Case No. 21-CV-370

IN THE

District of Columbia Court of Appeals

WALGREEN CO.,

Respondent-Appellant,

v.

HUMANA HEALTH PLAN, INC., HUMANA INSURANCE COMPANY, and HUMANA PHARMACY SOLUTIONS, INC.,

Movants-Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION, CASE NO. 2021 CA 001581 B
THE HONORABLE HIRAM E. PUIG-LUGO, JUDGE PRESIDING

BRIEF OF APPELLEES

Graeme W. Bush (#935064)*
Casey Trombley-Shapiro Jonas (#1670754)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W., Suite 1000
Washington, D.C. 20036
T: (202) 778-1800
F: (202) 822-8106
GBush@zuckerman.com
CJonas@zuckerman.com

Counsel for Appellees
Humana Health Plan, Inc.,
Humana Insurance Company, and
Humana Pharmacy Solutions, Inc.

DATED: September 22, 2021

LIST OF PARTIES, INTERVENORS, AMICI CURIAE, AND COUNSEL

Pursuant to Rule 28(a)(2)(A) of the Rules of the District of Columbia Court of Appeals, Appellees Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc., by and through undersigned counsel, provide the following list of all parties, intervenors, amici curiae, and their counsel in the trial court proceeding and in the appellate proceeding:

Movants-Appellees:
Humana Health Plan, Inc.
Humana Insurance Company
Humana Pharmacy Solutions, Inc.

Counsel to Movants-Appellees:
Graeme W. Bush
Casey Trombley-Shapiro Jonas
ZUCKERMAN SPAEDER LLP

Respondent-Appellant:
Walgreen Co.

Counsel to Respondent-Appellant:
Frederick Robinson
Selina P. Coleman
Megan F. Engel
James F. Segroves
REED SMITH LLP

Matthew Kaiser
KAISERDILLON PLLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 27(d)(5) of the Rules of the District of Columbia Court of Appeals, Appellees Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc., by and through undersigned counsel, state that Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. are wholly-owned subsidiaries of Humana Inc. Humana Inc. is a publicly traded corporation organized under the laws of Kentucky, with its principal place of business in Louisville, Kentucky. Humana Inc. has no parent corporation and no publicly-traded corporation owns 10% or more of Humana Inc.'s stock.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order granting a motion to compel arbitration, and this Court has jurisdiction under D.C. Code § 16-4427(a)(1).

STATEMENT OF THE ISSUE

Whether appellant Walgreen Co. ("Walgreens") is required to submit to arbitration a dispute over whether its arbitration agreement with appellees Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. (collectively, "Humana") covers its effort to disqualify Humana's counsel in ongoing arbitration where it is undisputed that the parties agreed to arbitrate arbitrability.

STATEMENT OF THE CASE

Walgreens appeals from the Superior Court's order compelling Walgreens to arbitrate its request to enjoin Crowell & Moring LLP ("Crowell") from representing Humana in arbitration proceedings against Walgreens. Those proceedings had been ongoing in Kentucky for a year and a half before Walgreens filed a lawsuit against Crowell in the District of Columbia, alleging that Crowell had previously represented Walgreens in a substantially related matter and breached its fiduciary duty by representing Humana in the arbitration. Walgreens did not name Humana as a party in the action and moved to enjoin Crowell from continuing to represent Humana in the arbitration just two months before the arbitration hearing was set to

begin. Walgreens took the position that the arbitrator could not decide the attorney disqualification question and an independent action against Crowell was the proper procedure to obtain removal of Humana's counsel.

Humana then filed the instant action in Superior Court to compel Walgreens to comply with its arbitration agreement with Humana and submit its effort to disqualify Humana's counsel to arbitration. Important for this appeal is that the arbitration agreement undisputedly requires an arbitrator to determine arbitrability, that is, whether any particular dispute is subject to arbitration. Walgreens thus is required to submit to the arbitrator in the pending arbitration its challenge to the arbitrator's authority to decide its effort to disqualify Humana's counsel and may not have it decided in Superior Court. Humana also moved to intervene in Walgreens' suit against Crowell for the sole purpose of seeking a stay of Walgreens' preliminary injunction motion, which Walgreens opposed and which the Court granted.

