IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 82556

Uber Technologies, Inc.; Rasier, LLC;
and Rasier-CA, LLC,
Appellants

v.

Megan Royz;
and Andrea Eileen Work,
Respondents

Appeal
Eighth Judicial District Court
Case No. A-20-810843-C

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are 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 Uber Technologies, Inc. is a publicly held corporation with no parent company. Based solely on SEC filings regarding beneficial ownership of Uber Technologies, Inc.'s stock, it is unaware of any publicly held corporation that beneficially owns ten percent or more of its outstanding stock. Appellant Rasier, LLC is a wholly-owned subsidiary of Uber Technologies, Inc. Appellant Rasier-CA, LLC is a wholly-owned subsidiary of Uber Technologies, Inc.

Lawyers from the following law firms have appeared for Appellants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC in the case or are expected to appear on their behalf in this Court: (1) Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and (2) Wilson, Elser, Moskowitz, Edelman & Dicker, LLP.

DATED: July 15, 2021

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JURISDICTIONAL STATEMENT

This is an appeal from district court orders denying a motion to compel arbitration and a subsequent motion for reconsideration. Notice of entry of the order denying the motion to compel arbitration and order denying the motion for reconsideration were both filed on January 29, 2021. 3 AA 353; 4 AA 362.[1] Appellants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC (collectively "Uber") timely noticed this appeal on February 24, 2021. 4 AA 372. Appellate jurisdiction exists under NRS 38.247(1)(a) and 9 U.S.C. § 16(a).

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(11) and (12) because it raises an issue of first impression and of statewide public importance involving arbitrability under the Federal Arbitration Act and the U.S. Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

ISSUES PRESENTED

The U.S. Supreme Court has held that where parties have entered into a valid arbitration agreement, and that agreement clearly and unmistakably delegates threshold issues of arbitrability to the arbitrator, courts must honor that delegation.

[1] "AA" refers to the Appellant's Appendix submitted in conjunction with this brief. The number preceding AA indicates the volume; the number following AA indicates the bates number.

This is true even if the court believes the argument for arbitrability of the disputes is "wholly groundless." Uber moved to compel arbitration of Respondents' claims based on the parties' arbitration agreement, which clearly and unmistakably delegated threshold questions of arbitrability to the arbitrator. Yet, the district court denied the motion (and a subsequent motion for reconsideration), deciding for itself the scope of the arbitration agreement and refusing to refer the disputed questions of arbitrability to the arbitrator.

Given the parties' delegation of threshold questions of arbitrability to the arbitrator, the issue presented is whether the district court erred by deciding disputed questions of arbitrability instead of compelling arbitration and referring the questions to the arbitrator?

STATEMENT OF THE CASE

Appellant Uber Technologies, Inc. and its affiliates are technology companies that developed, *inter alia*, the rider-version of the Uber App, which enables persons in need of rides ("riders") to request rides from independent transportation providers searching for passengers ("independent drivers").[2] 4 AA 366 (FOF No. 3).[3] When registering for their rider accounts, Respondents Work and Royz each entered into a binding arbitration agreement that expressly delegated threshold questions of arbitrability to the arbitrator, including the authority to resolve disputes related to the interpretation, applicability, or enforceability of the arbitration agreement. 4 AA 369 (FOF No. 7); 1 AA 80, 100.

Respondents subsequently filed this lawsuit against Uber, arising out of a 2018 car accident in which they were traveling as riders in a vehicle driven by independent driver Marco Antonio Heredia-Estrada. *See* 1 AA 1. Work requested and paid for the ride through the rider-version of the Uber App. 4 AA 366 (FOF No. 2). In response to the complaint, Uber moved to compel arbitration. 1 AA 34.

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[2] Appellants Rasier, LLC and Rasier-CA, LLC are wholly-owned subsidiaries of Appellant Uber Technologies, Inc. engaged in the business of providing lead generation services to providers of transportation services through the rider marketplace, using the driver version of the Uber App. 4 AA 366 (FOF No. 3).

[3] "FOF" refers to findings of fact from the district court's order denying Uber's motion to compel arbitration; whereas "COL" refers to conclusions of law from the same order. *See* 4 AA 365-371.

The district court denied the motion and a subsequent motion for reconsideration, refusing to refer questions of arbitrability to the arbitrator. *See* 3 AA 353; 4 AA 362. Rather, the district court interpreted the arbitration agreement to conclude: (1) the claims at issue did not fall within its scope, 4 AA 370-71 (COL Nos. 1-2), (2) the agreement was not applicable or enforceable as to Royz, *id.*, and (3) the parties' delegation was inapplicable. 3 AA 357-59.

