No. 17A859

IN THE SUPREME COURT OF THE UNITED STATES

HENRY SCHEIN, INC.; DANAHER CORPORATION; INSTRUMENTARIUM DENTAL, INC.; DENTAL EQUIPMENT LLC; KAVO DENTAL TECHNOLOGIES, LLC; AND DENTAL IMAGING TECHNOLOGIES CORPORATION, APPLICANTS

v.

ARCHER AND WHITE SALES, INC.

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

# RESPONDENT'S OPPOSITION TO THE APPLICATION FOR A STAY

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## CORPORATE DISCLOSURE STATEMENT

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

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## INTRODUCTION

In a final attempt to further delay resolution on the merits of respondent's antitrust claims (filed over five years ago), applicants ask this Court to take the extraordinary step of staying the entire case pending a forthcoming petition for a writ of certiorari. Applicants overstate their case. There is no reasonable probability this Court will grant certiorari, no substantial likelihood of reversal, no irreparable harm faced by applicants, and nothing remotely inequitable about maintaining the status quo. The stay application should be denied.

First, contrary to applicants' contention, the issue here is exceedingly narrow, and the purported circuit conflict is illusory. No court of appeals has refused to apply the wholly groundless exception when actually confronted with an implausible, groundless, or frivolous claim of arbitrability. Additionally, the only two appellate decisions to criticize the wholly groundless exception arose just last year. Accordingly, there is every reason to let the issue percolate to see if those circuits would actually endorse applicants' wooden, categorical rule when faced with a frivolous assertion of arbitrability.

Even if the supposed split was real and fully developed, the Court is unlikely to grant review because this case is an exceedingly poor vehicle for resolving it. Applicants would likely lose on the alternative ground that the parties did not

"clearly and unmistakably" delegate arbitrability questions to the arbitrator, as the district court held and the Fifth Circuit strongly suggested. Far from finding that high threshold met, the court below found the language "ambiguous at best" and declared that respondent has a "strong argument" that the parties never agreed to submit this dispute to the arbitrator. The question presented is thus wholly academic on this record, and there is no point in deciding this question in a case where the court below would likely reinstate the same result on remand.

Second, there is no significant possibility that this Court will reverse the court of appeals' decision. The "wholly groundless" exception is simply a logical application of this Court's and the FAA's recognition that courts play a special role in threshold questions about arbitrability. The goal always remains to enforce the parties' intentions. And contrary to applicants' assertions, it is applicants who are seeking to avoid the parties' agreement by forcing into arbitration claims that are expressly excluded from the arbitration clause.

Third, applicants suggest that an emergency stay is essential so the Court can consider their petition for certiorari before the trial starts and applicants suffer irreparable harm. But stays are usually reserved for situations where there are no alternatives to relief. There is a ready

alternative here: filing a petition for certiorari with any reasonable dispatch. The Fifth Circuit's decision issued on December 21, 2017. Had applicants filed their petition when they filed this stay application, they would be all but assured a decision on their petition before the May 14 trial date. And even under the current schedule, a certiorari decision from this Court is likely before trial. Applicants should not be able to point to any self-created irreparable harm to justify the heavy costs and disruption of a stay simply because they neglected to take available steps to seek effective relief in the ordinary course.

Finally, the equities do not favor a stay. Respondent's claims have already been put on hold once for over three years, all to litigate an arbitration claim both the district court and Fifth Circuit declared "wholly groundless." That delay resulted in lost evidence that can never be recovered. After spending immense amounts of time and money pursuing its claims -- all the while continuously subject to applicants' ongoing anticompetitive conduct -- delaying the trial date yet again would flip any ordinary concept of equity on its head.

## STATEMENT

1. On August 31, 2012, Archer commenced this action against defendants Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental, Inc.; Dental Equipment, LLC; KaVo Dental

Technologies, LLC; and Dental Imaging Technologies Corporation. C.A. App. 16. Schein is a large wholesale distributor of dental equipment and supplies. Id. at 20. The other defendants (the "Manufacturer Defendants") are major manufacturers of dental equipment and supplies.[1] Id. at 19-20.

