SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	Case 2017 CA 005989 B
	:	
Plaintiffs,	:	Judge Puig-Lugo
	:	
vs.	:	Status Conference
	:	May 8, 2019, 2:00 PM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 317
	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO APA'S
SECOND MOTION TO COMPEL ARBITRATION
IN RELATION TO COUNT 11 OF THE SUPPLEMENTAL COMPLAINT

Table of Contents

Table of Authorities

SUMMARY OF ARGUMENT

In its Motion to Compel Arbitration of Claims in First Supplemental Complaint[1], the American Psychological Association ("APA") repeats the arguments in its initial Motion to Compel. Plaintiffs have responded fully to those arguments in their Opposition to that Motion ("Plaintiffs' First Opposition"), which is incorporated by reference here. Under the applicable summary judgment standard, APA has not met its burden to demonstrate that:

1. There is a valid agreement to arbitrate between any of the Plaintiffs and Sidley or APA.
2. Even if there were a valid agreement to arbitrate, APA's actions in initially refusing to arbitrate and continuing to litigate have not waived any right to arbitrate.
3. Even if a right to arbitrate existed and had not been waived, Plaintiffs' defamation claims are arbitrable under narrow "arising under" scope of the arbitration clauses at issue.

This Opposition will deal solely with the relevance of the Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019). That case was relied on by APA at oral argument on February 8, 2019, and February 14, 2019, and in its new Motion to Compel Arbitration ("APA Second Arb."). At oral argument, APA took the position that, under *Schein,* the Court may decide no questions about the arbitrability of a dispute except whether there is "an extant arbitration agreement."[2] In its first Motion to Compel, APA did not argue that the

[1] The Supplemental Complaint added only one new cause of action (Count 11) and alleged facts occurring after the filing of the initial complaint to support that new claim and did not otherwise substantively change.

[2] ". . . the recent *Henry Schein* case issued by the Supreme Court on January 8th, 2019 somewhat changed the landscape of what the Court actually can even look at and should decide in connection with an arbitration motion. . . . the *Schein* case is unambiguous that the Court's sole look at this issue of arbitrability is whether there is an extant arbitration agreement. The Court is not supposed to decide whether there's been a waiver, whether there were limitations, whether there was

arbitration clauses at issue delegated arbitrability to the arbitrator. In APA's new Motion, it is unclear whether APA continues to maintain the position it stated in oral argument or, instead, relies on *Schein* only to reaffirm that the Court must respect the contract formed by an arbitration agreement. (APA Second Arb. 3) Given the scope of APA's assertion at oral argument, however, Plaintiffs wish to address questions the Court may have about *Schein*'s relevance to its ability to decide arbitrability under the facts of this case.[3]

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incompetence, none of those things are before the Court. It's a very narrow look. . . ." (February 8, 2019 hearing transcript, p. 13, lines 7-23).

The language quoted by Ms. Wahl below is drawn from the AAA Commercial Arbitration Rules, not the Employment Dispute Arbitration Rules referred to in the arbitration clauses here at issue. These rules do not contain the "or to the arbitrability of any claim or counterclaim" language to which Ms. Wahl referred and, at the time Newman's employment agreement was signed, contained no reference at all to jurisdictional issues. (*See* Section I below.)

> "It's [referring to *Schein*] is absolutely unambiguous. The Court said, quote, to be sure before referring a dispute to an arbitrator, the Court determines whether a valid arbitration exists. But if a valid agreement exists and if the agreement delegates the arbitrability issue to an arbitrator, a Court may not decide the arbitrability issue. No question that here there's an arbitration delegation. The AAA Rules, which are referred to in the parties' employment agreements, and the employment is referred to in the complaint at paragraphs 40 and paragraph 43, they are appropriately incorporated by reference. AAA Rules say with regard to jurisdiction of the arbitrator, Rule 7(a), 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 or to the arbitrability of any claim or counterclaim. They agreed to that.

