

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81346

AIRBNB, INC., a foreign corporation,

Appellant,

v.

ERIC RICE, individually; JEFFERSON TEMPLE,
as Special Administrator of the Estate of RAHEEM RICE,

Respondents.

Appeal from Order Denying Motion to Compel Arbitration
Eighth Judicial District Court, Case No. A-19-801549-C

APPELLANT'S OPENING BRIEF

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Electronically Filed
Mar 01 2021 08:57 a.m.
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Airbnb, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The following law firms have lawyers who appeared for Airbnb, Inc. in the case or are expected to appear on its behalf in this Court: (1) P.K. Schrieffer LLP, (2) McDonald Carano LLP, and (3) Dennett Winspear LLP.

Dated: March 1, 2021.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	vi
ROUTING STATEMENT.....	vi
STATEMENT OF THE ISSUES.....	vi
STATEMENT OF THE CASE.....	7
STATEMENT OF FACTS	9
A. The Parties’ Arbitration Agreement.	9
B. Respondents’ Lawsuit Against Airbnb.....	11
C. The District Court Denies Airbnb’s Motion to Compel Arbitration.	11
SUMMARY OF THE ARGUMENT	12
ARGUMENT	13
A. Standard of Review.....	13
B. The District Court Erred in Denying the Motion to Compel.	13
1. The Federal Arbitration Act Governs the Interpretation of the TOS’s Arbitration Provision.	13
2. Under the United States Supreme Court’s <i>Henry Schein</i> Decision, the District Court Had No Discretion to Decide the Disputed Question of Arbitrability and Was Required to Refer It to Arbitration.	14

CONCLUSION	18
AFFIRMATION	18
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Cases

<i>Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.</i> , 130 Nev. 252, 321 P.3d 912 (2014).....	4, 5
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2001).....	7
<i>DirectTV, Inc. v. Imburgia</i> , 577 U.S. 47 (2015).....	6
<i>Elko Broadband Ltd. v. Dhabi Holdings PJSC</i> , No. 3:19-cv-00610-LRH-WGC, 2020 WL 6435754 (D. Nev. Nov. 2, 2020)	8
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 139 S. Ct. 524 (2019).....	passim
<i>Int’l Ass’n of Firefighters Local No. 1285 v. City of Las Vegas</i> , 112 Nev. 1319, 929 P.2d 954 (1996).....	8
<i>Masto v. Second Jud. Dist. Ct.</i> , 125 Nev. 37, 199 P.3d 828 (2009).....	6, 7
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	7

Statutes

9 U.S.C. § 1	1
9 U.S.C. § 2	7
9 U.S.C. § 3	3, 11
NRS 38.221	3, 11
NRS 38.247(1)(a).....	vi
NRS 41.085	4
NRS 239B.030	12

Rules

NRAP 17	vi
NRAP 26.1	i, ii
NRAP 26.1(a).....	i
NRAP 28(e).....	13
NRAP 28.2	13
NRAP 32(a)(4).....	13
NRAP 32(a)(5).....	13
NRAP 32(a)(6).....	13
NRAP 32(a)(7).....	13
NRAP 32(a)(7)(C).....	13
NRCP 5(b).....	15

JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying a motion to compel arbitration entered on May 28, 2020. Notice of entry of that order was filed on June 15, 2020. II Appellant’s Appendix (“AA”) 336-41. Appellant Airbnb, Inc. timely noticed this appeal on June 15, 2020. Appellate jurisdiction exists under NRS 38.247(1)(a).

ROUTING STATEMENT

This appeal is neither presumptively retained by the Supreme Court nor presumptively assigned to the Court of Appeals under NRAP 17. However, retention by the Supreme Court is appropriate because the appeal raises a principal issue of public policy involving arbitrability under the Federal Arbitration Act and the United States Supreme Court’s decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

STATEMENT OF THE ISSUES

Respondents and Airbnb, Inc. (“Airbnb”) entered into a binding arbitration agreement that expressly delegated the gateway question of arbitrability to the arbitrator. Respondents subsequently filed this lawsuit against Airbnb, which Airbnb contended must be arbitrated under the parties’ agreement. Respondents disagreed, and Airbnb moved to compel arbitration to allow the arbitrator to decide whether the parties’ dispute is arbitrable under the agreement. The District Court

denied Airbnb’s motion, concluding that the arbitration agreement did not apply to the dispute as a matter of law. Did the District Court err in taking the issue of arbitrability away from the arbitrator, despite the agreement’s express delegation provision and the Supreme Court’s holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-31 (2019), that a court must honor such a delegation even where it believes the argument for arbitrability of the underlying dispute is “wholly groundless”?