Archer is a small, family-owned distributor of dental equipment and supplies. C.A. App. 21. Unlike its larger competitors, Archer keeps overhead (and prices) low by forgoing certain expenses rendered unnecessary by the advent of e-commerce. Id. at 21-22. Archer alleges that Schein, Patterson, and Benco conspired to maintain supracompetitive margins by agreeing not to compete with each other on price. Id. at 33-34. They enforced their margin-fixing conspiracy by boycotting low-margin distributors like Archer. Ibid. In particular, Archer alleges that the traditional distributors pressured major manufacturers, including the Manufacturer Defendants, to join the anticompetitive combination by threatening to stop distributing their products unless they terminated the distributorships of low-margin distributors like Archer. Ibid. The manufacturers succumbed to the pressure, first, severely

[1] By amendment to its complaint dated August 1, 2017, Archer joined as defendants two additional large distributors: Patterson Companies, Inc. and Benco Dental Supply Co.

restricting Archer's sales territories and, ultimately, terminating Archer's distributorships. Ibid.

As remedies for the defendants' antitrust violations, Archer demands damages and "also seeks injunctive relief," because "[t]he violations . . . are continuing and will continue unless injunctive relief is granted." C.A. App. 35.

2. Shortly after Archer filed its original complaint, defendant Dental Equipment moved to compel arbitration based on its distribution agreement with Archer permitting it to sell the Pelton & Crane line of dental equipment (the "Agreement"). The Agreement provided that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." C.A. App. 92 (emphasis added). The other Manufacturer Defendants joined Dental Equipment's motion, and Schein filed its own motion to compel arbitration,[2] arguing that under the doctrine of equitable estoppel, Archer also was required to arbitrate its claims against all of the defendants, even though it had an arbitration agreement only with Dental Equipment.

[2] Patterson and Benco had not yet been joined as parties, so they did not file motions to compel arbitration and did not participate in the current interlocutory appeal.

In May 2013, the magistrate judge granted the motions to compel arbitration and stayed the case. In June 2013, Archer filed a "motion for reconsideration" of the magistrate judge's order. C.A. App. 444. The motion was fully briefed by early July 2013, but the case remained stayed until October 28, 2016, when the district court sua sponte scheduled a status conference. Id. at 626.

Shortly thereafter, the district court vacated the magistrate judge's order and denied the motions to compel arbitration. First, the district court explained that the exception for "actions seeking injunctive relief" was "clear on its face" and covered Archer's claims, because Archer had asked the court to enjoin ongoing antitrust violations. App. 22a. The court rejected the defendants' argument that the Agreement "limit[s] the exclusion to actions seeking 'only' injunctive relief." Ibid.

Second, the district court ruled that it -- and not the arbitrator -- was empowered to decide arbitrability. App. 25a. The court reached this conclusion "for two reasons." Ibid. It first explained that the parties had not clearly and unmistakably agreed to delegate arbitrability to the arbitrator. Id. at 26a-27a. It observed that "[t]here is no express delegation clause in the [A]greement." Id. at 26a. And in light of the carve-out for actions seeking injunctive relief, said the

court, there was no reason to believe that the parties' adoption of the AAA Rules expressed their intent to delegate the arbitrability of such actions. Id. at 26a-27a.

Additionally, the court held that even if it had found that the parties clearly and unmistakably delegated arbitrability, it nevertheless would have the authority to decide arbitrability if the defendants' "argument in favor of arbitrability is 'wholly groundless.'" App. 27a-28a (citing Douglas v. Regions Bank, 757 F.3d 460, 463-64 (5th Cir. 2014)). The court recognized that the wholly groundless exception is a narrow one, but concluded that the defendants' argument for arbitrability in this case was wholly groundless, because the Agreement left them "with no plausible argument that this action falls within the narrowed parameters of those disputes subject to arbitration." Id. at 29a-30a.

3. Schein and the Manufacturer Defendants took an interlocutory appeal of the district court's denial of their motions to compel arbitration. They also moved the district court to stay the case pending the appeal, and the court denied the motion. Dist. Ct. Dkt. No. 88. The case has since proceeded through discovery and virtually all other pretrial phases. Trial is set for May 14, 2018.[3]

[3] The Fifth Circuit also denied a stay motion, which it had carried with the merits of the appeal. See Order (Feb. 4, 2017); Order (Dec. 21, 2017).

