IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	**:**	**CASE NO. 2017 CA 005989 B**
	:	**Judge Hiram Puig-Lugo**
Plaintiffs,		
	:	**Next Event:**
vs.		**May 8, 2019**
	:	**Status Hearing**
DAVID H. HOFFMAN, *et al.*,	**:**	
Defendants.	**:**	

DEFENDANT AMERICAN PSYCHOLOGICAL ASSOCIATION'S
REPLY IN FURTHER SUPPORT OF ITS
CONTESTED MOTION TO COMPEL ARBITRATION OF
CLAIMS IN FIRST SUPPLEMENTAL COMPLAINT

As APA pointed out during the February 8, 2019 hearing, under well-established case law, recently reiterated in a 2019 U.S. Supreme Court case, this Court should send to arbitration the threshold issue of whether the disputes of Plaintiffs Behnke and Newman must be arbitrated. The parties incorporated the American Arbitration Association Employment Dispute Resolution Rules ("AAA Rules") into the arbitration clauses, which in turn require *the arbitrator*, and not the Court, to decide whether the disputes are arbitrable. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019), the Court acknowledged the longstanding rule that, as here, where there is clear and unmistakable evidence of the parties' intent to delegate arbitrability to an arbitrator, "the courts must respect the parties' decision as embodied in the contract" and refer the issue of arbitrability to the arbitrator. *Id.*

Plaintiffs' Opposition to APA's Motion to Compel Arbitration of the First Supplemental Complaint ("Opp.") raises three arguments as to why the Court should find that the parties did not clearly agree to arbitrate, but each is meritless.[1] The Court should therefore order the parties to submit to arbitration the threshold issue of whether Plaintiffs' disputes are arbitrable.[2]

ARGUMENT

A. Plaintiffs Clearly and Unmistakably Agreed to Delegate Arbitrability to an Arbitrator by Agreeing to the AAA Rules.

In their employment agreements with APA, Plaintiffs agreed that their arbitration of disputes with APA "will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules," absent prior agreement by the

[1] In a footnote, Plaintiffs curiously argue that APA has not properly preserved the argument that the parties delegated the issue of arbitrability to the arbitrator, despite also claiming that APA raised the argument and spending fifteen pages trying to rebut it. *See* Opp. at 15 n.13. The Court should reject this argument as meritless.

[2] Plaintiffs filed two Oppositions: one in response to APA's Contested First Motion to Compel Arbitration ("FMTCA"), and one in response to APA's Second Contested Motion to Compel Arbitration ("SMTCA"), regarding the Supplemental Complaint, which is addressed here. Even if the Court were to decide arbitrability, the Court must still compel arbitration of Plaintiffs' disputes for the reasons stated in the FMTCA, Reply in Support of the FMTCA (incorporated herein by reference), and the SMTCA.

parties on the rules or on an arbitrator.[3]

Rule 6 of the AAA Rules states that an arbitrator must decide the gateway issue of whether a dispute is within the scope of an arbitration clause and is thus arbitrable: "The 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."[4] Rule 6 provided this requirement when Behnke entered into his employment agreement in December 2011, just as it does today, and thus applies to Behnke's dispute.[5] When Newman entered into his employment agreement, in December 2003, Rule 1 of the AAA Rules provided: "These rules, and any amendment of them, shall apply in the forms obtaining **at the time the demand for arbitration or submission is received by the AAA**."[6] As the demand for arbitration would be at the present time, when Rule 6 is part of the AAA Rules, it therefore applies to Newman's claims too. *See, e.g.*, *Grynberg v. BP P.L.C.*, 585 F. Supp. 2d 50, 54 (D.D.C. 2008) (future amendments to arbitration rules apply where agreed-to version of rules incorporates such amendments).

Courts in D.C. and elsewhere agree that, when parties agree to arbitrate using rules that include the language in Rule 6, as they have done here, such agreement constitutes "clear and unmistakable evidence" of the parties' intent to delegate the issue of arbitrability to the arbitrator. *See, e.g.*, *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding that it was "clear and unmistakable evidence of the parties' intent to delegate" arbitrability to the arbitrator where parties agreed to use AAA rules, which specified that the "arbitrator shall have

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[3] *See* FMTCA, Ex. 1-A, ¶ 14 (Behnke Arbitration Clause) & Ex. 1-B, ¶ 15 (Newman Arbitration Clause).

[4] *See* AAA, Employment Arbitration Rules and Mediation Procedures (Nov. 1, 2009), https://www.adr.org/sites/default/files/Employment%20Rules.pdf.

