APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INCORPORATED,
Plaintiff-Appellee

v.

HENRY SCHEIN, INCORPORATED; DANAHER CORPORATION; INSTRUMENTARIUM DENTAL, INCORPORATION; DENTAL EQUIPMENT, L.L.C.; KAVO DENTAL TECHNOLOGIES, L.L.C.; DENTAL IMAGING TECHNOLOGIES, CORPORATION,
Defendants-Appellants

Filed: August 14, 2019

HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge.

In light of the Supreme Court's decision, we consider anew the question of whether the parties in this dispute delegated the threshold arbitrability determination to an arbitrator. After being sued for antitrust violations, defendants in this suit sought to enforce an arbitration

agreement. Initially, the magistrate judge granted a motion to compel arbitration, concluding that the question of arbitrability of the claims itself belonged to an arbitrator. The district court disagreed, holding that the arbitrability question was one for the courts. This panel affirmed.[1] We determined that we need not reach the issue of whether the arbitration provision delegated the issue of arbitrability to an arbitrator because of a then-established narrow exception: where an assertion of arbitrability was "wholly groundless," a court was not required to submit the issue of arbitrability to an arbitrator. Determining defendants' arguments for arbitrability were wholly groundless, we affirmed the district court's holding that the claims were not arbitrable.

The Supreme Court reversed, holding that the "wholly groundless" exception was inconsistent with the Federal Arbitration Act.[2] The Court declined to opine on whether the contract in this case in fact delegated the threshold arbitrability question to an arbitrator, remanding for this court to make that determination in the first instance. It reminded that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'"[3] Tasked with interpreting the arbitration clause anew, we conclude that the parties have not clearly and unmistakably delegated the question of arbitrability to an arbitrator. Accepting that the district court had the power to decide arbitrability, we now hold that the district

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[1] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (2017), *rev'd*, 139 S. Ct. 524 (2019).

[2] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

[3] *Id.* at 531 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

court correctly determined that this case is not subject to the arbitration clause and affirm.

I.

The origins of this dispute are well-known; the complaint in this case was filed nearly seven years ago.[4] Plaintiff-Appellee Archer and White Sales, Inc. is a family-owned company that distributes, sells, and services dental equipment. It brought this antitrust suit against Defendant-Appellants Henry Schein, Inc., Danaher Corporation, and a number of subsidiaries who distribute and manufacture dental equipment. Archer claims that defendants entered into an anticompetitive agreement to restrict Archer's sales and to boycott Archer. Archer's complaint alleges violations of federal and Texas antitrust law and seeks money damages and injunctive relief.

The contract between Archer and Pelton and Crane, one of the defendant's predecessors-in-interest, (the "Dealer Agreement") contains an arbitration clause that is at the heart of this dispute. It provides:

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

After the case was referred to a magistrate judge, defendants invoked the Federal Arbitration Act and moved

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[4] *Id.* at 528–29; *Archer & White*, 878 F.3d at 491.

to compel arbitration. Archer opposed that motion, arguing that its complaint sought injunctive relief and the arbitration clause explicitly excluded actions seeking such relief.

The magistrate judge granted the motion, determining that the arbitrability question should be left to an arbitrator because the Dealer Agreement incorporated the AAA rules and there was at least a "plausible construction" that would compel arbitration. Three years later, the district court vacated that order and held that the court could decide the threshold arbitrability question, reasoning that this action fell squarely within the arbitration clause's express exclusion of actions seeking injunctive relief.

We affirmed. Relying on an exception then operative in at least four circuits,[5] we concluded that defendants' argument for arbitration was wholly groundless. In our view, there was "no plausible argument that the arbitration clause" applied to an action seeking injunctive relief.[6] Applying our precedent in *Douglas v. Regions Bank*,[7] we determined that because the assertion of arbitrability was implausible, the threshold arbitrability question should be decided by the district court.[8] The Supreme Court reversed, eliminating that exception and abrogating *Douglas*. Relying on the text of the Federal Arbitration Act, the Supreme Court held that if a "contract delegates the arbitrability question to an arbitrator, a court may not

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[5] *See Henry Schein*, 139 S. Ct. at 528–29 (collecting cases from the Fourth, Fifth, Sixth, and Federal Circuits applying the exception).

[6] *Archer*, 878 F.3d at 497.

[7] 757 F.3d 460 (2014).

[8] *Archer*, 878 F.3d at 497.

override the contract."[9] The Court reaffirmed its holding in *First Options*, that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."[10] Sending the case back to us, the Court instructed this court to determine whether clear and unmistakable evidence of the parties' delegation exists here.[11]

II.

We review a ruling on a motion to compel arbitration de novo.[12] Our inquiry proceeds in two steps. The first is a matter of contract formation—"whether the parties entered into any arbitration agreement at all."[13] Next we turn to the question of contract interpretation and ask whether "this claim is covered by the arbitration agreement."[14] While ordinarily both steps are questions for the court,[15] the parties can enter into an arbitration agreement that delegates to the arbitrator the power to decide whether a particular claim is arbitrable.[16] The Supreme Court has repeatedly made clear that "parties can agree

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[9] *Henry Schein*, 139 S. Ct. at 529.

[10] *Id.* at 530 (quoting *First Options*, 514 U.S. at 944).

[11] While both parties read the tea leaves in the questions asked by the Justices at oral argument, attempting to shepherd them to support their own positions, the Court declined to decide whether this agreement in fact delegated the arbitrability question.

[12] *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2012).

[13] *Id.*

[14] *Id.*

[15] *Id.* (citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003)).

[16] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."[17]

When considering whether there was a valid delegation, "the court's analysis is limited."[18] As always, we ask if the parties entered into a valid agreement. If they did, we turn to the delegation clause and ask "whether the purported delegation clause is in fact a delegation clause—that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated."[19] When determining that intent, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."[20] If there is a valid delegation, the court must grant the motion to compel.[21]

The parties agree that there is a valid arbitration clause. With respect to delegation, the parties' arguments on remand sing a familiar tune. Archer contends that there is no clear and unmistakable evidence that the parties delegated arbitrability disputes to an arbitrator. The way the agreement is written, Archer asserts that the AAA rules (and resulting delegation) only apply to disputes that fall outside of the arbitration clause's carve-out for actions seeking injunctive relief. Under their reading,

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[17] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (citing *Howsam*, 537 U.S. at 83–85).