4. On appeal, Archer urged affirmance on both of the two distinct grounds on which the district court ruled, viz., that "[t]he parties did not delegate the question of arbitrability to the arbitrator" and that, even if they had, the defendants' "arbitrability argument is 'wholly groundless.'" C.A. Br. 17, 26.

The Fifth Circuit unanimously affirmed the district court's denial of the motions to compel arbitration. The court "first ask[ed] if the parties 'clearly and unmistakably' delegated the issue of arbitrability." App. 5a. Far from finding a "clear and unmistakable" delegation, the court expressed serious doubt that the Agreement's atypical language delegated this particular issue to the arbitrator. Id. at 8a; see also id. at 10a (noting the agreement "'differs'" from "'standard arbitration'" clauses). It recognized a "strong argument" that the Agreement's "invocation of the AAA Rules" did "not apply to cases that fall within the [Agreement's] carve-out" for injunctive relief. Id. at 8a. It further found the "interaction" of the key clauses was "at best ambiguous," and noted that controlling state law required any ambiguity to be construed against the drafters (here, the applicants seeking arbitration). Ibid. (citing T.M.C.S., Inc. v. Marco Contractors, Inc., 780 S.E.2d 588, 597 (N.C. Ct. App. 2015)). Despite raising these substantial reservations, the court did not expressly "decide which reading

to adopt" because the "'wholly groundless' inquiry" resolved the issue. Ibid.

Turning to that inquiry, the court observed that the "contours of the 'wholly groundless' exception [are] not yet fully developed." Id. at 12a. Yet the court examined the defendants' arguments in favor of arbitrability and determined that each found "no footing within the four corners of the contract." Ibid. The court recounted the district court's findings that the Agreement was "clear on its face" and "the arguments for arbitrability were 'wholly without merit.'" Id. at 10a. Like the district court, the Fifth Circuit also saw "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief." Id. at 13a. Accordingly, it held that the defendants' argument for arbitrability was wholly groundless, and so affirmed the district court's denial of the motions to compel arbitration. Ibid.

**ARGUMENT**

Applicants have asked the Court take the extraordinary step of intruding on the district court's docket by staying proceedings pending applicants' (still-forthcoming) petition for a writ of certiorari. "Denial of . . . in-chambers stay applications is the norm," however, and "relief is granted only in 'extraordinary cases.'" Conkright v. Frommert, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., in chambers) (quoting Rostker

v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). Applicants have not carried their heavy burden of showing an "extraordinary" entitlement to a stay.

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

According to applicants, this case presents an important and recurring question that has divided the courts of appeals. But the court below decided only a narrow question with no widespread practical application. No court of appeals has rejected the wholly groundless exception in a case where the movant's argument was actually groundless, implausible, or frivolous, as it was here; the purported conflict is therefore illusory. There is a compelling argument to wait to see whether any court of appeals would refuse to apply the wholly groundless exception if faced with an actual frivolous and implausible claim. To date, no such decision exists.

To the extent there is a theoretical disagreement among the courts of appeals, that disagreement is very recent and has little practical effect given the narrowness of the wholly groundless exception. In such circumstances, there is no need for this Court to grant certiorari at this early stage; rather, it should give the lower courts the opportunity to resolve the disagreement themselves or at least sharpen the issues and arguments before this Court's review.

This case is also an exceptionally poor vehicle for deciding the question presented. The wholly groundless exception is relevant only if the parties "clearly and unmistakably" tasked the arbitrator with deciding arbitrability. Here, however, the court of appeals identified "strong" support for respondent's alternative argument that the parties had not delegated the arbitrability question, which independently supports the judgment below. The wholly groundless question is thus not outcome-determinative on these facts, and the independent ground for affirmance renders the question advisory here.

These serious defects and complications render this case a poor candidate for certiorari. Accordingly, there is little prospect of further review.

