No. 17-972

IN THE

Supreme Court of the United States

MICHAEL NORDYKE,

Petitioner,

v.

HOWMEDICA OSTEONICS CORP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The petition presents an important question regarding transfer and forum selection that has divided the federal courts following this Court's decision in *Atlantic Marine Construction Co. v. District Court*, 134 S. Ct. 568 (2013). *Atlantic Marine* held that where *all* parties to a litigation are bound by a forum-selection contract, the contract supplants the traditional private and public interest balancing test prescribed by 28 U.S.C. § 1404(a). As Nordyke and Howmedica agree, *Atlantic Marine* did not consider the legal standard for a motion to transfer venue where only *some* parties to a litigation have a forum-selection contract or where there are conflicting forum-selection contracts.

This unanswered question of federal law is of critical importance. In the four years since *Atlantic Marine*, the question has vexed the federal courts. Two courts of appeals – the Third and Fifth Circuits – have developed divergent tests that attempt to marry *Atlantic Marine* and the traditional balancing test. The federal district courts are hopelessly divided – some courts have extended *Atlantic Marine*, others have found that *Atlantic Marine* does not apply unless all parties are bound by identical forum-selection contracts, and still others have developed their own tests to balance *Atlantic Marine* and the traditional § 1404(a) inquiry. Because a decision on a motion to transfer can be appealed only by mandamus, an extraordinary writ, the courts of appeals are unlikely to clear this fog of disharmony.

This petition provides the Court with a unique and necessary opportunity to define the extent of the principles established by *Atlantic Marine*. The question presented is mature and this case provides

the perfect vehicle to answer every aspect of the issue left unaddressed by the Court's prior decision.

Accordingly, the Court should grant this petition.

ARGUMENT

I. THE PETITION PRESENTS AN IMPORTANT AND UNANSWERED QUESTION OF FEDERAL LAW

Howmedica agrees with Nordyke that *Atlantic Marine* did not address the question presented by the petition. Br. in Opp. 7; *see also* Pet. 8-9. The Court held only that an agreement by *all* parties "to litigate disputes in a particular forum" supplants the traditional 28 U.S.C. § 1404(a) balancing test for a motion to transfer venue. *Atlantic Marine*, 134 S. Ct. at 583. The Court did not consider whether, or how, this rule may apply where only *some* parties to a case have contracted to litigate in one forum or where different contracting parties have agreed to litigate in different forums. *See* Pet. 9.

Howmedica also does not dispute that this open question is one of critical importance to litigants and the federal courts. When only some parties have forum-selection contracts, there is a clear tension between the non-contracting parties' right to "just, speedy, and inexpensive litigation" (embodied in Federal Rule of Civil Procedure 1) and the contracting parties' expectation that disputes will be litigated in their selected venue. Pet. 12-15. On the one hand, this Court has emphasized that "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy,

and money that § 1404(a) was designed to prevent." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960). *See also U.S.O. v. Mizuho Holding Co.*, 547 F.3d 749, 750 (7th Cir. 2008) ("There is no reason for identical suits to be proceeding in different courts."). On the other hand, *Atlantic Marine* recognized that "courts should not unnecessarily disrupt [the] settled expectations" of parties to a forum-selection contract. 134 S. Ct. at 583.

The importance of the question is magnified by the disarray in the federal courts. Not only have the Third and Fifth Circuits adopted different tests that seek to reconcile *Atlantic Marine* and the traditional § 1404(a) analysis, *see* Pet. 9-10, but there is substantial and growing divergence in the district courts on how to resolve motions to transfer venue where some, but not all, parties have forum-selection contracts, *see id.* at 10-12. Because the question can graduate to the courts of appeals only through a writ of mandamus, this discord will not resolve itself without the Court's intervention. *Will v. United States*, 389 U.S. 90, 95 (1967) ("[I]t is clear that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.") (quotation omitted). *See also*, *e.g.*, *In re Khadr*, 823 F.3d 92, 101 (D.C. Cir. 2016) ("Appellate courts grant mandamus only rarely, reserving the writ for cases where petitioners show a 'clear and indisputable' right to relief.").

Despite conceding the importance of the question, Howmedica nevertheless insists that review is unwarranted for two reasons. Br. in Opp. 5-12. Each argument is flawed and neither presents a reason to deny the petition:

First, there is no basis for Howmedica's assertion that the petition advances an "extreme" and "radical" position. *Id.* at 5-6. Tellingly, in making this argument, Howmedica does not address the actual question presented. Nordyke does not contend, and the petition does not suggest, that the "mere presence of a non-signatory" to a forum-selection contract "will relieve signatories" of their obligations under that contract. *Id.* at 5. The petition simply presents a clear and open question: in a case where only some parties have a forum-selection contract, does that contract trump the statutory right of the non-contracting parties to have the litigation proceed efficiently and in a convenient forum. Pet. 12-14.