[18] *Kubala*, 830 F.3d at 202.

[19] *Id.*

[20] *First Options*, 514 U.S. at 944 (internal citation and alterations omitted).

[21] *Kubala*, 830 F.3d at 202. Of course, *Kubala's* statement that "the motion to compel arbitration should be granted in almost all cases"—where the argument for arbitration was not wholly groundless—should now be read without the "almost."

if a case falls within the carve-out, the agreement does not incorporate the AAA rules and the gateway arbitrability question is not delegated to an arbitrator. On the other hand, defendants argue that the agreement's incorporation of the AAA rules ends the inquiry. They maintain that the carve-out for actions seeking injunctive relief does not trump the parties' delegation. Defendants warn that to read the contract as Archer suggests would require the court to make a merits determination about the scope of the carve-out—whether this is indeed an action seeing injunctive relief—to answer the delegation question, precisely the category of inquiries a court is precluded from making in answering the delegation question.

"Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[22] A contract need not contain an express delegation clause to meet this standard. As we held in *Petrofac*, an arbitration agreement that incorporates the AAA Rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[23] Under AAA Rule 7(a), "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[24]

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[22] *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986).

[23] *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

[24] AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDICATION PROCEDURES 13 (2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf.

It is undisputed that the Dealer Agreement incorporates the AAA rules, delegating the threshold arbitrability inquiry to the arbitrator for at least some category of cases. The parties dispute the relationship of the carve-out clause—exempting actions seeking injunctive relief—and the incorporation of the AAA rules. The agreement states that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association.*"

The agreement in *Petrofac* explicitly covered "all claims and disputes," containing no carve-out provision.[25] We have previously applied *Petrofac* to arbitration provisions that do contain carve-out provisions. In *Crawford*, we considered an arbitration agreement that incorporated the AAA Rules and also contained a carve-out that nothing in the arbitration provision "shall prevent either party from seeking injunctive relief for breach of th[e Agreement]."[26] Without specifically discussing the carve-

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[25] *Petrofac*, 687 F.3d at 674.

[26] *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 256 (5th Cir. 2014). In that case, the Provider Agreement read as follows:

> Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement . . . . Any such arbitration must be conducted in Scottsdale, Arizona, and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties in writing. The expenses of arbitration, including reasonable attorney's fees, will be paid for by the party against whom the award of the arbitrator is rendered . . . . Arbitration shall be the exclusive and final remedy for any dispute

out, we held that the *Crawford* agreement's incorporation of the AAA rules was "clear and unmistakable evidence that the parties to the [] Agreement agreed to arbitrate arbitrability."[27] Under the terms of that agreement, the gateway arbitrability question was delegated to the arbitrator. The Ninth Circuit considered a similar agreement in *Oracle Am., Inc. v. Myriad Group A.G.*[28] The arbitration clause adopted arbitration rules delegating arbitrability issues to the arbitrator and contained a carve-out for certain intellectual property and licensing claims.[29] Because the claims carved-out by that agreement "ar[ose] out of or relat[ed] to" the Source License, and the agreement explicitly provided that any claim arising out of the

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between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law . . . .

[27] *Id.* at 263.

[28] 724 F.3d 1069, 1072–75 (9th Cir. 2013).

[29] The agreement at issue stated, in relevant part:

> Any dispute arising out of or relating to this License shall be finally settled by arbitration as set out herein, except that either party may bring any action, in a court of competent jurisdiction (which jurisdiction shall be exclusive), with respect to any dispute relating to such party's Intellectual Property Rights or with respect to Your compliance with the TCK license. Arbitration shall be administered: (i) by the American Arbitration Association (AAA), (ii) in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) (the "Rules") in effect at the time of arbitration as modified herein; and (iii) the arbitrator will apply the substantive laws of California and United States. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction to enforce such award.

Id. at 1071.

Source License was subject to arbitration, the Ninth Circuit held that Oracle's carve-out argument "conflate[ed] the *scope* of the arbitration clause . . . with the question of *who* decides arbitrability."[30]

The Second Circuit has also considered an arbitration clause that incorporated the AAA rules and exempted certain claims from arbitration.[31] The court noted that it had "found the 'clear and unmistakable' provision satisfied where a broad arbitration clause expressly commits all

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[30] *Oracle*, 724 F.3d at 1076. The clause in *Oracle* provided that "any claim arising out of the Source License shall be settled by arbitration" but exempted "any dispute relating to such party's Intellectual Property Rights or with respect to [Myriad's] compliance with the TCK license." *Id.* at 1075–76. The court noted that the issue with Oracle's carve-out argument was that the two categories of exempted claims by definition were claims arising out of or relating to the Source License, which were explicitly subject to arbitration. *Id.* at 1076. No such circularity exists in the contract at issue here.

[31] *NASDAQ OMX Grp., Inc. v. UBS Securities, LLC*, 770 F.3d 1010 (2d Cir. 2014). That agreement provided in relevant part:

> A. Except as may be provided in the NASDAQ OMX Requirements, all claims, disputes, controversies, and other matters in question between the Parties to this Agreement and the Parties' employees, directors, agents and associated persons arising out of, or relating to this Agreement, or to the breach hereof, shall be settled by final binding arbitration in accordance with this Agreement and the following procedure or such other procedures as may be mutually agreed upon by the Parties.
>
> B. Except as otherwise provided herein or by agreement of the Parties, any arbitration proceeding shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association or in accordance with such other rules and procedures as are agreed to by the Parties.