### A. The Purported Conflict is Illusory, and In Any Event, This Issue Is New and Needs Time to Percolate

1. Applicants claim to have identified a split in the courts of appeals over the wholly groundless exception, but that split is illusory. The Fifth Circuit, consistent with decisions in the Fourth Circuit, Sixth Circuit, and Federal Circuit, recognizes the existence of the wholly groundless exception. See Douglas v. Regions Bank, 757 F.3d 460 (5th Cir. 2014); Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522 (4th Cir. 2017); Turi v. Main St. Adoption Servs., LLP, 633 F.3d 496 (6th Cir. 2011); Qualcomm Inc. v Nokia Corp., 466 F.3d 1366 (Fed.

Cir. 2006). The Tenth and Eleventh Circuits, by contrast, recently cast doubt on that exception, but they did so in the context of arbitrability arguments that were not wholly groundless. See Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017); Jones v. Waffle House, Inc., 866 F.3d 1257 (11th Cir. 2017). Indeed, the Eleventh Circuit even acknowledged that it would "conclude that Waffle House's arguments were not wholly groundless." Jones, 866 F.3d at 1270-71 & n.1. The Tenth and Eleventh Circuits' supposed rejection of the wholly groundless exception is therefore mere dicta. Those cases say little about what would happen if the courts were confronted with an arbitrability argument that actually is wholly groundless.

To the extent that any split exists, it arose very recently, with both decisions calling into question the wholly groundless approach issued just last year. Given the recency of these two decisions, the Court should allow the lower courts time to resolve this issue themselves. For example, it remains to be determined how the Tenth and Eleventh Circuits themselves would address the wholly groundless exception if faced with a case in which the arbitration claim was wholly groundless. Further, the supposed split could encourage appellate courts to take the issue up en banc and reach a different conclusion. In any event, giving the lower courts time to engage in a dialogue with one another will sharpen the issues and arguments for if

and when the Court eventually reviews this question. At present, however, that dialogue has not had time to occur. As even the court below acknowledged, "Douglas is a recent case," and the "contours of the 'wholly groundless exception [are] not yet fully developed." App. 12a. The Court should allow that development to happen before any review.

2. Applicants overstate the practical effects of the purported split. Because the wholly groundless exception is a "narrow escape valve," App. 8a-9a, that applies only where the argument for arbitrability is "frivolous or otherwise illegitimate," Simply Wireless, 877 F.3d at 529, it impacts very few cases. Indeed, while the Fourth Circuit discussed the wholly groundless exception, it did not apply it to the case before it and instead ordered arbitration, see id. at 528-29, and the Eleventh Circuit acknowledged that it would have reached the same result even using the wholly groundless exception, Jones, 866 F.3d at 1270-71 & n.1. This is broadly true of other cases addressing the issue. In fact, respondent has found only three other cases in which an appellate court has found an argument so wholly groundless as to refuse to order arbitration. Douglas, 757 F.3d at 464; Turi, 633 F.3d at 511; Interdigital Commc'ns, LLC v. ITC, 718 F.3d 1336 (Fed. Cir. 2013), vacated and remanded on other grounds, 134 S. Ct. 1876 (2014).

The practical effects of any split are lessened even further given that the wholly groundless exception's limited application means that even if this Court were to reject it, many -- if not all -- of the disputes to which the exception would have applied will end up back in district court. Arbitrators deciding the arbitrability question likely would recognize the wholly groundless nature of the arbitrability argument, just as a court would have, and would send the case back to court. Given the limited practical impact of any split, then, there is no urgency for this Court to resolve the question.[4]

### B. The Wholly Groundless Issue Is Not Outcome-Determinative, Making This Case a Poor Vehicle

This case is a poor vehicle for this Court's review of the question presented given the unusual nature of the arbitration

[4] Contrary to applicants' contention (App. 21-22), there is no genuine concern of "'forum shopping.'" No rational party chooses a forum for litigating its entire case based on the minute risk that an opponent will lodge a baseless request to arbitrate and an arbitrator will reward that "wholly groundless" request. Indeed, even were applicants to prevail, the predicate outcome would be a temporary, and wasteful, trip for the arbitrator to confirm that the case indeed belongs back in court. The far more realistic concern is that parties (under applicants' rule) would assert groundless arbitration claims to drive up litigation cost and obtain unwarranted delays. Moreover, many agreements containing arbitration clauses also contain forum selection clauses mandating that any arbitration or court proceeding be filed in a specific venue, which further undercuts applicants' concern of "forum shopping."

clause at issue and the resultant alternative grounds for the Fifth Circuit's decision. The arbitration clause provides the following:

> 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)].