(February 8, 2019 hearing transcript; pp. 34 (lines 11-25), 35 (lines 1-10)).

> "The only new argument is the *Henry Schein* case which came down in January which we can address in a reply brief and we're happy to do that. …My only point, Your Honor was that what I alluded to last time we were here is the Supreme Court decision in the *Henry Schein* case which…" [The Court intervenes at this point.]

(February 14, 2019 hearing transcript, p.40 (lines 8-16)).

[3] *See, e.g.*, C*elanese Corp. v. BOC Grp. Pub. Ltd. Co.*, No. 3:06-cv-1462, 2006 WL 3513633, at *2 n.5 (N.D. Tex. Dec. 6, 2006) (examining whether an arbitration clause required that the arbitration tribunal determine its own jurisdiction over claims: "[T]he [c]ourt has the liberty to raise such a jurisdictional issue *sua sponte* and chooses to address this threshold issue before reaching the merits of the [m]otion to [c]ompel.")

The issue before the Supreme Court in *Schein* was whether, if a contract provides "clear and unmistakable" evidence that it delegates the question of arbitrability to an arbitrator, a court may nevertheless decide arbitrability if it finds the claim that the arbitration agreement applies to the dispute is "wholly groundless." The *Schein* Court held that a court may not take that step. However, the *Schein* Court "reaffirmed" that delegation to an arbitrator must be by "clear and unmistakable" evidence (*Schein*, 139 S. Ct. at 530), and nothing in *Schein* alters the previous state of the law as to when a contract provides such clear and unmistakable evidence. The court expressly left open the question of whether "the contract at issue in [the case before it] in fact delegated the arbitrability question to an arbitrator . . . ." *Schein*, 139 S. Ct. at 531.

In arguing in the lower courts that arbitrability must be decided by an arbitrator, the plaintiff in *Schein* relied on the express incorporation into the arbitration clause at issue of the American Arbitration Association's rules. The clause provided that "[a]ny dispute arising under or related to this Agreement . . . shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." *Schein*, 139 S. Ct. at 528.

In contrast, the arbitration clause in the Behnke and Newman's employment agreements provides in relevant part:

> [I]n the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this Agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration Association Employment Dispute Resolution Rules . . . .

Any argument that this clause represents the parties' agreement that arbitrability must be decided by the arbitrator would fail because the clause does not provide the required "clear and unmistakable" evidence of such an agreement. (Section I) In particular, under the relevant case law:

- Where, as here, the "under this agreement" language narrows the scope of the arbitration clause, a mere reference to AAA rules is not sufficient. (Section II)
- Where, as here, the arbitration clause refers to two possible sets of arbitration rules, one of which does not delegate arbitrability and the other of which is at best ambiguous, the clause cannot meet the "clear and unmistakable" test. (Section III)
- Even if the clause's reference to AAA rules could in principle support an inference that arbitrability should be delegated to an arbitrator, the principle does not apply to the facts of this case. As to Newman, when he signed his final employment agreement the AAA rules did not provide that arbitrability was to be decided by the arbitrator. As to Behnke, the mere reference to the AAA Employment Dispute Arbitration Rules is not enough in the face of language that—in contrast to language in other AAA arbitration rules—does not create the expectation that the issue of arbitrability is for the arbitrator, not the court, to decide. (Section IV)

ARGUMENT

I. The Arbitration Clauses at Issue Do Not Provide the Necessary "Clear and Unmistakable" Evidence that the Parties Agreed to Delegate the Issue of Arbitrability to the Arbitrator.

As a general proposition, the threshold issue of arbitrability—whether a judge or arbitrator decides if a claim is arbitrable—is "undeniably an issue for judicial determination" unless the parties provide otherwise. *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Courts presume that the parties intend courts, not arbitrators, to decide disputes about arbitrability. *BG Grp. Pub. Ltd. Co. v. Republic of Arg.*, 134 S. Ct. 1198, 1206 (2014).