This question, and its resolution, does not "require a serious departure from existing jurisprudence." Br. in Opp. 5. The question asks whether the federal courts must extend *Atlantic Marine* to cases where a plaintiff chooses to sue defendants with and without forum selection contracts. Because *Atlantic Marine* did not address this question, it is axiomatic that the answer will not require any departure from this Court's precedent. Furthermore, there will be no deviation from current jurisprudence regardless of the answer. If *Atlantic Marine* does apply, then its rule will also extend to cases where not all parties have identical forum-selection contracts. If *Atlantic Marine* does not apply, then courts will use the well-established § 1404(a) balancing test without giving controlling weight to the contracting parties' forum-selection contracts. Pet. 9-13.

Second, Howmedica's suggestion that the question presented invites "forum-shopping mischief" is a red-herring that is equally misplaced. Br. in Opp. 6. There is certainly no such assertion in this case:

Howmedica chose voluntarily to bring a single litigation against defendants with different forum-selection contracts and defendants without forum-selection contracts. Moreover, the federal courts have decades of experience applying the traditional § 1404(a) balancing test. *See*, *e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). It is unreasonable to suggest that this well-ventilated standard invites misuse or that the lower courts do not have the ability to identify and address "mischief" in any particular case.

II. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

Howmedica's further assertion that the there is no split in authority is both inapposite and inaccurate. Br. in Opp. 6-12. Because the petition presents an important and unanswered question of federal law, review is warranted irrespective of a circuit split. *See* Sup. Ct. R. 10(c). However, Howmedica is also incorrect to suggest that the tests developed by the Third and Fifth Circuits are "in harmony." Br. in Opp. 7-11.

The four-step test developed by the Third Circuit in this case requires piecemeal litigation unless the public interest "overwhelmingly" requires a plaintiff's claims against defendants with and without forum-selection contracts to be litigated in the same forum. Pet. App. 29a-30a. In the absence of an overwhelming public interest, a court must always sever and transfer only the plaintiff's claims against non-contracting defendants, while identical claims against contracting defendants must remain in the selected forum. *Id.* 21a-22a.

By contrast, the Fifth Circuit recognizes that "the answer is more complicated" under both this Court's precedents and the plain language of § 1404(a):

> While *Atlantic Marine* noted that public factors, standing alone, were unlikely to defeat a transfer motion, the Supreme Court has also noted that § 1404(a) was designed to minimize the waste of judicial resources of parallel litigation of a dispute.

In re Rolls-Royce Corp., 775 F.3d 671, 679 (5th Cir. 2014). Because of the "tension between these centrifugal considerations," the Fifth Circuit prioritizes judicial economy and efficient litigation. *Id.* Under the Fifth Circuit's test, "the need . . . to pursue the same claims in a single action in a single court can trump a forum selection clause." *Id.*

This case highlights the irreconcilable difference in the approaches adopted by the Third and Fifth Circuits. Even though Howmedica brought parallel claims, based on the same facts, against Nordyke and his co-defendants, the Third Circuit held that *Atlantic Marine* required those claims to be split into two mirror-image matters – Howmedica's claims against the non-contracting defendants were transferred to the Northern District of California, while the claims against the defendants with forum-selection contracts were retained in the District of New Jersey. Pet. App. 33a. Even though Howmedica had contracted with Nordyke to litigate in Michigan, the Third Circuit required Nordyke to remain in New Jersey, contrary to the express holding of *Atlantic Marine*. The outcome would have been different if Howmedica had first filed the litigation in a Fifth Circuit district court – the Third Circuit acknowledged that its decision "create[d] a risk of duplicative litigation," an often dispositive

factor under the Fifth Circuit test. *Id.* 30a. The stark distinction between how the Third Circuit and Fifth Circuit would merge *Atlantic Marine* and the traditional § 1404(a) balancing test in this case further underscores the importance of this Court's immediate review of the question presented.

III. THIS CASE IS THE PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case is the right vehicle for the Court to resolve the question presented and complete the path that it began in *Atlantic Marine*. Because Howmedica not only sued defendants that had and had not agreed to forum-selection contracts, but also sued defendants with contracts that selected competing forums, the Court has the unique opportunity to address and establish the governing rule for each aspect of the issue left unresolved by *Atlantic Marine*: Does *Atlantic Marine* supplant the § 1404(a) balancing test when a plaintiff chooses to also sue defendants that have not agreed to forum-selection contracts? And, does the analysis change where the defendants' forum-selection contracts are not uniform and require litigation in different forums?

Howmedica responds with two vehicle-related arguments, neither of which has merit. It first contends that Nordyke repudiated his forum-selection contract. Br. in Opp. 12. That claim is easily refuted by the decision below and the petition. Howmedica ignores that the Third Circuit was not presented with, and did not resolve, any claim of waiver. Pet. 15 n.2. *See also* Pet. App. 25a. Regardless, this assertion is no impediment to review. Because Howmedica sued multiple defendants with and without forum-selection contracts, the petition presents the same question on the scope

of *Atlantic Marine* irrespective of Howmedica's unsubstantiated suggestion of waiver.

Contrary to Howmedica's second argument, the question presented is mature and ripe for review. Br. in Opp. 13. The question is of critical importance and has been considered by scores of federal courts since *Atlantic Marine*. Pet. 11-12. Those courts are in disarray and their growing discord is unlikely to be resolved through mandamus petitions to the courts of appeals, which have themselves developed divergent tests. The Court's review is needed now to decide this undisputedly significant issue and resolve the split in authority.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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