The district court's refusal to honor the arbitration agreement's express delegation of gateway questions of arbitrability to the arbitrator is reversible error under the Federal Arbitration Act ("FAA") and the U.S. Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). 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 Arbitration Agreement.

Respondents Work and Royz both assented to the November 2016 version of Uber's U.S. Terms of Use ("Terms & Conditions"). *See* 1 AA 57-60 (Work) and 90-93 (Royz). Work initially registered for an account with Uber on March 27, 2015 through a smartphone. 1 AA 59. In the last step of registration, she was presented with a clearly hyperlinked notice, stating "By creating an Uber account,

you agree to the Terms & Conditions and Privacy Policy." *Id.* Later, on November 14, 2016, Uber sent Work an email, providing notice of updates to the terms. *Id.* The email provided another clearly marked hyperlink to the November 2016 version of the Terms & Conditions, specifying that continued use of the Uber App would constitute assent to the updated Terms & Conditions. *Id.* Work continued to use the Uber App, assenting to the November 2016 Terms & Conditions. *Id.*

Royz registered for an account with Uber on November 30, 2016 via the Uber website, where she was presented with a clearly hyperlinked notice, stating: "By clicking 'Create Account', you agree to Uber's Terms and Conditions and Privacy Policy." 1 AA 92. Royz proceeded and created an account. *Id.* Therein, Royz similarly assented to the November 2016 version of the Terms & Conditions.

At the outset, the Terms & Conditions direct the reader—in all-caps—to the arbitration agreement ("Arbitration Agreement"): "Please review the arbitration agreement set forth below carefully, as it will require you to resolve disputes with Uber on an individual basis through final and binding arbitration." 1 AA 79 (identical version also begins at 1 AA 99).

As it relates here, there are four pertinent aspects of the Arbitration Agreement.

1. The Arbitration Agreement provides that the parties agreed to submit

claims to binding arbitration:

> By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement.
>
> . . .
>
> You and Uber agree that any dispute, claim or controversy arising out of or relating to (a) these Terms or the existence, breach, termination, enforcement, interpretation or validity thereof, or (b) your access to or use of the Services at any time, whether before or after the date you agreed to the Terms, will be settled by binding arbitration between you and Uber, and not in a court of law.

1 AA 80.

2. The Arbitration Agreement provides that AAA rules apply:

> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the AAA's Consumer Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Arbitration Agreement. The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.

Id.

3. The Arbitration Agreement contains a delegation clause, under which the parties agreed that the arbitrator has the exclusive authority to resolve threshold questions of arbitrability, including disputes relating to the interpretation,

applicability, or enforceability of the Arbitration Agreement:

> The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel.

Id.

4. The Arbitration Agreement instructs that the FAA governs:

> Notwithstanding any choice of law or other provision in the Terms, the parties agree and acknowledge that this Arbitration Agreement evidences a transaction involving interstate commerce and that the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), will govern its interpretation and enforcement and proceedings pursuant thereto. It is the intent of the parties that the FAA and AAA Rules shall preempt all state laws to the fullest extent permitted by law. If the FAA and AAA Rules are found to not apply to any issue that arises under this Arbitration Agreement or the enforcement thereof, then that issue shall be resolved under the laws of the state of California.

Id.

B. Respondents file suit against Uber.

Respondents' complaint alleges that on February 22, 2018, they were travelling as riders in a vehicle driven by independent driver Heredia-Estrada,

when his vehicle collided with a vehicle operated by a separate independent driver, Mark Anthony Jacobs, resulting in injuries. *See* 1 AA 1. Work requested and paid for the ride for Royz and herself through her rider version of the Uber App. 4 AA 366 (FOF No. 2). Work and Royz filed suit against Heredia-Estrada, Jacobs, and Uber, seeking to hold Uber liable under theories of negligence and *respondeat superior*. *See* 1 AA 1.