In *Schein*, the Supreme Court held that when the parties' agreement, *in fact*, "delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in

that contract." 139 S. Ct. at 528. The Court cautioned, however, that "[u]nder our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Id.* at 531 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). In *First Options,* the Supreme Court cautioned that "[c]ourts should not assume that parties agreed to arbitrate arbitrability" and should "hesitate . . . [to] force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 944, 945.

The "clear and unmistakable" test has also been adopted by the D.C. Court of Appeals in *Capitol Place I v. George Hyman Constr. Co.*, 673 A.2d 194, 197 (D.C. 1996): "There is a strong presumption in favor of courts deciding whether an arbitrator has the 'power to determine jurisdiction.' Thus, '[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.'" (internal citations omitted)(citing *Virginia Carolina Tools v. International Tool*, 984 F.2d 113, 117 (4th Cir.), *cert. denied*, 508 U.S. 960 (1993) (presumption of arbitrability does not apply to "questions of the arbitrability of arbitrability issues themselves").

Whether an arbitration clause dictates that the arbitrator, not the court, must determine arbitrability is to be decided under state contract law. *See First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). Under D.C. contract law, all contracts "must be interpreted to carry out the reasonable expectations of the parties." *Sobelsohn v. Am. Rental Mgmt. Co.*, 926 A.2d 713, 718 (D.C. 2007).

The clauses in Behnke and Newman's employment contracts do not create a reasonable expectation that arbitrability would be decided by an arbitrator.

First, the arbitration rules referred to in the Behnke and Newman employment agreements are the AAA Employment Dispute Arbitration Rules. When the Newman agreement was signed, the Rules then in place did not include any provision relating to the arbitrator's jurisdiction. (Section IVA) Second, when Behnke's employment agreement was signed in December 2011, the Rules then (and still) in place appear not to delegate arbitrability to the arbitrator, in contrast to the Commercial Arbitration Rules which are the subject of the vast majority of relevant cases. In her oral argument on February 8, Ms. Wahl quoted from those Rules, which have no relevance to this case, rather than from the Employment Dispute Arbitration Rules. (Section IVB)

Second, even if the Employment Arbitration Rules were deemed to delegate arbitrability to the arbitrator, that would not be sufficient. As one court noted, a mere "cross-reference to a set of arbitration rules containing a provision that vests an arbitrator with the authority to determine his or her own jurisdiction does not automatically constitute clear and unmistakable evidence that the parties intended to arbitrate threshold questions of arbitrability." *Allstate Ins. Co. v. Toll Bros.*, 171 F. Supp. 3d 417, 428 (E.D. Pa. 2016). The court further noted that "incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of [a] party's intent would be to take 'a good joke too far.'" *Id.* at 429.

This Court should reject any theory holding that the mere inclusion of AAA or any arbitration body's rules automatically demonstrates an intent to arbitrate the issue of arbitrability, especially where the rules are, at best, ambiguous and where the arbitration clause describes AAA arbitration as only a secondary choice if the parties arbitrate. Most individuals signing an agreement with an arbitration clause would be surprised to learn that they had intended to remove a court's authority to determine arbitrability. *See Sobelsohn,* 926 A.2d at 718.

In any event, even when courts have adopted the principle that the simple reference to arbitration rules can support an inference that the parties intended to submit the arbitrability issue to the arbitrator, they have generally limited the principle's application to "those cases where [a] the arbitration clause generally provides for arbitration of *all* disputes and also [b] incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *James & Jackson, L.L.C. v. Willie Gary, L.L.C.*, 906 A.2d 76, 80 (Del. 2006) (emphasis added). *See also Sakyi v. Estée Lauder Cos.*, 308 F. Supp. 3d 366, 378 (D.D.C. 2018) (the language of the arbitration clause at issue was "broad [and] all encompassing," leading the court to conclude that it constituted "'clear evidence that the parties agreed to arbitrate all issues' arising between them, including the question of arbitrability.")[4]

II. Where, As Here, the Language of the Arbitration Clause Is Narrow, a Reference to AAA Rules Does Not Constitute Clear and Unmistakable Evidence of An Intent to Arbitrate the Issue of Arbitrability.