[5] *See supra* note 4.

[6] *See* AAA, National Rules for the Resolution of Employment Disputes (Nov. 1, 2002), https://web.archive.org/web/20031222122525/http:/www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\employment\AAA121current.html (emphasis added).

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"); *accord Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Haire v. Smith, Currie & Hancock LLP*, 925 F. Supp. 2d 126, 133 (D.D.C. 2013); *Grynberg*, 585 F. Supp. 2d at 54; *Avue Techs. Corp. v. DCI Grp.*, No. 06-327(JDB), 2006 WL 1147662, at *6–7 (D.D.C. Apr. 28, 2006) (also collecting cases holding that reference to rules incorporates all such rules by reference). Thus, the parties' reference to the AAA Rules in their arbitration agreements here constitutes "clear and unmistakable evidence" of their intent to arbitrate the issue of arbitrability.

Plaintiffs argue the Court should disregard this well-settled rule because in other versions of its rules AAA has more expressly stated that the issue of arbitration should be decided by the arbitrator. *See* Opp. at 6, 14. Plaintiffs rely on *Sakyi v. Estee Lauder Cos.*, 308 F. Supp. 3d 366, 377 (D.D.C. 2018), but that case held only that the revised AAA Consumer Arbitration Rules require arbitrability to be decided by the arbitrator—not that other AAA rules have abandoned that requirement. *Sakyi* actually reinforces the point that AAA intends for their rules to empower an arbitrator to decide arbitrability, and Rule 6 itself "was specifically meant to satisfy the clear and unmistakable evidence standard." *Avue*, 2006 WL 1147662, at *7.

Plaintiffs also argue that Newman did not clearly agree to delegate the issue of arbitrability to the arbitrator because the AAA Rules that were in effect when he signed his employment agreement did not include the current Rule 6. *See* Opp. at 6, 11–14. This too is meritless. Newman clearly and unmistakably agreed to be bound by the rules in effect when the party demands arbitration, *see supra* note 6, and Rule 6 currently requires the arbitrator to decide arbitrability, *see supra* note 4. In these circumstances, courts have routinely held that the parties clearly and unmistakably agreed to delegate the issue of arbitrability to the arbitrator, including a

federal district court in D.C. *See Grynberg*, 585 F. Supp. 2d at 55.[7] The Court should therefore decline Plaintiffs' invitation to depart from the well-established principle recognized as District of Columbia law—and enforce the parties' clear agreement.[8]

B. The Parties Agreed to the AAA Rules Only.

Plaintiffs argue that the parties agreed to "two possible sets of arbitration rules" in their arbitration clauses, and thus the AAA Rules do not clearly and unmistakably evidence their intent to delegate arbitrability to the arbitrator. *See* Opp. at 9–10. This argument is meritless. In *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016), on which Plaintiffs rely, the parties agreed to use the AAA rules only as a "fallback." Here, in contrast, the arbitration clauses require AAA Rules to apply, and provide for the possibility of other rules *only if* the parties or arbitrator so agree. *See* FMTCA, Ex. 1-A, ¶ 14 (Behnke Arbitration Clause) & Ex. 1-B, ¶ 15 (Newman Arbitration Clause). Plaintiffs have opposed arbitration itself, and plainly have not agreed to any set of governing rules. Where the parties have agreed to neither rules nor an arbitrator, under their clauses, the parties agreed to be bound by the AAA Rules. *See*

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[7] *See also, e.g.*, *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 397 (2d Cir. 2018) (holding that parties clearly and unmistakably agreed that arbitrability was an issue for the arbitrator because "Rule 1 . . . made clear that the rules would 'apply in the form obtaining at the time the demand for arbitration . . . is received by the AAA,'" and current rules empowered arbitrator to decide arbitrability); *JSC Surgutneftegaz v. President & Fellows of Harvard Coll.*, 167 F. App'x 266, 268 (2d Cir. 2006); *Marriott Ownership Resorts, Inc. v. Flynn*, No. CIV. 14-00372 JMS, 2014 WL 7076827, at *14 (D. Haw. Dec. 11, 2014); *Hodge v. Top Rock Holdings, Inc.*, No. 4:10CV1432 FRB, 2011 WL 1527010, at *4 (E.D. Mo. Apr. 20, 2011); *BNSF Ry. Co. v. Alstom Transp., Inc.*, No. 4:09-CV-740-Y, 2010 WL 11619686, at *3 (N.D. Tex. May 4, 2010); *Sleepy's LLC v. Escalate, Inc.*, No. 10 CIV. 1626 (SAS), 2010 WL 2505678, at *2 (S.D.N.Y. June 18, 2010); *Bank of Am., N.A. v. Micheletti Family P'ship*, No. 08-02902 JSW, 2008 WL 4571245, at *6 (N.D. Cal. Oct. 14, 2008); *Congress Constr. Co. v. Geer Woods, Inc.*, No. 3:05CV1665 (MRK), 2005 WL 3657933, at *3 (D. Conn. Dec. 29, 2005); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 684–85 (S.D. Fla. 2001), *aff'd in part, appeal dismissed in part*, 312 F.3d 1349 (11th Cir. 2002).