C. The district court denies Uber's motion to compel arbitration and motion for reconsideration.

Based on the Arbitration Agreement within the Terms & Conditions that both Work and Royz agreed to, Uber moved to compel arbitration and stay all proceedings. *See* 1 AA 34. Work and Royz opposed the motion on four grounds, arguing that (1) their claims against Uber did not fall within the scope of the parties' Arbitration Agreement; (2) the Arbitration Agreement was inapplicable or unenforceable as to Royz because she did not use the Uber App to request the ride at issue, only Work did; (3) Rasier, LLC, Rasier-CA, LLC, and Jacobs (who filed a joinder to the motion to compel arbitration) could not enforce the Arbitration Agreement because they were purportedly not signatories to it; and (4) even if the Court concluded that their claims against Uber fell within the scope of the Arbitration Agreement, such conclusion should only apply to their first cause of

action. *See* 1 AA 146-53.[4]

After expressing concerns during the hearing with respect to U.S. and Nevada Supreme Court precedent regarding the enforceability of arbitration agreements in light of the right to a civil jury trial, 2 AA 184-85, the district court issued an order denying Uber's motion for two reasons. *See* 4 AA 365-371. First, the district court concluded that the claims at issue did not fall within the scope of the parties' Arbitration Agreement:

> The Court finds that the arbitration clause focuses on the terms of service under the contract—not motor vehicle accidents. Because the arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration, this Court determines the issue. Accordingly, after reviewing the contract, the Court does not find that the parties have waived their rights to a civil trial in favor of arbitration, for a motor vehicle accident dispute.

4 AA 371 (COL No. 2).

Second, the district court determined that the Arbitration Agreement did not apply and/or was not enforceable as to Royz because Royz did not use the Uber App to request the transportation, only Work did:

> Further, Plaintiff Megan Royz did not use the Uber App to request transportation. Thus, Plaintiff Royz did not enter into a contract that could compel her claims to

[4] It is worth noting that Royz and Work did *not* argue that they did not enter into the Arbitration Agreement—there is no question as to the existence or validity of the agreements.

arbitration.

Id.

Following the denial, Uber moved for reconsideration, arguing that the district court clearly erred by interpreting the scope, applicability, and enforceability of the parties' Arbitration Agreement because, under the parties' delegation clause, only the arbitrator had the authority to make such threshold determinations of arbitrability. 2 AA 206. The district court denied the motion for reconsideration on the merits, reasoning that the parties' delegation clause could only apply to claims that fell within the scope of the parties' Arbitration Agreement, and thus, the delegation clause was inapplicable:

> While the Arbitration Agreement and Delegation Clause may be severable, the delegation clause must be read in conjunction with the [Terms] and Arbitration Agreement, which determines the scope of the arbitration or disputes related to what the parties agreed to arbitrate.
>
> After reviewing the [Terms], the Arbitration Agreement, and the delegation clause, this Court determines that the agreement to arbitrate is limited to those disputes, claims, or controversies arising out of or relating to the Terms or use of movant's services. As previously set forth within the Court's [Order], the arbitration clause focuses on [Terms] under the contract—not motor vehicle accidents. The arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration. Therefore this Court determines the issue.

3 AA 356-59.

Uber timely filed a notice of appeal. 4 AA 372. The underlying proceeding

is stayed pending this appeal. 4 AA 396.

SUMMARY OF THE ARGUMENT

The district court erred by deciding disputed questions of arbitrability instead of referring them to the arbitrator. Under the FAA, which governs, the district court was required to honor the parties' delegation clause, even if it believed that the argument that Respondents' claims fell within the scope of the Arbitration Agreement was frivolous or "wholly groundless", as recently held by the U.S. Supreme Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

The district court's refusal to grant Uber's motion to compel arbitration and refer questions of arbitrability to the arbitrator was clear error. In fact, the district court's refusal to compel arbitration because of its own view of the scope of the arbitration agreement smacks of the very "judicial hostility to arbitration" that the FAA was enacted to counteract. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). Reversal is warranted.

ARGUMENT

A. Standard of Review

The district court's denial of Uber's motion to compel arbitration is reviewed de novo. *See Masto v. Second Jud. Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("Whether a dispute arising under a contract is arbitrable is a

matter of contract interpretation, which is a question of law that we review de novo."); *see also Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 939 (9th Cir. 2019) ("We review de novo the district court's denial of a motion to compel arbitration.").

B. The district court erred by deciding the disputed questions of arbitrability instead of referring them to the arbitrator.

Because the FAA governs and mandates the enforcement of the parties' delegation clause, the district court committed reversible error by deciding the disputed questions of arbitrability instead of referring them to the arbitrator.