Id. at 1016.

disputes to arbitration, concluding that *all* disputes necessarily includes disputes as to arbitrability."[32] However, the parties in *NASDAQ* had not clearly and unmistakably delegated arbitrability "where a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute."[33] Because there was ambiguity as to whether the parties intended to have arbitrability questions decided by an arbitrator—because the dispute arguably fell within the carve-out—the court held the arbitrability question was for the court to decide.[34]

Defendants urge that *Crawford* controls and the only difference between that arbitration agreement and the one here is syntax—the ordering of words. But that is precisely the point—the placement of the carve-out here is dispositive. We cannot re-write the words of the contract. The 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. The plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out. Given that carve-out, we cannot say that the Dealer Agreement evinces a "clear and unmistakable" intent to delegate arbitrability.

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."[35] But we must also heed

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[32] *Id.* at 1031.

[33] *Id.*

[34] *Id.* at 1032.

[35] *Henry Schein, Inc.*, 139 S. Ct. at 531.

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.'"[36] The parties could have unambiguously delegated this question, but they did not, and we are not empowered to re-write their agreement.

III.

In addition to disputing whether an arbitrator must decide the gateway question of arbitrability, the parties disagree about whether the underlying dispute is arbitrable at all. Accepting that the district court had the power to decide arbitrability, we next examine whether it correctly determined that the instant action is not subject to the arbitration clause. We do so against the backdrop of a strong presumption in favor of arbitration,[37] yet we also remain mindful of the fact that the FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement."[38]

The magistrate judge found that while "[o]n the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief," there was also "a plausible construction [of the Dealer Agreement] calling for arbitration." The magistrate judge read the

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[36] *Id.* (quoting *First Options*, 514 U.S. at 944).

[37] *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .").

[38] *Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (internal citations omitted).

contract to leave open "the question of whether the exception for actions seeking injunctive relief should be limited to actions for an injunction in aid of arbitration or to enforce an arbitrator's award."

The district court, on the other hand, found that the carve-out for "'actions seeking injunctive relief' is clear on its face—any action seeking injunctive relief is excluded from mandatory arbitration." Thus, the provision's plain language includes all actions seeking injunctive relief, not a more limited category of cases.[39] In so holding, the district court pointed out that the carve-out clause is not part of the AAA's suggested language, and that "[s]uch an intentional drafting effort . . . is worthy of the court's notice." The court declined to "re-write the terms of the Parties' agreement to accommodate a party—notably the party that drafted the agreement—that could have negotiated for more precise language," and held that the arguments for arbitrability were "wholly without merit based on the plain language of the arbitration clause itself."

Defendants urge that, where an arbitration clause contains a carve-out for injunctive relief and one party files a complaint seeking both injunctive relief and damages, the court should read the carve-out to permit injunctive relief only as a preliminary matter to preserve the status quo pending arbitration or on a permanent basis after the plaintiff secures an arbitration award in its favor. They suggest that the court must send the damages clause to arbitration, even if it results in piecemeal litigation. In their view, that reading of the clause preserves

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[39] The district court observed, "no textual basis exists for reading the phrase 'actions seeking injunctive relief' as 'actions seeking injunctive relief if such injunctions are in aid of arbitration.' Further, the clause does not limit the exclusion to actions seeking 'only' injunctive relief, and the Court also declines to read that limitation into the document."

the parties' right to arbitrate the damages claims while preserving the court's role in any injunctive proceedings. They warn that Archer's interpretation allows a party to "tack on" a vague request for injunctive relief to evade arbitration.

Archer counters that the plain language of the clause makes clear that the parties did not agree to arbitrate *actions* that include a request for injunctive relief—therefore there is no plausible argument that the arbitration clause applies. Archer emphasizes that arbitration agreements are as enforceable as other contracts, but not more so, and the court cannot reach beyond the plain and unambiguous language in the agreement.

We note first that the arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to "actions seeking *only* injunctive relief," nor "actions for injunction in aid of an arbitrator's award." Nor does it limit the carve-out to *claims* for injunctive relief. Such readings find no footing within the four corners of the contract. Under North Carolina law, "[w]hen the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit."[40] The mere fact that the arbitration clause permits Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning. "While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, *or reach a result inconsistent with the plain text of the contract*, simply because the policy

[40] *Procar II, Inc. v. Dennis*, 721 S.E.2d 369, 371 (N.C. Ct. App. 2012) (quoting *Taylor v. Gibbs,* 268 N.C. 363, 365, (1966)).

favoring arbitration is implicated."[41] Fundamentally, defendants ask us to rewrite the unambiguous arbitration clause. We cannot.

Defendants urge that this reading would lead to absurd results, where one party could unilaterally evade the agreement to arbitrate with an attenuated request for injunctive relief. This argument overreaches. Even if we re-wrote the carve-out clause to apply only to actions seeking significant injunctive relief—which we cannot—this particular action would still fall within that exception. Archer's complaint alleges multiple continuing violations of federal and state antitrust laws.[42] As the district court

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[41] *E.E.O.C. v. Waffle House*, 534 U.S. 279, 294 (2002) (emphasis added) (internal citations omitted).

[42] In their initial briefing to this court and in their supplemental brief on remand, defendants contend that Archer is no longer entitled to injunctive relief because, during the pendency of this litigation, their contractual relationship with Archer ended. In support of this proposition, defendants cite cases where this court has held that plaintiffs are no longer entitled to injunctive relief. In *Hendricks*, the court held that enjoining a plaintiff's former employer from future ERISA violations was not appropriate. *Hendricks v. UBS Fin. Servs., Inc.*, 546 F. App'x 514, 520 (5th Cir. 2013) (per curiam). In *Glanville*, a district court found the plaintiffs had no standing to pursue a claim for declaratory and injunctive relief based on their purported misclassification as independent contractors because they no longer had any employment relationship with the defendants and thus could not allege future harm. *Glanville v. Dupar, Inc.*, 727 F.Supp.2d 596, 602 (S.D. Tex. 2010). In its initial brief, Archer responded that these cases are inapposite because they do not involve antitrust violations. Archer notes that other circuits have upheld injunctive relief in private antitrust actions even where the specific conspiracy alleged has ended. *See Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 378 (7th Cir. 1990) (affirming the grant of an injunction aimed at remedying lasting effects of an illegal boycott). We need not decide this question here, as the arbitrability question turns only on whether the

correctly noted, the proper vehicle to argue Archer failed to state a claim for relief is a motion under Rule 12. We cannot address the underlying merits of Archer's claim at this stage. It is enough to note that the current action is indeed an "action seeking injunctive relief."