[8] Plaintiffs rely on two non-D.C. state-court decisions, both of which admit that they depart from precedents in their own jurisdictions. *See* Opp. at 13 (citing *Taubman Cherry Creek Shopping Ctr., L.L.C. v. Neiman-Marcus Grp.*, 251 P.3d 1091, 1095 (Colo. App. 2010); *Gilbert St. Devs., LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1193 (2009)). *Lenox Corp. v. Blackshear*, 226 F. Supp. 3d 421, 431 (E.D. Pa. 2016), merely followed *Gilbert Street* in applying California law. *See id.* Plaintiffs' reliance on a footnote in *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 112 n.14 (D.D.C. 2017), is also misplaced, as the district court there merely rejected a party's invocation of *Tauber*, and did not endorse it. *See id.*

also Dist. No. 1 v. Liberty Mar. Corp., No. CV 18-1618 (RJL), 2019 WL 224291, at *5 (D.D.C. Jan. 15, 2019) (delegating arbitrability to arbitrator because parties agreed that either "the United States Secretary of Labor or the [AAA]" shall select an arbitrator).

Plaintiffs also cite two non-D.C. cases that departed from this rule because the arbitration clauses at issue contained sweeping exceptions to arbitrability. *See* Opp. at 10–11 (citing *NASDAQ OMX Grp. v. UBS Securities, LLC*, 770 F.3d 1010, 1031–32 (2d Cir. 2014) and *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80–81 (Del. 2006)). These cases are inapposite. In *NASDAQ OMX*, the court based its decision on the unique arbitration clause at issue, which contained an exception that likely immunized the non-moving party from liability. 770 F.3d at 1031–32. And in *James*, the Delaware court based its decision on the similarly unique arbitration clause that permitted both arbitration and court litigation. 906 A.2d at 79–80 (recognizing that the "majority" rule is that "reference to the AAA rules evidence a clear and unmistakable intent to submit arbitrability issues to an arbitrator"). In contrast, the arbitration clauses in the Behnke and Newman employment agreements contain no such exceptions.[9]

C. The Arbitration Clauses Are Broad.

Plaintiffs' argument that the parties did not clearly agree to arbitrate arbitrability because the arbitration clauses are "narrow" is erroneous. *See* Opp. at 7–9. Plaintiffs cite no D.C. case law to support this proposition, and, in any event, the arbitration clauses at issue here are broad—not narrow. *See* FMTCA at 6–7; Reply in Support of FMTCA at 5.

[9] Plaintiffs point to limited provisions that let APA seek injunctive relief, but these are not exceptions in the arbitration clause, and Plaintiffs do not even argue that they apply here. Also, no D.C. court has adopted the reasoning in *NASDAQ OMX* or *James*, and courts have widely criticized that reasoning. *See Oracle Am., Inc. v. Myriad Grp.*, 724 F.3d 1069, 1076 (9th Cir. 2013) (*James*'s decision "does not follow from the cases the court cited"); *Hopkinton Drug, Inc. v. CaremarkPCS, L.L.C.*, 77 F. Supp. 3d 237, 249 (D. Mass. 2015); *see also Trafigura Pte. Ltd. v. CNA Metals Ltd.*, 526 S.W.3d 612, 619 (Tex. App. 2017) (rejecting *James* where arbitration clause itself included exception but exception was available only to the party moving for arbitration).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2019, a true and correct copy of the foregoing Reply in Further Support of APA's Contested Motion to Compel Arbitration of Claims in First Supplemental Complaint was filed through the Court's electronic filing system, which will automatically send notification to counsel for Plaintiffs and Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and Sidley Austin LLP partner David Hoffman.

/s/ Barbara S. Wahl
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