The Superior Court then ordered Walgreens to arbitrate its request to enjoin Crowell from representing Humana in the arbitration proceedings and stayed Walgreens' motion for a preliminary injunction. Walgreens' appeal followed.

STATEMENT OF THE FACTS

I. Humana and Walgreens' Arbitration Agreement and Arbitration

In December 2009, Humana and Walgreens entered into a National Chain Pharmacy Provider Agreement, which includes a broad arbitration provision. J.A. 16–19 ("Agreement"). Section 12.2 of the Arbitration Agreement provides that in the event that the parties are unable to resolve the dispute themselves, then any such dispute arising out of the parties' business relationship is to be submitted to final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association, "including disputes concerning *the scope, validity or applicability of this Agreement to arbitrate*." That provision states:

> The Parties agree that any dispute arising out of their business relationship which cannot be settled by mutual agreement shall be submitted to final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), ***including disputes concerning the scope, validity or applicability of this Agreement to arbitrate*** ("Arbitration Agreement"). The Parties agree that this Arbitration Agreement is subject to, and shall be interpreted in accordance with, the Federal Arbitration Act, 9 U.S.C. §§ 1-14.[1]

[1] The arbitration provision continues:

> This Arbitration Agreement requires arbitration of disputes involving antitrust, racketeering and similar claims, but shall not apply with respect to any dispute relating to (i) professional or general liability; (ii) tax or criminal matters; or (iii) any other matter, which pursuant to the terms and conditions of either party's insurance or self-insurance policies, would result in the matter not being covered by the insurance or self-insurance if the matter was subject to this Arbitration Agreement. This Arbitration Agreement supersedes any prior

J.A. 17 (emphasis added). The parties' agreement to arbitrate is expressly subject to, and is to be interpreted in accordance with, the Federal Arbitration Act ("FAA"). *Id.*

On August 12, 2019, Humana filed a Demand for Arbitration. J.A. 135–36. Crowell represents Humana in that arbitration, which has proceeded through discovery, motions for summary judgment, and a hearing. The liability phase of the arbitration began on June 21, 2021 and proceeded for seven days. Post-hearing briefing is complete, and the parties are awaiting the arbitrator's liability decision.

II. Walgreens' Lawsuit Against Crowell and Humana's Motion to Compel Arbitration

On February 9, 2021, Walgreens' outside counsel in the arbitration apparently discovered that Humana's counsel—Crowell—had previously represented Walgreens. Decl. of Megan Engel ¶ 4, J.A. 176. Walgreens immediately claimed that the prior representation created a conflict of interest for Crowell in the arbitration. *See* Email from F. Robinson to K. Harrison, A. Portnoy (Feb. 10, 2021),

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> arbitration agreement between the Parties. The Parties agree to arbitrate disputes arising from the Parties' business relationship prior to the Effective Date of the Agreement under the terms of this arbitration provision. This Arbitration Agreement, however, does not revive any claims that were barred by the terms of prior contracts, by applicable statutes of limitations or otherwise. The Parties agree this Agreement is a transaction involving interstate commerce and therefore that the Federal Arbitration Act, 9 U.S.C. § 1 et seq. applies.

J.A. 17–18.

J.A. 178; Email from F. Robinson to D. Schnorrenberg (Feb. 16, 2021), J.A. 180–81. However, rather than raise its concerns with the arbitratorWalgreens filed an action for replevin against Crowell in the District of Columbia Superior Court on February 19, 2021, seeking Crowell's files from the prior representation. Compl., No. 2021 CA 000861 B, J.A. 91–92. It was not until April 6, 2021 that Walgreens amended its complaint to include claims for breach of fiduciary duty, breach of contract, and unjust enrichment. Am. Compl., No. 2021 CA 000861 B, J.A. 108–12. The amended complaint alleges that Crowell previously represented Walgreens in a substantially related matter and therefore may not represent Humana in the underlying arbitration. On April 9, 2021 Walgreens filed a motion for a preliminary injunction, seeking an order prohibiting Crowell from continuing to represent Humana in the arbitration. Pl.'s Opposed Mot. for Prelim. Inj., No. 2021 CA 000861 B, J.A. 115–17. Walgreens did not name Humana as a party in the action.