App. 2a. As relevant here, that language creates two preliminary questions before a court can reach the wholly groundless issue: implied delegation and the implications of the carve-out.

1. Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)). For that reason, before reaching the wholly groundless question, courts must "first ask if the parties 'clearly and unmistakably' delegated the issue of arbitrability." App. 5a.

That inquiry is easy where the arbitration provision contains an express delegation clause. See Jones, 866 F.3d at 1267; Douglas, 757 F.3d at 462 n.3. But it becomes much more difficult where the delegation, if any, is only implied. Several courts, including the Fifth Circuit, have held that a broad arbitration clause referencing rules of arbitration that

themselves delegate arbitrability to the arbitrator (such as the AAA Rules) sufficiently indicates the parties' clear and unmistakable intent to delegate arbitrability decisions to the arbitrator. See App. 5a & n.21 (citing Petrofac, Inc. v. DynMcDermott Petro. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)). This Court, however, has never considered implied delegation but would need to do so to properly reach the wholly groundless issue.

2. The arbitration clause at issue is even more unusual because it presents the further complication of an express carve-out of certain merits disputes. Compare Qualcomm, 466 F.3d at 1368 (agreement to arbitrate "[a]ny dispute, claim or controversy arising out of or relating to this Agreement"), and Simply Wireless, 877 F.3d at 525 (similar), with App. 2a (agreement to arbitrate "[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 Pelton & Crane)" (emphasis added)). In such situations, the carve-out clause may "remove[] the disputes from the ambit of both arbitration and the AAA Rules." App. 6a. And if the AAA Rules -- the only basis for finding an agreement to arbitrate arbitrability -- do not apply to the excluded disputes, the parties never agreed to arbitrate the arbitrability of those disputes.

The district court relied on the carve-out to hold that in the unique context of this case, the arbitration agreement did not show a clear and unmistakable intent to delegate arbitrability questions. The court reasoned that "there is no reason to believe that incorporation of the AAA rules . . . should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability . . . when an action falls squarely within the clause excluding actions like this from arbitration." App. 27a. Although the court of appeals did not technically reach the delegation question, it expressly found that (i) the agreement's language is "ambiguous" at best; (ii) any ambiguity must be construed against the drafter (here, those seeking arbitration); and (iii) "[t]here is a strong argument" that any delegation does not apply to this dispute. Id. 8a.

3. The upshot of these irregularities is that for this Court to determine that this dispute should have been sent to arbitration, it would have to conclude that, first, invocation of the AAA Rules is clear and unmistakable evidence of intent to delegate the arbitrability question to arbitrators; second, the AAA Rules apply even to disputes expressly carved out of the arbitration agreement, with its peculiar wording; and third, the wholly groundless exception is legally improper. In other words, the Court would have to answer two preliminary questions before

addressing the "narrow" question that applicants ask this Court to review.

Even if this Court were to ignore the first two questions to reach the wholly groundless issue, there is good reason to believe that the outcome -- affirming the district court's refusal to send the case to arbitration -- would remain the same on remand given the Fifth Circuit's recognition that respondent has a "strong argument" that invocation of the AAA Rules does not indicate a clear and unmistakable intent to arbitrate arbitrability in this instance. App. 8a. Were the Fifth Circuit to reach the same result on different grounds, this Court's decision on the wholly groundless issue would have been merely advisory.

If the Court wants to answer this question, it would be more appropriate to do so in a case involving an express delegation clause, or at least an implied delegation clause with no carve-outs or factual complications. But given the limited practical effect of the wholly groundless exception, see supra pp. 13-14, no compelling reason exists to ignore the serious vehicle problems presented by this case and to decide the question presented anyway.

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

Applicants' merits argument essentially boils down to the claim that agreements to arbitrate arbitrability are just like

agreements to arbitrate a substantive dispute, and because courts may not assess the merits in determining whether the parties have agreed to arbitrate their substantive claims, nor can courts ask whether a party's argument that the parties agreed to arbitrate arbitrability is wholly groundless. That argument fails at the outset; the two types of agreements are not identical, as threshold questions of arbitrability have long held a special place in both this Court's jurisprudence and the text of the FAA. The wholly groundless exception is simply a recognition of courts' special role in ensuring that parties are not forced to "arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945.