Where "the parties' agreement contains a narrow arbitration provision, the reference to the AAA rules does not constitute clear and unmistakable evidence that they intended to have an arbitrator decide arbitrability." *Zachariou v. Manios*, 891 N.Y.S.2d 54, 55 (1st Dep't 2009). *See also, e.g., Denson v. Donald J. Trump For President, Inc.*, 2018 NY Slip Op 32168(U) (N.Y. Sup. Ct. 2018) ("While the Court recognizes that the rules of the [AAA] provide that the arbitrator shall decide questions of arbitrability (*see* Rule 7), the circumstances of this case do not require this Court to send this matter to an arbitrator. . . . This narrow arbitration clause, which only applies to the narrow agreement, simply does not cover the claims asserted in this case."); *Microsoft Corp. v. Samsung Elecs. Co.*, 60 F. Supp. 3d 525, 529 (S.D.N.Y. 2014) ("where . . . the arbitration clause is a narrow one," any inference that the parties intended, by incorporating rules, to submit the

[4] No relevant D.C. Court of Appeals cases were located on the issue.

question of arbitrability to the arbitrator "does not hold."); *Mem'. Hermann Health Sys v. Blue Cross Blue Shield of Tex.*, No. 17-cv-2661, 2017 WL 5593523, at *8 (S.D. Tex. Nov. 17 2017) ("defendant has not cited and the court has not found any authority holding that a narrow arbitration agreement coupled with incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction is enough to show that the parties clearly and unmistakably agreed to arbitrate arbitrability.").

The clause at issue in the present case provides for arbitration for "any dispute that may arise regarding their respective rights, duties or obligations under this Agreement." As demonstrated in detail in Plaintiffs' Opposition to APA's first Motion to Compel Arbitration ("Plaintiffs' First Opposition"), case law, including D.C. Court of Appeals precedent not cited by APA, is clear that a clause limiting its scope to disputes arising "under this Agreement" is the *narrowest* of arbitration clauses, requiring arbitration only with respect to claims relating to interpretation and performance of the contract—nothing more. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 307 (2010); *Dowley v. Dewey Ballantine, L.L.P.*, No. 05-cv-622, 2006 WL 1102768, at *9 (D.D.C. Apr. 26, 2006) ("This Court finds that the language 'arising under' is more restrictive than 'arising out of', for 'arising under' may denote disputes limited to the interpretation and performance of the contract itself."). See also cases cited in Plaintiffs' First Opposition at ftn. 5. Those cases include a D.C. Court of Appeals case not cited by APA: *Byrd v. VOCA Corp.*, 962 A.2d 927, 940 (D.C. 2008) ("The provisions describing the grievance procedure itself . . . similarly reference 'any difference or dispute arising out of or under this Agreement.' Thus, the grievance and arbitration provisions . . . appear to cover only matters in dispute under the contract.") (citations omitted).

Given the limited scope of the arbitration clause at issue, the mere reference to AAA rules

does not constitute "clear and unmistakable evidence" of an intent to arbitrate the issue of arbitrability, even if those rules were to clearly delegate that issue to the arbitrator. *See Zachariou*, 68 A.D.3d at 539; *Microsoft Corp.*, 60 F. Supp. 3d at 529-30; *Memorial*, 2017 WL 5593523, at *8.

III. Where, As Here, the Language of the Arbitration Clause Contains Two Possible Sets of Arbitration Rules, One of Which Does Not Delegate Arbitrability, the Clause Cannot Constitute Clear and Unmistakable Evidence of An Intent to Arbitrate the Issue of Arbitrability.