IV.

Because this action is not subject to mandatory arbitration, we do not reach Archer's alternative argument that third parties to the arbitration clause cannot enforce such an arbitration clause. We affirm the district court's order denying defendants' motions to compel arbitration.

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existing action as a whole constitutes an "action seeking injunctive relief."

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civ. No. 2:12-CV-572-JRG

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC. ET AL.,
Defendants.

Filed: December 7, 2016

MEMORANDUM OPINION AND ORDER

RODNEY GILSTRAP, District Judge.

Before the Court is Plaintiff's Motion for Reconsideration (Dkt. No. 45) of the Magistrate Judge's Memorandum Order (Dkt. No. 44). Having fully considered the briefing and the Parties' arguments at the hearing on November 9, 2016, the Court finds that Plaintiff's Motion should be and hereby is **GRANTED.**

I. BACKGROUND

a. Factual Background

According to the Complaint, Plaintiff Archer and White Sales ("Plaintiff") is a distributor of dental equipment that competes directly against Defendant Henry Schein, Inc. ("Schein") and Company X (not named as a defendant in this action). Plaintiff is allegedly known nationally among dental professionals for its low prices and high-quality service. (Compl. at 7.) Schein is alleged to be the largest distributor of dental equipment in the United States. (Compl. at 5.) Defendant Danaher Corporation ("Danaher") is allegedly the largest manufacturer of dental equipment in the United States. (Compl. at 4.) The remaining defendants—Instrumentarium, Dental Equipment LLC d/b/a Pelton & Crane, Dental Equipment LLC d/b/a DCI Equipment, KaVo, and Gendex—are alleged to be wholly-owned subsidiaries of Danaher, which were acquired by Danaher since 2004. (Compl. at 4-7.) Danaher and these subsidiaries are sometimes referred to herein as the "Manufacturer Defendants."

Plaintiff alleges that Schein and Company X have conspired to fix prices and to refuse to compete with each other in the sale of dental equipment to dental professionals. (Compl. at 1–2.) Moreover, Plaintiff alleges that Schein and Company X have conspired with the Manufacturer Defendants to terminate and/or reduce Plaintiff's distribution territory in response to Plaintiff's low prices. (Compl. at 2.) Plaintiff claims that this termination constitutes an illegal boycott, orchestrated by the Defendants to perpetuate the price-fixing agreement and the agreement not to compete between Schein and Company X. (Compl. at 2.) Plaintiff further claims that Danaher, as the common supplier to all three horizontal competitors,

knowingly participated in this illegal boycott. (Compl. at 2.)

b. Procedural Background

On August 31, 2012, Plaintiff filed suit against Defendant Schein and the Manufacturer Defendants alleging violations of Section 1 of the Sherman Act, violations of Section 16 of the Clayton Act, and violations of the Texas Free Enterprise and Antitrust Act. Soon after, on September 26, 2012, the Manufacturer Defendants filed a Motion to Compel Arbitration and Stay All Proceedings (Dkt. No. 10). A few days later, Defendant Schein also filed a Motion to Compel Plaintiff to Arbitrate and to Stay Proceedings (Dkt. No. 14). After holding a hearing on these the Motions, the Magistrate Judge on May 28, 2013, issued an Order granting both Motions, staying the action pending arbitration of the asserted claims, and directing the Parties to notify the Court upon completion or abandonment of the arbitration process (Dkt. No. 44).

On June 10, 2013, Plaintiff filed this Motion for Reconsideration of the Magistrate Judge's Order (Dkt. No. 45). Although Plaintiff styled its filing as a "Motion for Reconsideration," the first sentence of the Motion reads: "Plaintiff Archer and White Sales, Inc. ('Archer') objects to and moves for reconsideration of the May 28, 2013, Memorandum Order." (Dkt. No. 45 at 1.) As such, it was unclear whether Plaintiff intended to have the Magistrate Judge reconsider his Order or whether Plaintiff intended to file objections to the Order under Rule 72(a). Having reviewed the Motion in full, and noting that Plaintiff filed its Motion within fourteen days of the Magistrate Judge's Order, the Court finds that Plaintiff intended its Motion to be considered as objections to the Magistrate Judge's Order, rather than as a Motion for the Magistrate Judge

to reconsider that Order. The Court now reviews the Motion accordingly.

II. STANDARD OF REVIEW

A party may file objections to a magistrate judge's order regarding a nondispositive matter within fourteen days of the order. Fed. R. Civ. Pro. 72(a).[1] A district judge may modify or set aside any part of the order that is clearly erroneous or contrary to law. *Id.*

III. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), an arbitration agreement that involves interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Section 3 of the FAA

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[1] The Fifth Circuit has yet to determine the appropriate standard for reviewing a magistrate judge's ruling on motions to compel arbitration. *Lee v. Plantation of Louisiana, L.L.C.*, 454 F. App'x 358, 360 (5th Cir. 2011) ("[W]e need not reach the question of whether a motion to compel arbitration is a dispositive or non-dispositive motion for purposes of the standard of review by the district judge of the magistrate judge's order.") Other courts, however, have concluded that a ruling on a motion to compel arbitration is a non-dispositive ruling. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 13–15 (1st Cir. 2010); *Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 134–35 (3d Cir. 2014); *Tige Boats, Inc. v. Interplastic Corp.*, No. 1:15-CV-0114-P-BL, 2015 WL 9268423, at *1–3 (N.D. Tex. Dec. 21, 2015) (holding that the magistrate judge's ruling compelling arbitration was non-dispositive where the ruling stayed the case rather than dismissing the case pending arbitration). Moreover, when "review of a non-dispositive motion by a district judge turns on a pure question of law, that review is plenary under the 'contrary to law' branch of the Rule 72(a) standard," and thus "there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s de novo standard." *PowerShare*, 597 F.3d at 15.

requires courts to stay court proceedings pending arbitration for any issue covered by an arbitration agreement. 9 U.S.C. § 3. *See also Hornbeck Offshore Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993).