STATEMENT OF THE CASE

Respondent Eric Rice and his late son Raheem Rice were registered account holders with Appellant Airbnb, Inc. (“Airbnb”), an online platform that connects third-parties who wish to offer their unique accommodations (“Hosts”) with third-party travelers seeking to book accommodations (“Guests”). I AA 20-21, 37, 40-42, 46-49, 70-72. When registering for their Airbnb accounts, Eric Rice and Raheem Rice each signed Airbnb’s Terms of Service (“TOS”). I AA 21, 40-42, 46-49, 70-72. The TOS includes a broad arbitration clause consenting to binding arbitration of, *inter alia*, “any dispute, claim or controversy arising out of or relating to . . . the use of the Airbnb platform.” I AA 23, 66. It also provides that any threshold dispute about whether a claim is arbitrable must itself be arbitrated, expressly delegating to the arbitrator the authority to resolve any “dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute.” *Id.*

In 2018, Raheem Rice was fatally shot in the street while on his way to a party in Las Vegas. I AA 4. Alleging that the party’s host had booked the venue “through the use of Defendant AIRBNB’s service,” Eric Rice and Respondent Jefferson Temple, the administrator of Raheem’s estate, sued Airbnb for damages from the shooting. I AA 4, 6-15. Invoking the TOS’s arbitration clause, Airbnb moved to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which governs the arbitration clause’s application. I AA 17. The District Court denied Airbnb’s motion, refusing to refer the question of arbitrability to the arbitrator and ruling that the clause did not require arbitration of wrongful death claims. II AA 340; *see also* II AA 327-31. In doing so, the District Court ratified the Rice Parties’ attempt to have it both ways: they claim that Airbnb is somehow responsible for injuries they sustained while *en route* to a property Airbnb did not own and over which it had no control, yet they disclaim any connection to Airbnb with respect to the issue of arbitrability under the contract they signed—a contract which governs disputes with Airbnb and provides the only arguable nexus between Airbnb and their claims.

The District Court’s refusal to honor the TOS’s express delegation of disputes over arbitrability to the arbitrator was reversible error under the United States Supreme Court’s recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). Addressing the exact question posed here, the Supreme Court

unanimously held that a court presented with a motion to compel arbitration under the Federal Arbitration Act must honor such a delegation, even where the court believes (as the District Court apparently did here) that the argument for arbitrability is entirely without merit. *Id.* at 531. Under *Henry Schein*, the District Court had no discretion to decide the question of arbitrability in the first instance, but was bound to refer it to the arbitrator as the TOS expressly requires. *Id.* Accordingly, this Court should vacate the District Court's order and remand with instructions to refer the matter to arbitration and stay further proceedings in the District Court under 9 U.S.C. § 3 (or NRS 38.221).

STATEMENT OF FACTS

A. The Parties' Arbitration Agreement.

Airbnb provides an online platform that connects third-parties who wish to offer their unique accommodations (called "Hosts") with third-party travelers seeking to book accommodations (called "Guests"). I AA 20, 37-38. All persons who sign up for accounts with Airbnb must consent to Airbnb's TOS, which provides for binding arbitration of all disputes. Specifically, the dispute resolution agreement provides:

You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement or interpretation thereof, or to the use of the Airbnb platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding arbitration (the "Arbitration Agreement").

I AA 23, 66.

The agreement expressly and unambiguously delegates the authority to decide disputes over arbitrability to the arbitrator, stating that “[i]f there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.” *Id.* The agreement also expressly provides that, while California law governs the interpretation of the TOS generally (for U.S. residents), the Federal Arbitration Act governs the interpretation and enforcement of the arbitration clause. I AA 23, 66-67 (§§ 19.6, 21.1).

Airbnb’s website presents the TOS to prospective registrants via hyperlink during the account registration process. Registrants must affirmatively click a checkbox next to the hyperlink that reads: “By clicking on Sign up or Continue with, I agree to Airbnb’s Terms of Service” I AA 21, 40-41, 51. Raheem Rice created an Airbnb account on May 22, 2018 and consented to the TOS on that date. I AA 21, 40, 47-49. Eric Rice created an Airbnb account on October 3, 2016 and consented to the TOS on that date. I AA 21, 41-42, 70-72. Eric Rice again consented to Airbnb’s TOS on January 14, 2018. I AA 21, 41-42, 72. His agreement to the TOS, including the arbitration provision, also binds his estate.¹

¹ A wrongful death action brought by the representative of the decedent derives from rights belonging to the decedent. *See* NRS 41.085; *see also Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014)

B. Respondents' Lawsuit Against Airbnb.

Respondents' complaint alleges that on June 3, 2018, Raheem Rice and Bryan Lovett² were on their way to a party at a residence in Las Vegas (the "Property"). I AA 4. While Raheem Rice and Lovett were still walking to the Property, "an unknown individual opened fire on the crowd," killing Raheem Rice and injuring Lovett. *Id.* Alleging that party's host booked the property "through the use of Defendant AIRBNB's service," *id.*, Lovett and Respondents Eric Rice (Raheem Rice's father) and Jefferson Temple (the administrator of Raheem's estate) sued Airbnb for damages from the shooting, asserting claims for negligence, negligence per se, negligent security, wrongful death, and *respondeat superior*. I AA 1-15.