On May 12, 2021, Humana filed the present case, moving to compel Walgreens to arbitrate its request that Crowell be enjoined from representing Humana in the ongoing arbitration between Humana and Walgreens. Mot. of Humana to Compel Arbitration, J.A. 5. Humana also moved to intervene in Walgreens' action against Crowell for the sole purpose of requesting a stay of Walgreens' motion for a preliminary injunction. Opposed Mot. of Humana to Intervene, No. 2021 CA 000861 B, J.A. 281. Walgreens opposed the motion.

Walgreen Co.'s Opp'n to Humana's Mot. to Intervene, No. 2021 CA 000861 B, J.A. 290. The Superior Court granted Humana's motion to intervene on May 26, 2021, Order (May 26, 2021), No. 2021 CA 000861 B, J.A. 312–15, and the following day, the Superior Court also granted Humana's motion to compel arbitration and stayed Walgreens' preliminary injunction motion. Order (May 27, 2021) ("Order"), J.A. 41–45; Order (May 27, 2021), No. 2021 CA 000861 B, J.A. 317.

Walgreens noticed this appeal and filed an emergency motion for summary reversal, then requested a stay in Superior Court pending this Court's ruling on the emergency motion. Walgreens' Opposed Mot. for Stay Pending Appeal, J.A. 59. This Court denied Walgreens' emergency motion on June 16, 2021, and Walgreens withdrew its request for a stay. Praecipe Withdrawing Motion, J.A. 68.

Proceedings on Walgreens' underlying claims against Crowell continue and are in discovery. *See* Docket, No. 2021 CA 000861 B, J.A. 77–83. Walgreens never moved in the arbitration to disqualify Crowell.

SUMMARY OF THE ARGUMENT

The Superior Court properly found that an enforceable arbitration agreement exists between Humana and Walgreens and that the agreement requires the parties to submit to arbitration any question over whether the agreement covers a particular dispute. The Superior Court therefore properly concluded that it was for the

arbitrator, and not the Court, to decide whether Walgreens' effort to disqualify Humana's counsel in arbitration must be arbitrated.

Walgreens paints a distorted picture of its effort to remove Humana's counsel, insisting its dispute lies only with Crowell. But it is Humana that sought to compel Walgreens to arbitrate its effort, the agreement exists between Humana and Walgreens, and the relief Walgreens seeks—the disqualification of Humana's counsel in arbitration—would unquestionably have a significant impact on Humana and the arbitration. It is thus irrelevant that no arbitration agreement exists between Walgreens and Crowell; Walgreens is not required to arbitrate its underlying claims against Crowell and is free to pursue them in court (as it is currently doing). Therefore, the Superior Court's order should be affirmed.

Furthermore, the Court should reject Walgreens' implied invitation to impose a blanket rule that arbitrators can *never* decide issues of attorney disqualification. The cases that have come to such a conclusion are ill-reasoned and inapposite, and there is substantial case law coming out the other way. And for good reason: such a prohibition would undermine the very purpose and benefits of arbitration—including efficiency, cost savings, and confidentiality—and would be contrary to the policy of the Federal Arbitration Act and a long succession of Supreme Court decisions reinforcing and upholding that policy.

ARGUMENT

I. The Superior Court Properly Concluded that Walgreens Must Comply with Its Agreement to Submit Arbitrability Disputes to Arbitration

The parties agree: "Before compelling arbitration, a court must find that the relevant parties have an enforceable agreement to arbitrate." Br. of Appellant ("Walgreens' Br.") 6; *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). The Superior Court properly found, and Walgreens does not dispute, that a valid arbitration agreement exists between Humana and Walgreens. *See* Nat'l Chain Pharmacy Provider Agreement, J.A. 16–19; Order, J.A. 43; Walgreens' Br. 3. The court also properly found, and Walgreens does not dispute, that "the arbitration agreement contains clear and unmistakable evidence that Humana and Walgreen[s] intended to compel the question of arbitrability to arbitration." Order, J.A. 44–45; *see* Walgreens' Br. 17–18 (arguing relevancy but not disputing court's finding). That is the end of the inquiry, and this Court should affirm the Superior Court's order, which properly concluded that it is for the arbitrator to decide whether Walgreens' effort to remove Humana's counsel in arbitration is arbitrable. *See Henry Schein*, 139 S. Ct. at 529 ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract.").