At a high level, courts perform a two-step inquiry to determine whether to compel a party to arbitrate. *Dealer Computer Servs. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). First, a court must determine whether the parties agreed to arbitrate the particular dispute at issue. *Id. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If so, the court must next determine whether any applicable federal statute or policy renders the claims nonarbitrable. *Dealer Computer Servs.*, 588 F.3d at 886. In other words, the court must determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors*, 473 U.S. at 628. With respect to the first inquiry, there are two separate considerations: whether a valid agreement to arbitrate *some* claims exists (contract formation) and whether the dispute at hand falls within the terms of that valid agreement (contract interpretation). *Dealer Computer Servs.*, 588 F.3d at 886. In this case, the Parties do not dispute that a valid agreement to arbitrate *some* set of claims exists. However, the Parties dispute whether that agreement covers the Plaintiff's claims in this case.

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). The FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Info. Scis.*,

Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (internal citation omitted).

a. The Question Of Arbitrability

Although in most circumstances the Supreme Court has recognized a liberal policy in favor of arbitration, the Court has "made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (first quoting *AT&T Technologies*, 475 U.S. at 649 (emphasis added); then quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Although the Court's definition of "question of arbitrability" is narrow, it includes "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84 (citing *AT&T Technologies*, 475 U.S. at 651-52).

The Court has also explained that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (internal citations omitted). As to questions of arbitrability, the Court applies a "strong pro-court presumption as to the parties' likely intent." *Howsam*, 537 U.S. at 86. *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (noting that questions of arbitrability are "presumptively for courts to decide"); *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) ("[T]he law presumes that courts have plenary

power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.'") (quoting *First Options*, 514 U.S. at 942). Thus, the Court has held that "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Howsam*, 537 U.S. at 86. *See also First Options*, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies*, 475 U.S. at 649).

IV. ANALYSIS

The arbitration clause at issue in this case is found in a Dealer Agreement between Pelton & Crane[2] and Archer and White Sales, dated October 4, 2007, which established Archer and White Sales as a distributor of Pelton & Crane products. (Dkt. No. 46-1, Ex. C.) The arbitration clause states:

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

[2] The same arbitration clause is found in Addendum 2 to the Marus Dealer Agreement (with the name "Marus Dental" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. D) and Addendum 2 to the DCI Equipment Dealer Agreement (with the name "DCI Equipment" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. E).

> Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina.

Here, the Parties dispute whether they agreed to arbitrate antitrust claims. Additionally, the Parties disagree as to who should make that determination—the arbitrator or this Court.

Plaintiff argues that this action is unambiguously excluded from the arbitration clause because the clause expressly excludes "actions seeking injunctive relief"—and it is not disputed that Plaintiff seeks injunctive relief. (Dkt. No. 45, at 3-9.) Defendant responds by contending that a claim for injunctive relief can be added to most lawsuits, and Plaintiff should not be able to evade arbitration by merely asking for injunctive relief in addition to Plaintiff's claim for damages. (Dkt. No. 46, at 7.) According to Plaintiff, however, the fact that a plaintiff may put forth a claim for damages in addition to a claim for injunctive relief is simply irrelevant, and the Court must give the contract its plain and unambiguous meaning. (Dkt. No. 45, at 4.) As such, Plaintiff objects to the Magistrate Judge's ruling on the grounds that it is contrary to the plain language of the arbitration clause. (Dkt. No. 45, at 4.) Further, both sets of Defendants argue that the Magistrate Judge correctly held that the question of arbitrability should be determined by the arbitrator rather than this Court.

a. Scope Of Arbitration Clause

"[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)). However, to determine the scope of an arbitration

agreement, "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). As such, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294 (internal citation omitted). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478.

The Manufacturer Defendants argue that the only "sensible" construction of the arbitration clause would require arbitration of the present action. (Dkt. No. 46, at 6.) Specifically, the Manufacturer Defendants argue that this dispute is "related to" the parties' agreement because the rights Plaintiff seeks to vindicate were created by the Dealer Agreement. (Dkt. No. 46, at 6.) As to the express exclusion of actions seeking injunctive relief, the Manufacturer Defendants argue that Plaintiff's interpretation of the clause would significantly weaken the arbitration clause and thus cannot be correct. (Dkt. No. 46, at 7.) According to the Manufacturer Defendants, a party's "mere inclusion of a boilerplate request for injunctive relief in a complaint otherwise seeking a jury trial for a damages claim" would suffice to remove an action from arbitration. (Dkt. No. 46, at 7.) As such, the Manufacturer Defendants propose another interpretation of that express exclusion: that the exclusion is intended to "allow[ ] a party to seek injunctive relief in court, particularly where the issue in dispute involves 'trademarks, trade secrets or other intellectual property,' or to seek an injunction in aid of arbitration or to enforce an arbitrator's award." (Dkt. No. 46, at

7.) However, these Defendants fail to provide any substantive basis for reading into the Parties' agreement such significant limitations.

Defendant Schein adopts the Manufacturer Defendants' arguments. (Dkt. No. 47, at 13.) Schein also argues that Plaintiff's complaint fails to allege facts to support a claim for injunctive relief. (Dkt. No. 47, at 13.) Specifically, Schein lists the four *eBay* factors and argues that Plaintiff failed to plead the "elements" of a claim for a preliminary or permanent injunction. (Dkt. No. 47, at 13–14.) The Court will address each of the Defendants' arguments in turn.

First, the Court need not affirmatively decide whether the present action falls within the clause which indicates that any disputes "related to" the agreement must be arbitrated, as the ultimate question turns on the clause's express exclusion, which excludes from arbitration "actions seeking injunctive relief."

Second, the phrase "except actions seeking injunctive relief" is clear on its face—any action seeking injunctive relief is excluded from mandatory arbitration. Plaintiff's action seeks injunctive relief. Applying the plain meaning of the clause, Plaintiff's action is excluded from mandatory arbitration.