Even in cases where there is a broad arbitration clause—not the case here—"[w]hen an arbitration clause references two possible sets of arbitration rules, one that delegates arbitrability and one that does not, the incorporation of both sets cannot constitute clear and unmistakable evidence of the parties' intent to arbitrate arbitrability especially when it is only the fallback set of rules that contains that kind of delegation provision." *Allstate Ins. Co.*, 171 F. Supp. 3d at 429.[5] "In such circumstances, [courts] have identified ambiguity as to the parties' intent to have questions of arbitrability … decided by an arbitrator." *NASDAQ OMX Grp., Inc. v. UBS, Sec., L.L.C.*, 770 F.3d 1010, 1031 (2d Cir. 2014).

The arbitration clause in this case is just such a circumstance:

> [I]n the event they are unable to resolve amicably any dispute that may arise regarding their respective rights, duties or obligations under this Agreement, the disputed issues shall be settled by binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement and, in the absence of agreement, by the arbitrator. If the parties are unable to agree to an arbitrator, the arbitration will take place pursuant to the rules and under the auspices of the American Arbitration

[5] In *Allstate, supra,* a very broad arbitration clause provided for arbitration "in accordance with the rules and procedures of Construction Arbitration Services, Inc." If that organization was "unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the [AAA] . . . ." *Id.* at 421. The court noted that "[t]he arbitration clause provides that the rules of the [AAA] are only a fallback in the event that the arbitration cannot be conducted in accordance with the rules and procedures of Construction Arbitration Services. Those rules do not appear to contain any clear delegation of authority to the arbitrator to determine questions of arbitrability." *Id.* at 429.

Association Employment Dispute Resolution Rules. . .

This clause requires that the parties *first* submit the dispute to "binding ad hoc arbitration before a single arbitrator mutually agreeable to the parties and pursuant to rules also determined by mutual agreement . . . ." Only if the parties are unable to agree to an arbitrator is the dispute to be arbitrated in accordance with the AAA Employment Dispute Resolution Rules. Thus, the arbitration clause at issue contains "two possible sets of arbitration rules." And, as in *Allstate Ins. Co.*, the AAA rules are only the "fallback" rules. 171 F. Supp. 3d at 429. Consequently, there is no "clear and unmistakable evidence" of the parties' intent to arbitrate arbitrability. *See NASDAQ OMX Grp., Inc.*, 770 F.3d at 1031.

The contracts at issue also fail to provide "clear and unmistakable evidence" of an agreement to arbitrate arbitrability for another reason: portions of the contracts governing the non-compete and confidentiality provided for referral to a court for injunctive relief and were thus express carve-outs to the arbitration clauses in the agreements. (Behnke ¶¶ 7, 8 & 9; Newman 8, 9, & 10). The effect of such carve-outs was addressed in *James & Jackson, supra*. There, the arbitration clause was broad and required arbitration of any controversy "arising out of or relating to" the parties' agreement in accordance with AAA rules—but also expressly authorized injunctive relief and specific performance. Based on this alternative option, the court held:

> Thus, despite the broad language at the outset, not all disputes must be referred to arbitration. *Since 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. There being no such clear and unmistakable evidence of intent, the trial court properly undertook the determination of substantive arbitrability.

906 A.2d at 81 (emphasis added). *See also NASDAQ OMX Grp., Inc.*, 770 F.3d at 1032 ("[T]he Services Agreement does not clearly and unmistakably direct that questions of arbitrability be decided by AAA rules; rather, it provides for AAA rules to apply to such arbitrations as may arise

under the Agreement. . . . Thus, this case is not akin to those in which we have construed the incorporation of AAA rules into an agreement with a broad arbitration clause to signal the parties' clear and unmistakable intent to submit arbitrability disputes to arbitration.").

To support the position APA took at oral argument—that issues of arbitrability, aside from the question of whether there is an "extant arbitration agreement," must be decided by the arbitrator—APA must provide "clear and unmistakable evidence" of the parties' intent to arbitrate arbitrability. *James & Jackson,* 906 A.2d at 81. It has not and cannot do so. *See also NASDAQ OMX,* 770 F.3d at 1032 ("UBS must point to a clear and unmistakable expression of the parties' intent to submit arbitrability disputes to arbitration."); *Capitol Place I,* 673 A.2d at 198 ("specificity will overcome the presumption against the arbitrability of arbitrability questions, but such is lacking here.")[6]

IV. Even if the Arbitration Clauses' Reference to AAA Rules Could in Principle Support an Inference that Arbitrability Should Be Delegated to an Arbitrator, the Principle Does Not Apply to the Facts of This Case.