1. The FAA governs the interpretation of the Arbitration Agreement.

The FAA governs the interpretation of arbitration agreements that expressly invoke its terms and preempts any inconsistent state law. *DirectTV, Inc. v. Imburgia*, 577 U.S. 47, 53-54 (2015); *see Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 442-43 (2006) (applying the FAA to resolve a motion to compel brought in state court when the parties agreed the FAA would govern in their arbitration agreement). Because the Arbitration Agreement at issue here states that the FAA "will govern its interpretation and enforcement and proceedings pursuant thereto," 1 AA 80, the decisions of the U.S. Supreme Court construing the FAA are authoritative on the interpretation of the Arbitration

Agreement.[5]

As those decisions underscore, the FAA reflects a "liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations and citation omitted). Indeed, the FAA was enacted in 1925 to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The "principal purpose" of the FAA is to "ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 563 U.S. at 344. 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, 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.").

[5] The FAA also applies because the parties' agreements and Arbitration Agreement "involv[e] interstate commerce," as expressly acknowledged and agreed to by the parties: "this Arbitration Agreement evidences a transaction involving interstate commerce." 1 AA 80; *see U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 192, 415 P.3d 32, 42 (2018) (concluding that the FAA governed because the contracts at issue "evidenced transactions involving interstate commerce").

2. Under the FAA, the district court did not have authority to decide the disputed questions of arbitrability and was required to refer these questions to the arbitrator.

The U.S. Supreme Court has long held that the FAA's command that courts enforce arbitration agreements according to their terms applies in disputes over "gateway" issues of arbitrability, such as whether a particular claim falls within the scope of the arbitration provision, and, the antecedent question of who decides such gateway issues: the court or the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *Rent-A-Center., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).[6]

Where the parties include a so-called "delegation provision" in their agreement, it is treated as an "additional, antecedent agreement the party seeking

[6] The Nevada Supreme Court reached a similar conclusion in *Int'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1324, 929 P.2d 954, 957 (1996), holding that the district court's determination of arbitrability was error where a 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.").

arbitration asks the federal court to enforce;" the FAA "operates on this additional agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70; *see Henry Schein*, 139 S. Ct. at 529. The Supreme Court "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein*, 139 S. Ct. at 530 (quoting *First Options*, 514 U.S. at 944).

In *Henry Schein*, the Supreme Court revisited this law to address a single issue: whether a district court could elect to decide threshold questions of arbitrability if it found that the argument in favor of arbitration was "wholly groundless." 139 S. Ct. at 527-28. The "wholly groundless" exception was a judicially created rule, whereby judges opted to decide threshold questions of arbitrability—such as the scope of the arbitration agreement—despite the existence of a clear and unmistakable delegation clause, because they viewed the argument in favor of arbitration as frivolous or "wholly groundless." *Id.* at 529. The courts that applied the rule "reasoned that the 'wholly groundless' exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration." *Id.*

The Supreme Court, however, rejected the "wholly groundless" exception as "inconsistent with the statutory text and with [the Court's] precedent," explaining that "[w]hen the parties' contract delegates the arbitrability question to an

arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.* at 531. The Court put it plainly: "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530.[7]

Here, under the FAA, the parties' delegation of authority to the arbitrator to resolve disputed questions of arbitrability is clear and unmistakable. Under the delegation, only the arbitrator has authority to resolve the disputed questions of arbitrability. The district court's reasoning to the contrary lacks merit.

a. The parties' delegation of authority to the arbitrator to resolve the disputed questions of arbitrability is enforceable as it is clear and unmistakable.

As stated above, for the parties' delegation of authority to the arbitrator to resolve the disputed questions of arbitrability to be enforceable, it must be "clear and unmistakable." *Henry Schein*, 139 S. Ct. at 530. Here, that is the case. It is important to note that the district court made no specific finding or conclusion to

[7] In an attempt to save the "wholly groundless" exception, respondents in *Henry Schein*, raised a bevy of policy and practical concerns, including "as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless" and "the 'wholly groundless' exception is necessary to deter frivolous motions to compel arbitration. 139 S. Ct. at 530-31. The Court rejected these concerns, pointing out that it cannot rewrite the law and arbitrators, like courts, "can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable." *Id.*

the contrary. But, to be sure, the wording of the parties' Arbitration Agreement and delegation clause leaves no room for doubt.