Because there is a broad arbitration agreement between Humana and Walgreens—which by its terms covers arbitrability disputes—an order compelling Walgreens to submit its effort to remove Humana's counsel from arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *2200 M St. LLC v. Mackell*, 940 A.2d 143, 151 (D.C. 2007) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986)). In other words, to prevail on appeal, Walgreens must establish that there is *no* interpretation of the Humana-Walgreens arbitration agreement that would cover the dispute over whether the disqualification issue is arbitrable pursuant to that agreement. Walgreens does not even attempt to meet that standard here, and it failed to do so below. Instead, Walgreens makes essentially two arguments to avoid complying with its agreement to arbitrate: (1) No arbitration agreement exists between Walgreens and Crowell, and (2) efforts to disqualify counsel can *never* be decided in arbitration. Both arguments fail, and Walgreens' efforts to skirt its obligations under the arbitration agreement it entered with Humana should be rejected.

II. Walgreens Cannot Avoid Arbitrating Its Effort to Remove Humana's Counsel Simply Because No Agreement Exists Between Walgreens and Crowell

Walgreens' brief relies entirely on the fact that it has no arbitration agreement with Crowell, but that is irrelevant to whether Walgreens must arbitrate with Humana its effort to disqualify Humana's counsel in arbitration. Walgreens provides no basis for avoiding its obligation to submit this dispute to arbitration. *Jahanbein v. Ndidi Condominium Unit Owners Association, Inc.*, 85 A.3d 824 (D.C. 2014), upon which Walgreens primarily relies, supports the Superior Court's order; the other inapposite cases upon which Walgreens relies do not support reversal; and additional authority further supports affirmance.

A. Walgreens' Dispute Is with Humana and Must Be Arbitrated Pursuant to Their Agreement

Walgreens argues that its claims lie exclusively against Crowell; it has no arbitration agreement with Crowell; and thus, it cannot be compelled to arbitrate with Crowell. This framing ignores the relevant dispute and parties and fails to provide a basis for Walgreens to avoid its obligation to arbitrate *with Humana* a dispute concerning arbitrability pursuant to their arbitration agreement.

First, Walgreens' insistence that only it and Crowell are the "relevant parties" in this dispute is incorrect. *See* Walgreens' Br. 6, 10, 11.[2] For one, it is Humana, not

[2] If Walgreens were correct and this were a dispute only between Walgreens and Crowell, then there would be no reason why a party to litigation could not file in an

Crowell, that moved to compel arbitration pursuant to the arbitration agreement it has with Walgreens. And it is indisputable that Walgreens' request to enjoin Crowell from representing Humana in ongoing arbitration would have a significant impact on Humana and on the proceeding between Humana and Walgreens, which is undeniably subject to the arbitration agreement. *See* Order, J.A. 45 ("The Court questions Walgreen's attempt to sever[] its request for injunctive relief from Humana and the pending arbitration when it is in fact inseparable from Humana and the pending arbitration."); Walgreens' Br. 23 (underplaying but still acknowledging that Walgreens' effort to disqualify Crowell "might collaterally affect Humana"); *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 719 (7th Cir. 1982) ("[O]rders granting disqualification requests have immediate, severe, and often irreparable and unreviewable consequences upon both the individual who hired the disqualified attorney or law firm as well as upon the disqualified counsel.").