1. This Court has long recognized the special place that arbitrability determinations hold, writing that a party must "clear[ly] demonstrat[e]" that a collective bargaining agreement "excluded from court determination . . . the question of its arbitrability." United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960). By contrast, judicial inquiry of whether the parties agreed to arbitrate the merits of a dispute "must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. . . . Doubts should be resolved in favor of coverage." Id. at 582-83. This Court later reiterated the diverging standards, explaining

that "the question of arbitrability . . . is undeniably an issue for judicial determination," while at the same time instructing lower courts to send merits disputes to arbitration even if the claim appears to be frivolous. AT&T Techs., 475 U.S. at 649-50.

In First Options, this Court applied that jurisprudence to the FAA, writing that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944 (quoting AT&T Techs., 475 U.S. at 649). The Court acknowledged that "the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'" Id. at 944-45. But it justified "revers[ing] the presumption" with respect to arbitrability disputes because they are "rather arcane" and "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." Id. at 945; see also Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010) (acknowledging the "caveat" that agreements to arbitrate arbitrability are not identical to agreements to arbitrate the merits of a dispute insofar as the

former requires "clear and unmistakable" evidence that the parties agreed to do so).[5]

The wholly groundless exception is a logical extension of this Court's long-standing instruction that agreements to arbitrate arbitrability are unique and require closer scrutiny by courts before forcing the parties into a (perhaps unexpected) arbitration. In short, the wholly groundless exception "accurately reflects the law -- that what must be arbitrated is a matter of the parties' intent." Douglas, 757 F.3d at 464.

2. The text of the FAA reinforces the conclusion that courts have a special role to play in deciding the threshold issue of arbitrability. Section 3 authorizes courts to stay litigation pending arbitration only if they are "satisfied that the issue involved in such suit or proceeding is referable to arbitration under [an arbitration] agreement." Similarly, section 4 states that the court "shall hear the parties" and "shall proceed summarily to the trial thereof" if there is an "issue" about "the making of the arbitration agreement." Indeed, there is evidence that Congress intended judicial determination

[5] These cases also belie applicants' claim that "assessing intent and deciding what is or is not 'inconsistent with the plain text of the contract' are tasks for the arbitrator." App. 27. While those tasks might ultimately be for the arbitrator, courts have to assess the parties' intent and the text of the arbitration clause to answer the preliminary question whether the parties have clearly and unmistakably agreed to delegate the arbitrability question.

of these threshold matters to be mandatory, limiting parties' ability to avoid judicial review entirely. See David Horton, Arbitration About Arbitration, 70 Stan. L. Rev. at 33-34 (forthcoming 2018). Regardless of their mandatory nature, these provisions evince Congress's understanding that disputes about the arbitrability of a matter are more sensitive than substantive disputes on the merits. Accordingly, the former require closer judicial scrutiny.

3. This is not to say that courts have free rein to ignore or independently divine the best reading of all agreements to arbitrate arbitrability. Their review remains limited to only what is necessary to effectuate the parties' intent. But that is exactly what the wholly groundless exception does. It prevents parties from being forced "to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945.

The cases applying the wholly groundless exception prove it is rooted in common sense and how courts practically use it to effectuate the parties' intent. For example, the arbitration provision at issue here expressly excludes "actions seeking injunctive relief." It is undisputed that respondent is seeking injunctive relief. Nevertheless, applicants argue that the arbitration clause requires respondent to arbitrate any claim for damages. As the court below recognized, however, the

arbitration clause "does not limit the exclusion to 'actions seeking only injunctive relief,' nor 'actions for injunction in aid of an arbitrator's award,'" nor "only claims for injunctive relief." App. 12a. Because applicants' reading found "no footing within the four corners of the document," the court held that applicants' arbitrability argument was wholly groundless. Id. at 13a. Accordingly, the parties could never have expected to arbitrate such claims, and forcing them to go to arbitration -- as applicants argue should happen -- would actually frustrate the parties' intent. See also Turi, 633 F.3d at 511 (refusing to order arbitration of claims for RICO violations, civil conspiracy, misrepresentations, and infliction of emotional distress where the arbitration agreement covered only "a claim regarding fees"); Douglas, 757 F.3d at 464 (refusing to order arbitration of dispute arising from an attorney's embezzlement of the funds from a car accident settlement where the plaintiff signed an arbitration agreement when opening her own separate and since-closed checking account five years earlier).