As Plaintiff noted in its Response to the Manufacturer Defendants' Motion to Compel, the arbitration clause in the Dealer Agreement differs from the standard arbitration clause suggested by the American Arbitration Association ("AAA"). (Dkt. No. 21, at 6 (citing Dkt. No. 10-3, Ex. B).) Specifically, the clause's exclusion of actions seeking injunctive relief (and trademark disputes) is not part of the AAA's suggested language. The arbitration clause in this case is unique. Such an intentional drafting effort as opposed to dropping in standard language is worthy of the Court's notice.

Third, the Manufacturer Defendants' proposed interpretation of the exclusion clause fails based on the plain language of the clause itself. Those Defendants argue that the exclusion covers only intellectual property disputes or actions seeking injunctions in aid of arbitration. However, no textual basis exists for reading the phrase "actions seeking injunctive relief" as "actions seeking injunctive relief if such injunctions are in aid of arbitration." Further, the clause does not limit the exclusion to actions seeking "only" injunctive relief, and the Court also declines to read that limitation into the document.

A very similar clause was recently addressed by the Southern District of New York in *Frydman v. Diamond*, No. 1:14-CV-8741-GHW, 2015 WL 5294790 (S.D.N.Y. Sept. 10, 2015). The clause that excluded actions from arbitration in that case stated:

> Should any dispute arise between the Parties which gives rise to injunctive or equitable relief pursuant to the terms of this Agreement, the Operating Agreements or the Settlement Agreements, then notwithstanding anything else contained in such agreements, *the party initiating an action seeking injunctive or equitable relief may at his/her/its election bring such action in a court of competent jurisdiction*, and each of the other Parties hereby consent to same and shall not seek to dismiss or move such action to arbitration or other adjudication. *Id.* at *2 (emphasis added).

The parties' arguments in that case mirror the arguments presented to this Court. There, the plaintiff argued that the exception allowed the plaintiff to choose the forum in which to bring any action seeking injunctive relief.

Id. at *2. Meanwhile, the defendants argued that the clause "was intended to be a narrow exception to the parties' broad agreement to arbitrate, and that the plaintiff's interpretation of [the clause] would render the parties' agreement to arbitrate meaningless because any party could avoid arbitration by simply including any type of claim of injunctive or equitable relief in his complaint." *Id.* at *6. There the defendants also argued that the exclusion should be interpreted as "a standard 'aid of arbitration' provision of the sort that allows a party to an arbitration agreement to seek equitable or injunctive relief either to enforce an arbitral award or to maintain the status quo pending arbitration." *Id.* at *6. The court in that case held that the plain language excluded the plaintiff's action from arbitration because the plaintiff's action sought equitable relief. In reaching the same conclusion, this Court finds persuasive the *Frydman* Court's emphasis on the plain language chosen and agreed to by the parties.[3]

The Manufacturer Defendants' argument that this reading of the clause would substantially weaken the arbitration clause simply cannot override the plain meaning of the words chosen by the parties in their agreement. To put it concisely, the Court will not re-write the terms of the Parties' agreement to accommodate a party—notably,

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[3] Although the court in *Frydman* relied on New York state law principles of contract interpretation to underscore the supremacy of the plain language, North Carolina law places the same emphasis on the plain meaning of words in contract interpretation. Under North Carolina law, "when the terms of a contract 'are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written,' . . . and 'enforce[d] . . . as the parties have made it.'" *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 91 (2009) (first quoting *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942); then quoting *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)) (internal citations omitted).

the party that drafted the agreement[4]—that could have negotiated for more precise language. It is the duty of the courts to "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (noting that the purpose of the Federal Arbitration Act was "to make arbitration agreements as enforceable as other contracts, *but not more so*") (emphasis added).

Finally, Defendant Schein's argument that Plaintiff failed to "plead" a claim for injunctive relief also fails. First, any argument that Plaintiff failed to state a claim for relief should be raised under Federal Rule of Civil Procedure 12. There is no such motion before the Court. Further, the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), are not pleading requirements—rather, they are factors that are to be considered and carefully weighed by a court before an injunction should issue. To put it simply, injunctive relief is a remedy, not a cause of action. *See Prompt Med. Sys., L.P. v. Allscriptsmisys Healthcare Sols., Inc.*, No. 6:10-CV-71, 2011 WL 12863577, at *1 (E.D. Tex. Feb. 11, 2011) (noting that the defendants in that case failed to provide any authority that an injunction must be pleaded with more specific facts). *See also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.").

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[4] As Plaintiff noted in its Sur-reply to the Manufacturer Defendants' Motion to Compel, the clause at issue was drafted by Pelton & Crane. (Dkt. No. 33, at 2.)

Given the plain meaning of the language chosen by the Parties, and there being no basis for reading significant limitations into the express exclusion, the Court concludes that there is, in this case, a "positive assurance" that no reasonable interpretation of the arbitration clause would force this action into arbitration. *See Pers. Sec. & Safety Sys.*, 297 F.3d at 392 ("[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'") (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)).

b. The Question Of Arbitrability

The Parties disagree as to who should determine the scope of the arbitration clause in this case—the arbitrator or this Court. A general presumption exists in favor of arbitrability being decided by the Court, as "the law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.'" *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) (quoting *First Options*, 514 U.S. at 942). Thus, the Court concludes that the question of arbitrability should not be sent to the arbitrator in these narrow circumstances for two reasons: (1) the Parties did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief; and (2) Defendants' argument that Plaintiff's claims fall within the scope of the arbitration clause is wholly groundless. The Court will address these two independent rationales in turn.

i. Clear And Unmistakable Evidence

Courts often find clear and unmistakable evidence of an agreement to arbitrate arbitrability when an agreement includes an express delegation provision. *See, e.g.*, *Aviles v. Russell Stover Candies, Inc.*, 559 F. App'x 413, 415 (5th Cir. 2014) (holding that the delegation clause provided clear and unmistakable evidence that the parties intended to arbitrate arbitrability). "A delegation provision is an 'agree[ment] to arbitrate "gateway" questions of "arbitrability," such as . . . whether [the parties'] agreement covers a particular controversy.'" *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014). There is no *express* delegation clause in the agreement before this Court. Nonetheless, as Schein and the Manufacturer Defendants correctly note, the Fifth Circuit has held that the adoption of the AAA rules to govern arbitration proceedings "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Cooper v. West-End Capital Mgmt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016) (quoting *Petrofac, Inc. v. DynMcDermott Petroleum Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). As such, Defendants rely on *Petrofac* to argue that the Magistrate Judge correctly decided to refer the case to an arbitrator to determine arbitrability based on the Parties incorporation of the AAA rules. (Dkt. No. 46, at 1; Dkt. No. 47, at 13.)