First, the parties' delegation of authority is clear and unmistakable because their Arbitration Agreement incorporates the AAA Rules. 1 AA 80. The AAA Rules explicitly provide that 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." 2 AA 216; *see Blanton v. Domino's Pizza Franchising LLC*, 962 F. 3d 842, 846 (6th Cir. 2020), cert. denied sub nom., 141 S. Ct. 1268 (2021) (providing that "the AAA Rules clearly empower an arbitrator to decide questions of 'arbitrability'—for instance, questions about the 'scope' of the agreement"). Further, every federal Circuit to have faced the issue—which is all but one—has ruled that incorporating the AAA Rules satisfies the "clear and unmistakable" standard with respect to the types of threshold questions of arbitrability at issue here. *See Blanton*, 962 F. 3d at 845 (reaching this conclusion and noting that "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability'").

Second, the parties' delegation clause goes one step further and specifically

states that "the arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement" and "shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel." 1 AA 80. The delegation clause could not be clearer.

It is for these reasons that courts across the country have found "Uber's delegation provision dispositive" and effective. *Heller v. Rasier, LLC*, No. CV178545PSGGJSX, 2020 WL 413243, at *12 (C.D. Cal. Jan. 7, 2020).[8] There is no basis for a different conclusion here.

b. Only the arbitrator has authority to decide the disputed questions of arbitrability.

The parties' incorporation of the AAA Rules and additional delegation clause gives the arbitrator "exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement." 1 AA 80. Despite this clear delegation, the district court elected to

[8] *See, e.g., Mohammed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016); *Lathan v. Uber Techs., Inc.*, 266 F. Supp. 3d 1170, 1173-74 (E.D. Wis. 2017); *Olivares v. Uber Techs., Inc.*, No. 16 C 6062, 2017 WL 3008278, at *3-4 (N.D. Ill. July 14, 2017) (citing additional cases); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 892 (N.D. Ill. 2016) ("This Court agrees with the Ninth Circuit and the numerous district courts that have found this delegation clause clear and unmistakable in delegating the question of arbitrability to an arbitrator.").

interpret the scope of the Arbitration Agreement, concluding that it did not encompass the parties' dispute. 4 AA 371. Compounding this error, the district court elected to address the applicability and enforceability of the Arbitration Agreement, determining that the agreement was not applicable and/or enforceable as to Royz. *Id.* Given the clear directive from the AAA Rules and the parties' delegation clause, the district court had "no power to decide the[se] arbitrability issue[s]." *Henry Schein*, 139 S. Ct. at 529.[9]

c. The district court's reasons for not honoring the parties' delegation of authority lack merit.

The district court attempted to justify its refusal to enforce the parties' delegation of authority to the arbitrator to resolve the disputed questions of arbitrability through two different lines of thought. Both lack merit.

First, in its order denying Uber's motion to compel arbitration, the district court concluded that it had the authority to interpret the scope, applicability, and enforceability of the Arbitration Agreement because "the arbitration provision does not clearly or unmistakably provide that the parties have agreed to submit a motor vehicle dispute to arbitration." 4 AA 371. To support this justification, the court cited *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) for the

[9] It goes without saying that Uber submits that Respondents' claims fall within the scope of the Arbitration Agreement and that the agreement is applicable and enforceable as to Royz. But, because these issues are not before the Court, as they are reserved for the arbitrator, Uber does not address them here.

proposition that a court retains authority to decide questions of arbitrability unless the parties clearly and unmistakably provide otherwise. 4 AA 370.

In reaching this conclusion, however, the district court looked past or ignored the parties' delegation clause, which addresses a more preliminary question than whether the parties agreed to arbitrate a particular dispute. That is, who has the authority to decide whether the parties agreed to arbitrate a particular dispute? As *Henry Schein* teaches, where, like here, an effective delegation clause delegates the question of "who has authority to decide," a court does not have authority to interpret the scope of the arbitration agreement, *even* if it believes that the argument in favor of arbitration is frivolous or "wholly groundless." 139 S. Ct. at 530 (providing that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator").

Instead of reaching the issue of whether the Arbitration Agreement clearly and unmistakably included motor vehicle disputes in its scope, the district court should have first addressed the antecedent issue of whether the parties' delegation clause clearly and unmistakably delegated the disputed threshold questions of arbitrability to the arbitrator. There is no doubt that it did. *Dean Witter,* which is consistent with the Court's holding in *Henry Schein* and this reasoning, does not dictate a different result. *See, e.g., Hidalgo v. Amateur Athletic Union of United States, Inc.*, 468 F. Supp. 3d 646, 661 (S.D.N.Y. 2020) ("In light of the broad

delegation to the arbitrator of issues of arbitrability, the plaintiff's argument that his claims are not covered by the arbitration provision because the claims do not 'arise out of or during the term of membership' is an argument that must be submitted to the arbitrator in the first instance.") (citing *Henry Schein*, 139 S. Ct. at 529); *Elko Broadband Ltd. v. Dhabi Holdings PJSC*, 319CV00610LRHWGC, 2020 WL 6435754, at *4 (D. Nev. Nov. 2, 2020) (reasoning that under *Henry Schein* and the parties' delegation provision, "considerations like Bajwa's signature and the ultimate scope of arbitrable issues are best left to arbitrators").

