine. These two doctrines—the separability doctrine and the delegation doctrine—operated together as Justice Antonin Scalia wrote for the majority, uniting them in the case of ***Rent-A-Center, West v. Jackson, 561 U.S. 63 (2010).*** In ***Cipolla v. Team Enterprises, LLC*, No. 19-15964 (9th Cir. June 24, 2020)** - Ninth Circuit Remands Order Denying Motion to Compel Arbitration That Failed to Address the Effect of Delegation Clause in Parties' Arbitration Agreement.

The District Court and Appeals Courts decisions "runs against this courts unambiguous instruction that lower courts may not 'delve into the merits of the dispute.'

(**quoting *Douglas, 757 F.3d at 468*** (Dennis, J., dissenting)). The U.S. Supreme Court observed that enforcing delegation provisions without regard to the merits of the underlying dispute was "altogether consonant with the FAA's 'liberal federal policy favoring arbitration agreements' " and its "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms." (quoting ***Moses H. Cone, 460 U.S. at 24***, and ***AT&T Mobility, 563 U.S. at 344***) also see...***e.g., American Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 233 (2013)**; ***CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339; *Rent-A-Center*, 561 U.S. at 67, *d.***. There can be little doubt that there is a conflict in this matter, or that the questions is ripe for the Court's review. And given the depth of the conflict, there is no realistic prospect that it will resolve itself without the Court's intervention or petitioning congress. Further review is therefore warranted.

The law requires proof of jurisdiction to appear on the record of the administrative agency and all administrative proceedings." ***Hagans v. Lavine, 415 U. S. 533***." "There is no discretion to ignore lack of jurisdiction." ***Joyce v. U.S. 474 2D 21.***" "The law provides that once State and Federal Jurisdiction has been challenged, it must be proven." ***Main v. Thiboutot, 100S. Ct. 2502 (1980).*** "Defense of lack of jurisdiction over the subject matter may be raised at any time, even on appeal." ***Hill Top Developers v. Holiday Pines Service Corp. 478 So. 2d. 368 (Fla 2nd DCA 1985).*** "The burden shifts to the court to prove jurisdiction." ***Rosemond v. Lambert, 469 F2d 416***.

Despite this Court's clear holdings that parties are free to delegate threshold disputes of arbitrability to arbitrators, the district court and the court of appeals refused to enforce and acknowledge the delegation provision at issue in this case and deciding the arbitrability question and overriding the agreement by stating that "there was no agreement between the

respondents and the petitioner and there was no applicable arbitration clause." See...**Appendix – C**. That holding cannot be reconciled with the FAA as written or with this court's precedent in ***Henry Schein, Inc. v. Archer and White Sales, Inc.***

II. The Questions Presented Are Important And A Recurring One That Warrants The Court's Review In This Case

The Court's intervention is necessary to safeguard the FAA's commitment to the enforceability of arbitration agreements according to their terms and to provide clarity and uniformity in the law.

Indeed, this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the FAA. **See *New Prime Inc.* v. *Oliveira*, cert. granted, No. 17-340 (Feb. 26, 2018); *Italian Colors*, 570 U.S. at 228; *AT&T Mobility, supra*; *Stolt-Nielsen S.A.*, 559 U.S. at 662.** In light of that practice, this case, which presents a clear and important conflict involving district court and the fourth circuit appeals court, cries out for the Court's review.

This case is an important vehicle in which to inform the district courts, any other circuit appeals courts to follow the FAA statute as written, and agreements delegating arbitrable questions of arbitrability to be decided by an arbitrator under the arbitration clause. There is no basis in law or logic for imposing on the FAA and the FAA provides no exceptions to make claims based off their own opinions when the agreement delegate's questions of arbitrability such as disputes, claims, and controversies related to the agreement to an arbitrator. The district court and the fourth circuit court of appeals' contrary decision was erroneous, and the Court should grant the petition for rehearing and writ of certiorari to correct that error and resolve a circuit conflict which conflict with the FAA as written and

this courts precedent which is affecting similarly situated parties arbitration agreements presented before these courts.

This case is also an important vehicle in which to inform the district courts and courts of appeals on unilateral performance contracts, tacit acquiescence and about challenges to jurisdiction.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition for rehearing and review the merits of this case.

Respectfully Presented,

"Without Prejudice"

Nelson L. Bruce 2-4-2021

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CERTIFICATE OF UNREPRESENTED PARTY

I HEREBY CERTIFY the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. That this petition for rehearing is presented in good faith and not for delay.

"Without Prejudice"

Nelson L. Bruce 2-18-2019

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