## III. APPLICANTS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

Applicants bear the burden of showing irreparable harm, and that "burden is particularly heavy when, as here, a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals." Beame v. Friends of the Earth, 434 U.S.

1310, 1312 (1977) (Marshall, J., in chambers). Applicants have not met that burden.

1. A stay pending this Court's decision on applicants' forthcoming petition for a writ of certiorari is unnecessary, as the Court has time to decide the petition before trial begins without issuing a stay. Applicants' only claim of irreparable harm is being forced to go to trial.[6] But trial is not scheduled to begin until May 14. If the applicants file their petition no later than March 9 as they intend, App. 11, respondent's brief in opposition would be due no later than April 9, and the applicants would have until April 23 to file a reply. The Court then has two conferences scheduled between the completion of certiorari briefing and the beginning of trial on May 14. If the applicants need a faster decision, they could have filed their petition weeks ago, or they could expedite or waive their reply. In both cases, the Court would have even more opportunities to consider the petition before trial.

Given that the Court has time to decide whether to grant certiorari before trial begins, no reason exists to take the

[6] Applicants cannot credibly claim that merely preparing for trial is an irreparable harm. To accept that argument would be to suggest that a stay pending appeal must be granted in every case involving an arbitrability dispute -- or, indeed, any dispute involving a denied motion under Rule 12(b)(6) or Rule 56. What is more, completing the final stages of trial preparation after years of active litigation is hardly irreparable harm.

extraordinary step of intruding on the district court's docket by staying all pretrial preparations and taking the trial date off of the district court's schedule. That is especially true where, as explained above, it is unlikely that the Court will grant certiorari. If it does not, the Court will have upended the district court's docket control order and trial date for no reason at all.

Applicants' delay also undercuts their claim of irreparable harm and demonstrates that the purported emergency is of applicants' own making. The Fifth Circuit issued its decision nearly two months ago. Had applicants filed their actual petition rather than a stay application on February 12 -- or even if they file their petition before March 9 (consuming 78 days of the full 90-day period) -- there would be practically no question that the Court has time to decide whether to grant a writ of certiorari before trial begins. That applicants waited two months to file a stay application largely encompassing all aspects of a petition for a writ of certiorari and then declared their intent to wait nearly another month before filing their actual petition indicates that applicants are not concerned about irreparable harm, but rather are using the stay as a litigation ploy to further delay resolution of respondent's claims. See Beame, 434 U.S. at 1313 ("The applicants' delay in filing their petition and seeking a stay vitiates much of the

force of their allegations of irreparable harm."). Applicants cannot point to their self-created emergency to justify asking this Court to take the extraordinary step of issuing a stay.

2. Even if this case goes to trial before the Court renders a decision, applicants' description of the "severity of the harm" is overblown. They claim that their "most sensitive business documents and data" and "most valuable secrets" will be exposed during trial. App. 30. Applicants fail to mention, however, that respondent's claims focus on anticompetitive conduct from 2008 to 2014, meaning much of the evidence is many years old and cannot be said to have any current competitive value. Additionally, the crux of the respondent's claims -- and therefore the bulk of the evidence -- concerns manufacturers yielding to the defendant distributors' threats to stop dealing with low-margin competitors. Evidence of threats or coordination among the defendant distributors simply is not sensitive business information.

What is more, much of this evidence is already available in redacted filings in this case, public documents in other cases, or even in public government investigation materials. See, e.g., Dist. Ct. Dkt. No. 361 (redacted summary judgment response and exhibits); Complaint, In re Benco Dental Supply Co., No. 9379

(F.T.C. Feb. 12, 2018).[7] To the extent that truly sensitive information is presented at trial, the district court has options to protect that information, such as sealing the courtroom or particular exhibits. See Nixon v. Warner Commc'ns, 435 U.S. 589, 598 (1978). Because it is applicants' burden to show irreparable harm, they must do more than make generalizations about allegedly confidential information and the district court's supposed inability to protect it. Indeed, their claim that a trial will destroy their confidential information is undercut by their admission that the district court has adequately protected their confidential information thus far. See App. 30. Without a more specific showing of irreparable harm, this Court (and applicants) should trust the district court to enact appropriate safeguards to keep truly confidential information confidential, just as it has done throughout this case.