The fact that Walgreens' requested relief would have such a significant impact on Humana and in the arbitration is irrefutable evidence that the dispute at least *may* fall within the Humana-Walgreens arbitration agreement. Under these

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entirely separate jurisdiction a motion to disqualify its adversary's counsel on the same grounds. Yet motions to disqualify counsel are decided in the proceedings in which the counsel appears, *see, e.g.*, *Airbus S.A.S. v. Pickering*, No. 06-4261, 2007 WL 5084428, at 5 (D.C. Super. Ct. Jan. 10, 2007) ("Typically, the challenge to the attorney's qualifications must be made in the forum in which the underlying suit is being litigated."), and there is no difference for arbitration.

circumstances, the parties are required to have the arbitrator decide whether it in fact does. *See* Agreement, J.A. 17 (agreeing to "submit[] to final and binding arbitration . . . disputes concerning the scope, validity or applicability of this Agreement to arbitrate"); *2200 M St.*, 940 A.2d at 151 (requiring arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute") (quoting *AT&T Techs.*, 475 U.S. at 650). Additionally, as the United States Supreme Court recently held,

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, *a court possesses no power to decide the arbitrability issue*. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Henry Schein, 139 S. Ct. at 529 (emphasis added). Walgreens essentially attempts to argue that because it never entered an arbitration agreement with Crowell, the argument that the Humana-Walgreens arbitration agreement applies to Walgreens' efforts to remove Crowell as Humana's counsel in arbitration is "wholly groundless." Even if Walgreens were correct—and it is not[3]—its argument fails under Supreme Court precedent.

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[3] *See, e.g.*, *Reuter Recycling of Fla. Inc. v. City of Hallandale*, 993 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 2008) ("The issue of disqualification constitutes an 'other matter in question arising out of or relating to' the [arbitration] agreement."); *Morgan Stanley DW, Inc. v. Kelley & Warren, P.A.*, No. 02-80225-CIV, 2002 WL 34382748, at *2 (S.D. Fla. May 10, 2002) ("[T]he disqualification dispute arises from the . . . Arbitration.").

Second, Walgreens' portrayal of the Superior Court's order as compelling Walgreens "to arbitrate a professional ethics claim," *see* Walgreens' Br. 1, 5, 18, 19, is incorrect. Instead, the court ordered Walgreens "to arbitrate its request that Crowell be enjoined from representing Humana in the ongoing arbitration between Humana and Walgreens." Order, J.A. 45; *see also* Mem. in Supp. Mot. to Compel Arbitration 1 (seeking to compel Walgreens "to arbitrate its request in Civil Action No. 2021 0861 that Crowell & Moring . . . be enjoined from representing Humana in the ongoing arbitration between Humana and Walgreens"). This distinction is critical.

For one, Walgreens is not required to arbitrate with Crowell. Indeed, Walgreens is free to pursue (and is currently pursuing) all of its claims against Crowell in Superior Court. *See, e.g.*, Order (June 30, 2021), No. 2021 CA 000861 B (scheduling order); Answer & Demand for Jury Trial (filed July 1, 2021), No. 2021 CA 000861 B. The *only* component of that action that the Superior Court ordered Walgreens to arbitrate is Walgreens' request to enjoin Crowell from continuing to represent Humana in ongoing arbitration. *See* Order, J.A. 45; Order (May 27, 2021), No. 2021 CA 000861 B, J.A. 317 (staying Walgreens' motion for preliminary injunction); *see also* Reply in Supp. of Walgreen Co.'s Opposed Mot. for Prelim. Inj., No. 2021 CA 000861 B, J.A. 262 (noting that "Walgreens asks the Court . . . to disqualify Crowell from representing Humana in the currently pending arbitration").

Moreover, the *relief* the Superior Court ordered Walgreens to seek in arbitration—the removal of Crowell as Humana's counsel—is related to but distinct from the *claims* Walgreens has raised against Crowell. *See, e.g.*, Reply in Supp. of Walgreen Co.'s Opposed Mot. for Prelim. Inj., No. 2021 CA 000861 B, J.A. 262 n.9 (emphasizing the *relief* sought, *i.e.*, "an order 'disqualifying Crowell'") (quoting Prayer for Relief No. 6, First Am. Compl., No. 2021 CA 000861 B, J.A. 112). Although Walgreens attempts to conflate the two, whether counsel violated ethical duties and whether counsel should be disqualified from a particular proceeding are distinct questions. *See Ambush v. Engelberg*, 282 F. Supp. 3d 58, 62 (D.D.C. 2017) ("In considering a motion to disqualify counsel, the . . . court must conduct a two-step inquiry: first, it must determine 'whether a violation of an applicable Rule of Professional Conduct has occurred or is occurring,' and second, 'if so, whether such violation provides sufficient grounds for disqualification.'") (citation omitted).