C. The District Court Denies Airbnb's Motion to Compel Arbitration.

Invoking Raheem Rice's and Eric Rice's execution of the Airbnb TOS, Airbnb moved to compel arbitration and stay all proceedings. I AA 17. Respondents opposed the motion, arguing that the TOS's arbitration clause did not extend to disputes relating to accommodations booked by a third-party. II AA 287-93. The District Court denied Airbnb's motion, refusing to give effect to the TOS's

(holding that NRS 41.085 creates two separate wrongful death claims, "one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent"). The Rice parties did not challenge this issue in the District Court.

² Airbnb concedes that Lovett's claims are not subject to the arbitration provision at issue because Lovett was a minor at the time of the incident. II AA 334-35.

delegation requirement for disputes over arbitrability and holding that the arbitration clause did not apply to the parties' dispute because "the cause of action arises under the wrongful death statute." II AA 340. Airbnb filed a timely Notice of Appeal and the District Court has stayed its proceedings pending this Court's decision. II AA 345-46.

SUMMARY OF THE ARGUMENT

This appeal presents a single question: where the parties have entered into a valid arbitration agreement, and that agreement expressly delegates the threshold issue of arbitrability to the arbitrator, can a court disregard the delegation provision and rule on the issue of arbitrability itself? The United States Supreme Court recently answered this precise question in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-31 (2019). The Court unanimously held that the Federal Arbitration Act requires a court presented with a motion to compel arbitration to honor an arbitration agreement's delegation clause, even where the court takes a dim view of the merits. Because the TOS expressly and unambiguously delegates the authority to decide disputes about arbitrability to the arbitrator, the Supreme Court's decision in *Henry Schein* controls the decision here and compels reversal of the District Court's order denying Airbnb's motion to compel arbitration.

ARGUMENT

A. Standard of Review.

“Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that [this Court] review[s] de novo.” *Masto v. Second Jud. Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009).

B. The District Court Erred in Denying the Motion to Compel.

1. The Federal Arbitration Act Governs the Interpretation of the TOS’s Arbitration Provision.

The Federal Arbitration Act (“FAA”) governs the interpretation of agreements to arbitrate that expressly invoke its terms and preempts any inconsistent state law. *DirectTV, Inc. v. Imburgia*, 577 U.S. 47, 53-54 (2015). Because the TOS states that “[t]he Federal Arbitration Act governs the interpretation and enforcement of [its arbitration] provision,” I AA 23, 66-67 (§§ 19.6, 21.1), the decisions of the United States Supreme Court construing the FAA are authoritative on the interpretation of the TOS’s arbitration provision.

As those decisions emphasize, the FAA codifies a strong federal policy favoring arbitration, making arbitration provisions “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; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2001). Under the FAA, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury*

Constr. Corp., 460 U.S. 1, 24-25 (1983); *see also Masto*, 125 Nev. at 44, 199 P.3d at 832 (“As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.”).

2. **Under the United States Supreme Court’s *Henry Schein* Decision, the District Court Had No Discretion to Decide the Disputed Question of Arbitrability and Was Required to Refer It to Arbitration.**

The Supreme Court’s *Henry Schein* decision presents the same issue in this case and requires reversal of the District Court’s order. As the Court in *Henry Schein* observed, “the [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions.” 139 S. Ct. at 527. Here, Airbnb and Respondents did just that. The TOS unambiguously states: “If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.” I AA 66.

The question presented in *Henry Schein* was whether a court presented with such an agreement could nevertheless deny a motion to compel arbitration if it believed that the moving party’s contention of arbitrability was “wholly groundless.” 139 S. Ct. at 527-28. Before *Henry Schein*, some circuit courts had held that this circumstance provided a narrow exception to the FAA’s general rule that agreements to submit threshold disputes over arbitrability to the arbitrator must be honored and enforced. *See id.* at 528-29. The Court in *Henry Schein* unanimously rejected that exception, finding it to be “inconsistent with the text of the Act and with our

precedent.” 139 S. Ct. at 529. Rather, “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”³ *Id.* at 531. And this rule applies “even if the court thinks that the argument that the arbitration provision applies to a dispute is wholly groundless.” *Id.* at 529.