Even if the Court were to reject all of the above arguments, the issue of arbitrability will still be before this Court and not properly referred to the arbitrator.

A. Newman

The clause at issue incorporated the AAA "Employment Dispute Resolution Rules." At the time Newman purportedly signed the agreement in December 2003 (almost a year after the effective date), these rules did not include a provision relating to the arbitrator's jurisdiction, let

[6] Aside from other issues of arbitrability, the issue of waiver is also properly for the Court to decide. *Hossain v. JMU Props., LLC*, 147 A.3d 816, 822 (D.C. 2016) ("the trial judge can properly decide whether there has been a 'waiver by litigation conduct' in circumstances like those presented here.").

alone his or her jurisdiction to determine the issue of arbitrability.[7] The rules that included the arbitrator's power to rule on jurisdiction came into effect only in July 2006.[8]

A contract cannot effectively incorporate a document that does not yet exist. "In order to uphold the validity of terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and *assented* to the incorporated terms." *Lamb v. Emhart Corp.*, 47 F.3d 551, 558 (2d Cir. 1995) (emphasis added).[9] *See, e.g., Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1269 (9th Cir. 2017) ("If a provision or term of an incorporated document 'does not exist at the time of incorporation by reference,' then it 'fails the elementary test of being known or easily available at the time of incorporation.'") (citations omitted); *Bricklayers, Masons & Plasterers Int'l Union of Am., Local Union No. 15, Orlando, Fla. v. Stuart Plastering Co.*, 512 F.2d 1017, 1029 (5th Cir. 1975) ("an instrument may incorporate by reference only the terms of an instrument already in existence").

Several courts have specifically addressed the question of whether an arbitration clause incorporating AAA rules that did not exist when the parties signed the agreement may be deemed

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[7] AAA "National Rules for the Resolution of Employment Disputes" effective January 2004 https://www.adr.org/sites/default/files/National%20Rules%20for%20the%20Resolution%20of%20Employment%20Disputes%20Jan%2001%2C%202004.pdf

[8] Rule 6, Employment Arbitration Rules and Mediation Procedures, Effective July 1, 2006 https://www.adr.org/sites/default/files/Employment%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jul%2001%2C%202006.pdf.; http://apps.americanbar.org/labor/lel-aba-annual/papers/2006/40.pdf (noting that "[a] new provision, Rule 6, relates to the authority of the arbitrator to determine his or her jurisdiction and establishes an important deadline for a party wishing to challenge arbitrability. The previous version of the rules did not address this issue.")

[9] *See also* 11 R. Lord, Williston on Contracts § 30.25 (4th ed. 2015) ("in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms . . . ."); 17A C.J.S. Contracts § 402, at 294–95 ("For an incorporation by reference to be effective, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms."); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) (collecting authorities).

to have incorporated the rules. In *Gilbert St. Developers, L.L.C., v. La Quinta Homes, LLC*, 174 Cal.App.4th 1185, 1194 (Cal.App. 2009), this question was answered in the negative: "Most basically, what is being incorporated must actually exist at the time of the incorporation, so the parties can know exactly what they are incorporating."

Similarly, in *Taubman Cherry Creek Shopping Ctr., L.L.C. v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091, 1095 (Colo. App. 2010), in determining that a party could not have assented to AAA rules not yet in existence, the court explained:

> . . . unlike general contractual agreements, an agreement to divest courts of jurisdiction to decide whether a dispute is within the scope of an arbitration agreement requires more than agreement, it requires plain and unambiguous (or, as federal courts phrase it, clear and unmistakable) agreement. . . . . Here, the parties merely incorporated by reference a set of rules that provided any incorporation of them would be construed as incorporating future amendments and that were subsequently amended by a nonparty to empower the arbiter to decide arbitrability. Accordingly, we conclude that, at the very least, whether the parties thereby agreed to have the arbiter decide questions of arbitrability is ambiguous and, therefore, the parties did not abrogate the general rule that courts make such determinations.