There is no escaping the legal certainty that under the parties' delegation clause, only the arbitrator has the authority to resolve the disputed questions of arbitrability.

Second, in its order denying Uber's motion for reconsideration, the district court attempted to defend its initial decision by contending that the delegation clause was inapplicable because it "must be read in conjunction with the Terms and Arbitration Agreement, which determines the scope of the arbitration or disputes related to what the parties agreed to arbitrate." 3 AA 358-59. Based on this flawed reasoning, the district court concluded that the delegation clause could only apply to claims that fell within the scope of the parties' Arbitration Agreement, which the claims at issue, in the district court's opinion, did not. *Id.* Such circular reasoning suffers from at least four fatal flaws.

One, it misinterprets the parties' delegation clause. The clause does not include any such limitations. It simply provides, *inter alia*, that "[t]he parties agree that the arbitrator . . . shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement." 1 AA 80.

Two, as explained above, this circular reasoning runs afoul of *Henry Schein*. The district court essentially made a "wholly groundless" finding as to arbitrability, without doing so explicitly. There is no basis for this under the law.

Three, such reasoning would render every delegation clause superfluous. The Sixth Circuit has recognized as much, explaining why such reasoning "doesn't make much sense," as it would mean the arbitrator would only "have the power to determine the scope of the agreement . . . as to claims that fall within the scope of the agreement":

> Piersing argues that his arbitration agreement incorporates the AAA Rules only as to claims that fall within the scope of the agreement. In other words, he thinks that a court must first determine whether the agreement covers a particular claim before the arbitrator has any authority to address its jurisdiction. But nothing in the relevant provision limits the incorporation in this way. Instead, it simply provides that "the arbitration will be conducted in accordance with then-current [AAA Rules]." Other courts have read similar references to "arbitration" or "the arbitration" as generally authorizing an arbitrator to decide questions of "arbitrability." And on its own terms, Piersing's reading of the agreement **doesn't make much sense**. He reads the agreement to

> say that the arbitrator shall have the power to determine the scope of the agreement only as to claims that fall within the scope of the agreement. **Yet that reading would render the AAA's jurisdictional rule superfluous**.

Blanton, 962 F.3d at 847 (emphasis added) (citations omitted).

Four, the district court's reasoning ignores the severable nature of delegation clauses. As explained by the U.S. Supreme Court in *Rent-A-Center*, Section 2 of the FAA operates to make an arbitration provision and, likewise, a delegation clause, severable from the remainder of the contract. 561 U.S. at 72. As such, here, the parties' delegation clause "does not depend on the substance of the remainder of the contract." *Id.* at 71.

In short, a court cannot conclude that an agreement delegating authority to interpret the scope of an arbitration agreement to an arbitrator is inapplicable based on the court's own interpretation of the agreement's scope. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 204 (5th Cir. 2016) (providing in response to numerous contract-interpretation arguments designed to show that the arbitration agreement does not apply that "those are precisely the sort of issues that, in the presence of a valid delegation clause, we cannot resolve").

For the foregoing reasons, the district court's denial of Uber's motion to compel arbitration does not survive review. Where as here, the parties clearly and unmistakably delegated threshold questions of arbitrability to the arbitrator,

including the authority to resolve any disputes related to the interpretation, applicability, or enforceability of the Arbitration Agreement, "the courts *must* respect the parties' decision as embodied in the contract." *Henry Schein*, 139 S. Ct. at 531 (emphasis added). By ignoring this law and electing to address these questions itself, the district court committed reversible error.

CONCLUSION

Accordingly, this Court should vacate the district court's order denying Uber'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), stay all proceedings until the arbitration between Uber and Respondents is completed.

DATED: July 15, 2021.

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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.

DATED: July 15, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRS 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,397 words.

3. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters to the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED: July 15, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on July 15, 2021, I submitted the foregoing **APPELLANTS' OPENING BRIEF** and **4 Volumes of APPELLANTS' APPENDIX** for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

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