As Plaintiff noted during its oral argument, the arbitration clause in *Petrofac* did not contain any exclusions. Rather, it was a standard broad arbitration clause. Plaintiff also argues that unlike the arbitration clause in *Petrofac*, the arbitration clause here "cabins application of the AAA rules to disputes 'arising under or related to' the Agreement that are *not* 'actions seeking injunctive relief' or 'disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane.'" (Dkt. No. 48, at

1 (emphasis added).) In other words, according to Plaintiff, the clause represents an agreement that the AAA rules would govern only when the dispute did *not* fall within the expressly excluded categories. This Court finds such argument to have merit.

Although Plaintiff's argument at first blush appears circular, the logic of Plaintiff's argument holds true given the exclusion expressly set forth by the Parties. For example, if the present action fell *outside* of the clause's express exclusion, any questions as to arbitrability (*e.g.*, whether a particular cause of action "arises out of or relates to" the agreement) would be sent promptly to the arbitrator. That is not the case here, where the present action falls squarely within the terms of an express carve-out. Indeed, it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration. As such, there is no reason to believe that incorporation of the AAA rules, including the AAA rule that delegates the question of arbitrability to the arbitrator, should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances—when an action falls squarely within the clause excluding actions like this from arbitration. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 81 (Del. 2006) (addressing a broad arbitration clause that contained a clause allowing injunctive relief to be pursued in court and holding that "[s]ince this arbitration clause does not generally refer *all* controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator") (emphasis added).

ii. The "Wholly Groundless" Exception

Even if this Court were to find that the adoption of the AAA rules constituted clear and unmistakable evidence that the Parties agreed to arbitrate the question of arbitrability in these unique circumstances, recent guidance from the Fifth Circuit indicates that in narrow circumstances, a court should nonetheless determine arbitrability where a defendant's argument in favor of arbitrability is "wholly groundless." *Douglas*, 757 F.3d at 463–64. In *Douglas*, the Fifth Circuit addressed whether the question of arbitrability should be sent to the arbitrator. *Id.* at 462. The arbitration clause at issue in that case defined the "disputes" that would be subject to arbitration as including "the validity, enforceability, or scope of this Arbitration provision." *Id.* at 462. Despite the existence of an express delegation clause in the arbitration agreement (which does not exist here), the Fifth Circuit held that the question of arbitrability need not be sent to arbitration. *Id.* at 462–63.

The Circuit held that "[t]he law of this circuit does not require all claims to be sent to gateway arbitration merely because there is a delegation provision." *Id.* at 463. In its analysis, the Fifth Circuit relied on a test established by the Federal Circuit, a test that "most accurately reflects the law—that what must be arbitrated is a matter of the parties' intent." *Id.* at 464.[5] The Federal Circuit's test involves two steps: "(1) did the parties 'unmistakably intend

[5] Though cited with approval, it is unclear whether the Fifth Circuit has expressly adopted the Federal Circuit's "wholly groundless" test. Regardless, even if that test has not been adopted by the Fifth Circuit, as discussed in Section IV.b.i above the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator because the adoption of the AAA rules in this case applies only to matters subject to arbitration—not to those that are expressly excluded from arbitration.

to delegate the power to decide arbitrability to an arbitrator,' and if so, (2) is the assertion of arbitrability 'wholly groundless.'" *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)). As applied, "the 'wholly groundless' inquiry 'necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement.'" *Douglas*, 757 F.3d at 463 (quoting *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 718 F.3d 1336, 1346–47 (Fed. Cir. 2013), vacated on other grounds, 134 S.Ct. 1876 (2014) (vacating on mootness grounds)).

In so holding, the Fifth Circuit emphasized that to hold otherwise would require the plaintiff to go to an arbitrator merely to have the arbitrator "flatly" explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court. *Douglas*, 757 F.3d at 463. The Circuit noted the absurdity of such a process:

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not. *Id.* at 464.

The same unequivocal response from the arbitrator would just as readily occur here, where the plain language of the clause carves out and excludes the action brought by this Plaintiff. As discussed above in Section IV.a, Defendants' argument that this action seeking injunctive relief should be referred to arbitration is wholly without

merit based on the plain language of the arbitration clause itself. As a result, the Court finds that even if the inclusion of the AAA rules for disputes not carved out by the Parties' own language is held to be clear and unmistakable evidence that the parties generally agreed to arbitrate the question of arbitrability, Defendants' assertion that this particular action should be arbitrated is "wholly groundless." Additionally, given the clarity of the arbitration provision discussed above, it would be senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court.

The Court recognizes that the "wholly groundless" exception in *Douglas* should be used only in "exceptional" circumstances, and the Court does not seek to expand that narrow exception by applying it in this case. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016) ("Such cases are exceptional, and the rule in *Douglas* is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause. So long as there is a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated, a delegation clause is effective to divest the court of its ordinary power to decide arbitrability."). However, given the precise facts of this case—that there is no express delegation of arbitrability, but simply the adoption of the AAA rules for disputes not excluded from arbitration—and given that the plain meaning of the language at issue leaves Schein and the Manufacturer Defendants with no plausible argument that this action falls within the narrowed parameters of those disputes subject to arbitration, application of the *Douglas* exception is appropriate in this particular case.

c. Equitable Estoppel

Having concluded that this action falls within the express exclusion contained in the parties' arbitration clause and that this action is not subject to mandatory arbitration, the Court need not decide, and does not reach, the question of whether the third parties to the arbitration clause in this case can enforce such arbitration clause

V. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Order should be and hereby is **REVERSED**. It is therefore **ORDERED** that the Magistrate Judge's Order (Dkt. No. 44) is hereby **VACATED**. Accordingly, the Motions to Compel Arbitration filed by Defendant Schein and the Manufacturer Defendants are **DENIED**, and the stay previously entered in this case is hereby **LIFTED**.