(citations omitted). *See also, Lenox Corp. v. Blackshear*, 226 F.Supp.3d 421 (E.D. Penn. 2016).

In fact, courts specifically distinguish cases where the agreement was signed prior to promulgation of the rule sought to be incorporated, as in the present case, from those where the rule existed at the time of the signing. *See, e.g., Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 244 F.Supp.3d 100, 112 n. 14 (D.D.C. 2017) (specifically distinguishing the holding in *Taubman* "because the parties had signed their agreement prior to the year when the AAA incorporated such a … rule."); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017).

In the present case, when Newman purportedly signed the agreement,[10] the AAA rule quite

[10] The Agreement appears to be signed almost a year after its effective date. Neither the Behnke, nor Newman agreements is properly attested to since the attestation and date have not been completed.

simply did not exist and, therefore, Newman cannot possibly be deemed to have assented to it.

B. Behnke

When Behnke's agreement was signed in December 2011, the section of the rules then in effect at that time (and remaining in effect to this date) stated:

> Jurisdiction
> 6 (a) 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.

Employment Arbitration Rules and Mediation Procedures, Effective November 1, 2009.[11]

However, the Consumer Arbitration Rules referred to in the clause at issue in *Sakyi*, 308 F. Supp. 3d at 371 (Rule 14(a)), as well as the Commercial Arbitration Rules which are the subject of the vast majority of relevant cases, are broader. The latter appear to be the Rules that Ms. Wahl on February 8, 2019, wrongly represented were incorporated in the agreements in this case. (See fn. 2.) They provide an additional clause that expressly states that the arbitrator has the power to rule on "the *arbitrability* of any claim …":

> Jurisdiction
> 7 (a) 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 or to the arbitrability of any claim or counterclaim.

Commercial Arbitration Rules and Mediation Procedures, Effective October 1, 2013.[12]

Given the Supreme Court's directive that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so," *First Options*, 514 U.S. at 944, the language of the AAA Employment Arbitration Rules should not be held to meet the "clear and unmistakable" test, especially in light of the express language including arbitrability in other AAA rules which are inapplicable in this case.

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[11] https://www.adr.org/sites/default/files/Employment%20Rules.pdf
[12] https://www.adr.org/sites/default/files/Commercial%20Rules.pdf

CONCLUSION

Three issues are now properly before this Court, to be decided under the applicable summary judgment standard:

1) Is there a valid agreement to arbitrate between Behnke or Newman and Sidley or APA?

2) Even if there were a valid agreement to arbitrate, has the right to compel arbitration been waived by APA's litigation conduct: its initial refusal to arbitrate, its filing of summary judgment-like motions that submitted the merits of this case for adjudication, and its representations in Ohio that this case would be properly "litigated" in the District of Columbia courts?

3) Even if a right to arbitrate existed and had not been waived, are Plaintiffs' defamation claims arbitrable under the narrow arbitration clauses at issue?

APA has now requested oral argument with respect to its latest motion. Plaintiffs do not join in that request and believe APA has had ample opportunity to set forth its case.[13]

Dated: March 7, 2019

Respectfully submitted,

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[13]APA's failure to argue the delegation issue in its First Motion to Compel Arbitration or to clearly articulate any such argument here prevents it from raising the argument at a later stage, including in a reply brief. *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-cv-01582, 2015 WL 9269401, at *3 (D.D.C. Dec. 8, 2015) ("Litigation is a not a shell game, in which a movant is permitted to make general assertions in a motion, leaving its opponent to guess at its grounds, only then to supply content in a reply brief.")

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