Here, Respondents asserted that the arbitration clause did not apply because their dispute with Airbnb had nothing to do with their use of the Airbnb website.⁴

Airbnb contends their claims are arbitrable because claims alleging damages from

³ The decision in *Henry Schein* is of course binding on all Nevada courts, which applied a similar rule even before *Henry Schein*. See *Elko Broadband Ltd. v. Dhahi Holdings PJSC*, No. 3:19-cv-00610-LRH-WGC, 2020 WL 6435754, at *4 (D. Nev. Nov. 2, 2020) (reviewing an arbitration agreement containing a delegation provision and citing *Henry Schein* for the proposition that “threshold issues of arbitrability” should be decided by the arbitrator); *Int’l Ass’n of Firefighters Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1324-25, 929 P.2d 954, 957 (1996) (holding that court’s determination of arbitrability was error where collective bargaining agreement provided “that an arbitrator [was] to decide any dispute over interpretation and application of the CBA, including the arbitrability of a dispute”); *accord Masto*, 125 Nev. at 44, 199 P.3d at 832 (“In interpreting a contract, [the Court will] construe a contract that is clear on its face from the written language, and it should be enforced as written.”).

⁴ This is exactly the issue that the *Henry Schein* Court addressed:

When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court’s cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.

139 S. Ct. at 527.

criminal conduct that occurred at or around a property booked on Airbnb’s platform—Airbnb’s only alleged connection to the lawsuit here—necessarily implicate disputes about what alleged duties, if any, arise under Airbnb’s TOS or the use of its website. Contrary to Respondents’ argument, the TOS’s arbitration provision expressly covers disputes relating to those subjects. But, as explained below, Respondents’ position on arbitrability was irrelevant to Airbnb’s motion to compel arbitration because, in the words of the Supreme Court in *Henry Schein*, it “confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability.” *Id.* When there is a delegation clause and the litigants disagree on whether the arbitration clause applies to the dispute, the District Court has no power to determine whether the issues are arbitrable: “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.” *Id.* at 529. The threshold question of arbitrability is reserved for the arbitrator. *Id.* at 527-29.

The District Court’s proffered rationale for its decision, *i.e.*, that the arbitration agreement does not apply to a “cause of action aris[ing] under the wrongful death statute,” does not save it from reversal. II AA 340. *First*, to the extent the Court considered wrongful death claims to be outside the scope of the clause, it squarely violated *Henry Schein* by resolving the merits of the threshold question of arbitrability despite the express delegation provision, as explained above.

Second, to the extent the Court questioned the clause’s applicability to “the claims of [the decedent’s] parent[] for wrongful death” based on the decedent-son’s assent to the TOS,⁵ the Court misconstrued the record and the core of Airbnb’s argument. While the *estate* is bound by Raheem Rice’s agreement, Airbnb never argued that Eric Rice was compelled to arbitrate based on his son’s assent to the TOS. Eric Rice himself agreed to the TOS, including its arbitration clause, and must arbitrate his claims because of *that* agreement.⁶ I AA 21, 41-42, 70-72.

Under *Henry Schein*, the District Court had no discretion to decide the arbitrability of the claims brought by Raheem Rice’s estate *or* the claims brought by Eric Rice. That is true even if the District Court believed—as it evidently did—that Airbnb’s arguments for arbitrability were not well taken. Because both Raheem Rice and Eric Rice agreed to the TOS’s arbitration provision, the District Court was required to refer all threshold arbitrability questions to the arbitrator. The District Court’s failure to do so was reversible error.

⁵ See II AA 328 at 21:13-16 (The Court: “[T]he claims of his parents for wrongful death, how can you bind somebody else to the fact that he clicked on an app when it’s their claim for wrongful death. And their damages are their loss of loving support of their child.”).

⁶ Eric Rice brings his wrongful death claim in his individual capacity, arising from his personal loss due to the death of his son. He is therefore bound by his own agreement to arbitrate disputes against Airbnb, including the threshold dispute of arbitrability.

CONCLUSION

For all the reasons stated above, this Court should vacate the District Court's order denying Airbnb's motion to compel arbitration and remand with directions to refer the matter to arbitration and, under 9 U.S.C. § 3 (or NRS 38.221), to stay all proceedings until the arbitration between Airbnb and Respondents is completed.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 1st day of March, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3,137 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I also

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understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated March 1, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on March 1, 2021, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and/or was emailed and served via U.S. Mail, postage prepaid, upon the following:

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