For example, "it is well-settled that an attorney who is the subject of [disciplinary] proceedings is entitled to procedural due process safeguards." *In re Slattery*, 767 A.2d 203, 207 (D.C. 2001); *see also In re Ruffalo*, 390 U.S. 544, 550–51 (1968). That is because disciplinary proceedings are "of a quasi-criminal nature," *Ruffalo*, 390 U.S. at 551, "designed to protect the public," *id.* at 550, and designed to punish, deter, and/or rehabilitate those who violate ethical duties. Similarly, where a private party brings an "ethics claim" against another party—such as the breach-

of-fiduciary claim Walgreens has brought against Crowell—the defendant is entitled to mount a full defense and may hire counsel, file dispositive motions, and seek a trial by jury. *See, e.g.*, Answer & Demand for Jury Trial (filed July 1, 2021), No. 2021 CA 000861 B.

Disqualification of counsel, on the other hand, falls within a court's (or arbitrator's) authority to supervise the adjudicatory process and is generally decided in the court's discretion, without a hearing, and without the targeted counsel being represented by outside counsel. *See, e.g.*, *Ambush*, 282 F. Supp. 3d at 61 ("A motion to disqualify counsel is committed to the sound discretion of the district court."); *Airbus S.A.S.* 2007 WL 5084428 at 5; *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992) ("A motion for disqualification is simply an injunctive order issued in a case already pending."); *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1359 (Fla. Dist. Ct. App. 1980) ("The basic purpose of the trial court is to afford litigants an impartial forum in which their complaints and defenses may be presented, heard and decided with fairness. . . . [A] trial court may decide, after consideration of a motion alleging sufficient facts which, if true, would warrant removal of opposing counsel, that removal is mandated.").

Walgreens thus misrepresents the nature of the Superior Court's order and what dispute the Court ordered it to raise before the arbitrator. To the extent Walgreens seeks the relief of disqualification of Humana's counsel in arbitration,

the Superior Court properly required Walgreens to seek that disqualification in the relevant proceeding: the arbitration with Humana.

B. *Jahanbein v. Ndidi Condominium Unit Owners Association* Supports Requiring Walgreens to Arbitrate Its Effort to Disqualify Humana's Counsel

Walgreens is wrong that "the Superior Court's Order ran directly contrary to this Court's ruling in *Jahanbein*," Walgreens' Br. 9, as the facts of that case are readily distinguishable from those at issue here. Indeed, the Court's decision in *Jahanbein* supports the Superior Court's order below.

Unlike in this case—where one party to an arbitration agreement moved to compel arbitration of a dispute with another party to the arbitration agreement—in *Jahanbein* a *non-party* sought to compel arbitration against a party to an arbitration agreement. In that case, a condominium owner left his heat off, and when his pipes froze, they burst and damaged a neighboring condominium. *Jahanbein*, 85 A.3d at 826. The neighboring condominium's owner sued the Condominium Association for insurance proceeds, as well as the neighbor for negligence. *Id.* The Condominium Association and the allegedly negligent neighbor moved to compel arbitration pursuant to the arbitration agreement the condominium owners had entered with the Condominium Association. *Id.* This Court concluded that it was appropriate for the Superior Court to compel arbitration of the claims against the Condominium Association but that the defendant neighbor "cannot enforce those provisions [of the

arbitration agreement with the Condominium Association] against [the plaintiff neighbor] *as a third-party beneficiary*, and *must show that he is a direct party to the [agreement] in order to compel arbitration in this dispute*." *Id.* at 831 (emphasis added). Importantly, this Court specifically determined that no enforceable arbitration clause existed in the arbitration agreement with the Condominium Association "as it relates to disputes between unit owners, and *we discern no basis for concluding that the Condo Association has any interest in how two owners resolve a dispute of this kind*." *Id.* (emphasis added).