## IV. THE EQUITIES DO NOT FAVOR A STAY

As with the irreparable harm inquiry, applicants bear the burden of showing that the equities favor a stay, and that burden is particularly heavy where the district court and court

[7] https://www.ftc.gov/system/files/documents/cases/docket_no_9379_bsp_part_3_complaint_provisionally_redacted_public_version.pdf.

of appeals denied a stay. Beame, 434 U.S. at 1312. Again, applicants have failed to carry that burden.

1. While applicants make much of the fact that this case has been pending for five years, they fail to disclose that the case was stayed for over three of those years pending the district court's review of the magistrate judge's arbitration decision.

Moreover, it is simply untrue that delay has not caused respondent harm. Respondent is a small, family-owned discount distributor of dental products, and it has spent an enormous amount of time and money pursuing its claims. To take its trial date away from it at the last moment, especially after it has waited for so long already -- still suffering the effects of applicants' anticompetitive boycott -- is incredibly unfair. Indeed, respondent's case already has been harmed by delays in resolving this case. For example, since the time of the events at issue, at least two crucial witnesses have died, respondent's founder (another critical witness) developed Alzheimer's disease and is unable to testify, and other witnesses cannot be located. Of the witnesses available, many have had trouble remembering events that occurred ten years ago. Delaying trial even longer risks respondent losing even more of its evidence to the passage of time -- an indisputable irreparable harm.

What is more, respondent has been and continues to be the victim of applicants' anticompetitive conduct, as respondent still cannot obtain access to the products necessary to allow it to compete. That it has not sought preliminary injunctive relief does not "confirm[]" that it faces no prospect of irreparable injury. The standard for obtaining preliminary injunctive relief is high, and irreparable harm is only one of the factors considered. That respondent has not sought such preliminary relief is unrelated to whether it would be prejudiced by a stay on the eve of trial. More relevant is the fact that respondent continues to seek permanent injunctive relief.

2. Nor does the public interest weigh in favor of a stay. It would be an extraordinary step to intrude on the district court's ability to control its own docket. Such an intrusion is unwarranted here, especially where the district court rejected applicants' request for a stay pending appeal. See Beame, 434 U.S. at 1312.

Applicants urge that public policy favors arbitration, but they wholly ignore the distinction between agreements to arbitrate the merits of a dispute and agreements to arbitrate the arbitrability of a dispute. Because public policy favors arbitration, courts liberally construe agreements to arbitrate the merits of a dispute. But "the law reverses the presumption" in the context of agreements to arbitrate arbitrability,

requiring "'clea[r] and unmistakabl[e]' evidence that" the parties delegated the arbitrability question to an arbitrator. First Options, 514 U.S. at 944-45. If anything, then, the public interest weighs in favor of courts maintaining their roles as a jurisdictional gatekeeper.

3. Finally, applicants are wrong to claim that resources will be wasted "litigating a matter that will ultimately be resolved by the arbitrator." App. 32. As a practical matter, it is highly likely that the parties will end up resolving the merits of their dispute in district court no matter this Court's decision on the stay application, the certiorari petition, or even the merits. Even if an arbitrator must decide the arbitrability question in the first instance -- a result that would require not only that this Court grant certiorari and reject the wholly groundless exception, but also that the Fifth Circuit reject respondent's "strong argument" that the AAA Rules delegating arbitrability do not apply to the arbitration provision's carve-out -- the arbitrator likely will recognize the wholly groundless nature of applicants' arbitration position, just as the district court and the unanimous court of appeals did. The parties would then be right back where they are today -- preparing for trial, only after suffering additional cost and delay and further disrupting the proceedings. Those substantial costs, all of which applicants could have avoided

simply by filing their petition for certiorari more promptly, are unwarranted.

**CONCLUSION**

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

Respectfully submitted.

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