The trial date for this action is hereby set for February 5, 2018, and the pre-trial hearing date is set for January 8, 2018. Accordingly, the Parties are **ORDERED** to meet and confer and thereafter jointly submit a proposed Docket Control Order to the Court within 14 days of this Order based on the above trial and pre-trial dates.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Civ. No. 2:12-CV-572-JRG

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC. ET AL.,
Defendants.

Filed: May 28, 2013

MEMORANDUM ORDER

ROY S. PAYNE, Magistrate Judge.

Currently before the Court are the two motions to compel arbitration, filed by Defendant Henry Schein, Inc. (Dkt. No. 14) and by Defendants Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies Corporation, Instrumentarium Dental Inc., and KaVo Dental Technologies, LLC (hereinafter "the Manufacturer Defendants") (Dkt. No. 10). For the reasons that follow, the motions are **GRANTED**.

Plaintiff ("Archer") is a distributor of dental equipment and competes directly against Defendant Henry

Schein, Inc. ("Schein"), which is alleged to be the biggest distributor in the country. Defendant Danaher Corporation ("Danaher"), which is alleged to be the biggest manufacturer of dental equipment, has over the last decade acquired all of the other named defendants, formerly its smaller competitors in the dental equipment manufacturing field. Archer alleges that Schein conspired with Danaher and its subsidiaries, and one unnamed large distributor, to restrict Archer's access to the market because Archer was attempting to sell the equipment to dentists at discounted prices. In these motions, the Defendants assert that Archer is bound by arbitration clauses in its distributor agreements with some of the Manufacturer Defendants. Defendants also assert that the doctrine of equitable estoppel allows even the Defendants who are not parties to any contract with Archer containing an arbitration clause to demand arbitration.

The starting point for this case is the arbitration clause itself. However, it must be read against the background of the strong public policy in favor of arbitration expressed in the Federal Arbitration Act. 9 U.S.C. § 1, et seq. The clause provides: "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[1]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Three parts of this clause bear upon the outcome of the dispute. First, the opening clause is a broad one, referring as it does to *any* dispute *related* to the agreement. Second, that broad clause has an exception for

[1] Pelton & Crane was the predecessor of one of the Danaher subsidiaries.

actions seeking injunctive relief. Third, the clause incorporates the rules of the AAA.

The Court has no hesitation in concluding that this lawsuit is a dispute "related" to the distributor agreement. After all, the very rights that Archer claims the Defendants conspired to defeat were created by the distributor agreement and others like it that the record suggests have similar arbitration clauses. *E.g.*, Dkt. No. 24 at 11. The fact that Archer was an authorized dealer for the equipment at issue is essential to its claims. However, the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration. On the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief. On the other hand, it does not seek *only* injunctive relief, and the Court is persuaded that damages (described in Paragraph 1 of the Complaint as "in the tens of millions of dollars") are the predominant relief sought. The incorporation of the rules of the AAA provides the answer to this problem, as those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules.

In *Petrofac, Inc. v. DynMcDermott Petrol Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012), the Court held that "We agree with most of our sister circuits that the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." If there were no reasonable construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide. However, there is in this case a plausible construction calling for arbitration. Thus, the question of whether the exception for actions seeking injunctive relief should be limited to actions for an injunction in aid of arbitration or to enforce an

arbitrator's award, should properly be left for the arbitrator to decide.

The case relied upon by Archer actually supports this analysis. In *State of New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 62 (2nd Cir. 1996), the Court held that "While it is true that exclusionary clauses should not be given expansive readings, here the language excluding a certain class of disputes from arbitration was *clear and unambiguous.*" (emphasis supplied). As shown above, that standard has not been met here.

The next question is whether non-signatory defendants can avail themselves of the arbitration clause. Both sides agree that *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000), is the controlling authority on the application of the doctrine of equitable estoppel in this circumstance, namely whether Archer is estopped from asserting the lack of privity against the non-signatory defendants who seek to compel arbitration.[2] In *Grigson*, the Fifth Circuit expressly adopted the Eleventh Circuit's test applying equitable estoppel to non-signatory parties seeking to compel arbitration of "intertwined" claims. That test provides:

> "Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims*

[2] Because both sides agree that Grigson is controlling, the Court need not consider whether *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (U.S., 2009) would call for further analysis under state law.

> *against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."*

Id. at 527 (emphasis in original). Both branches of the test appear to apply here. First, Archer has to rely on its written distributorship agreement with Pelton & Crane in order to allege that it was wrongfully excluded from the market (e.g., Complaint ¶ 32, Dkt. No. 1 at 10). Second, the conspiracy alleged between Schein and the Manufacturer Defendants alleges "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Finally, the Court cannot presume that the defendants did act wrongfully, which would be necessary in order for equity or fairness to override the application of the doctrine in this instance.

Accordingly, the Motions to Compel Arbitration are granted and this action is stayed pending arbitration of the claims asserted herein. All parties are directed to notify the Court when the arbitration process is complete or if it has been abandoned.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INCORPORATED,

Plaintiff-Appellee

v.

HENRY SCHEIN, INCORPORATED; DANAHER CORPORATION; INSTRUMENTARIUM DENTAL, INCORPORATION; DENTAL EQUIPMENT, L.L.C., KAVO DENTAL TECHNOLOGIES, L.L.C., AND DENTAL IMAGING TECHNOLOGIES, CORPORATION,

Defendants-Appellants

Filed: December 6, 2019

HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM.

(✔) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir.

R. 35), the Petition for Rehearing En Banc is **DENIED**.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is **DENIED**. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is **DENIED**.