Whereas in *Jahanbein* a non-party to an arbitration agreement sought as a third-party beneficiary to compel arbitration of tort claims, here, Crowell is not the party seeking to compel Walgreens to arbitrate its claims for injunctive relief; Humana is. And Humana—with which Walgreens plainly *did* enter an arbitration agreement—does not seek to compel arbitration of *all* of Walgreens' claims against Crowell, just its claim that *Humana's* counsel in the ongoing arbitration should be disqualified *from representing Humana* in that proceeding, *i.e.*, something Humana very much "has an[] interest" in resolving. *Id. Jahanbein* is therefore inapposite, and the Superior Court's order does not conflict with this Court's holding in that case.

Rather, *Jahanbein* directly supports the Superior Court's decision below. "Before compelling arbitration under District of Columbia law, a court must find that the parties have an enforceable agreement to arbitrate and that 'the underlying

dispute between the parties falls within the scope of the agreement.'" *Id.* at 827 (quoting *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 354 (D.C. 2005)). This Court "ha[s] a preference for arbitration such that when 'ambiguity as to whether a matter is within the scope of an arbitrator's authority [exists], any doubts are to be resolved in favor of arbitration.'" *Id.* (second alteration in original) (quoting *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 922 (D.C. 1992)). "If the arbitration clause is 'susceptible of an interpretation that arbitration is required for the particular dispute[,] the trial court must order arbitration.'" *Id.* at 828 (quoting *Masurovsky v. Green*, 687 A.2d 198, 202 (D.C. 1996)) (alterations omitted). Walgreens points again and again to the lack of any arbitration agreement between Walgreens and Crowell but, again and again, fails to engage with the arbitration agreement between *Humana* and Walgreens, which governs this dispute and on which the Superior Court based its decision. Because there is an arbitration agreement between Humana and Walgreens, *Jahanbein* dictates that the Superior Court was *required* to compel arbitration so long as the arbitration agreement was "susceptible of an interpretation" that covered the dispute between the parties.

"Arbitrability refers to whether the parties agreed to arbitrate a particular type of issue." *Id.* at 827 (quoting *Certain Underwriters at Lloyd's London v. Ashland, Inc.*, 967 A.2d 166, 173 (D.C. 2009)). Whether Humana's counsel should be disqualified from representing Humana in the arbitration with Walgreens is "a

particular type of issue," and the parties disagree as to whether they agreed to arbitrate that type of issue. *See, e.g.*, Opp'n to Mot. to Compel Arbitration, J.A. 33–38. As in *Jahanbein*, there is no question that an arbitration agreement exists here between Humana and Walgreens. *See Jahanbein*, 85 A.3d at 828. And as in *Jahanbein*, whether Walgreens' efforts to disqualify Humana's counsel fall within the scope of the Arbitration Agreement "depends upon the interpretation" of the Arbitration Agreement. *Id.* at 829. Therefore, as in *Jahanbein*, the Superior Court was correct to require Walgreens to submit that dispute—*i.e.*, the arbitrability question—to the arbitrator. *See id.*

C. The Remaining Cases Walgreens Cites Do Not Support Reversal of the Superior Court's Order

Walgreens further relies on two "nonbinding" and "unpublished" decisions, Walgreens' Br. 23 n.3, in its effort to convince the Court to reverse the Superior Court. Both cases are inapposite, and neither supports reversal of the Superior Court's order.

In *Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, LLP*, a party to arbitration brought a separate action in federal district court against the law firm that was representing its adversary in an arbitration proceeding, seeking to disqualify the firm from further participation in the arbitration on the basis of an alleged conflict of interest. No. H-99-1882, 2000 WL 36098499, at *1 (S.D. Tex.

Sept. 8, 2000). The court denied the law firm's motion to dismiss, which argued that "the disqualification issue . . . should be decided by the arbitrators." *Id.* at *2.

The *Dean Witter* opinion does not support reversal of the Superior Court's order. First, the parties before the court in that case included one party to the arbitration (like Walgreens) and the law firm that represented the other party (like Crowell). In the instant case, on the other hand, both parties before the Court are the *same* parties that are appearing in arbitration and between whom an arbitration agreement exists. The *Dean Witter* court thus did not consider whether parties to the arbitration agreement (one of which was not a party to the lawsuit) had agreed to submit arbitrability questions to arbitration.[4]

Additionally, the court largely based its decision on a rejection of the defendant law firm's arguments that (1) "the disqualification issue arises out of the . . . arbitration," *id.* at *2; and (2) "the Customer Agreement between [plaintiff] and the [adversary in arbitration] operates to bind [plaintiff] to arbitration with

[4] The plaintiff in *Dean Witter* had also "filed three separate letter briefs with the arbitrators requesting that the arbitration be stayed to resolve the conflict-of-interest issue" prior to filing its motion to disqualify in court and had "resisted certain discovery requests in the arbitration based on the conflict-of-interest issue," but the arbitrators had denied the plaintiff's requests. 2000 WL 36098499, at *1. Walgreens failed to raise the disqualification issue in the arbitration with Humana.

[defendant law firm]," *id.* at *3. Humana is not making similar arguments here,[5] and the Superior Court did not rely on such reasoning.

Indeed, the *Dean Witter* court decided without analysis or citation to authority "that the present disqualification issue is wholly unrelated to the [arbitration adversary's] underlying claims," and that "at its core, the disqualification dispute lies between [plaintiff] and [defendant law firm], not between [plaintiff] and the [adversary in arbitration]." *Id.* at *4. As outlined above, *see* Sec. I, because Humana and Walgreens undisputedly agreed to submit arbitrability questions to arbitration, it would be inappropriate for this Court to decide that the disqualification issue is "plainly outside the scope of the arbitration agreement" as the court did in *Dean Witter*. *Id.*; *see also Henry Schein*, 139 S. Ct. at 529.[6]

Finally, the court in *Dean Witter* reached its decision in part based on a flawed extrapolation from precedent that does not apply in the District of Columbia. The court relied on an opinion of the U.S. Court of Appeals for the Fifth Circuit in which the court held in relevant part that "a district court is obliged to take measures against

[5] Humana does not concede that the disqualification issue does not arise out of the arbitration or that the arbitration agreement would not bind Walgreens to arbitrate disputes with Crowell; but it does not (and need not) rely on either argument here.

[6] The *Dean Witter* court's offhand conclusion that the disqualification issue does not arise out of the arbitration is also misplaced. Even in the other case on which Walgreens heavily relies, the court found that "the disqualification dispute arises from the . . . Arbitration," *Morgan Stanley*, 2002 WL 34382748, at *2; *see also supra* note 3.

unethical conduct occurring in connection with any proceeding before it." *Dean Witter*, 2000 WL 36098499, at *4 (quoting *In re Am. Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992)) (internal quotation marks, alterations, and emphasis omitted). The district court extrapolated from that precedent "that trial courts are obligated to police the rules of ethical conduct." *Id.* Not only has the District of Columbia not adopted the Fifth Circuit's rule generally, but the *Dean Witter* court also failed to acknowledge a key part of the rule: that a trial court is required to police ethical conduct "occurring *in connection with any proceeding before it*." *Am. Airlines*, 972 F.2d at 611 (emphasis added). The Fifth Circuit did *not* hold that a trial court must police ethical conduct in proceedings in *other forums*. *See also Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984) ("[T]he district court has the duty and responsibility of supervising the conduct of *attorneys who appear before it*.") (emphasis added); *Woods v. Covington Cnty. Bank*, 537 F.2d 804, 810 (5th Cir. 1976) ("[A] District Court is obliged to take measures against unethical conduct occurring *in connection with any proceeding before it*.") (emphasis added); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 376–77 (S.D. Tex. 1969) ("[A] court's authority to disqualify counsel is based upon its duty to supervise the conduct of the *attorneys practicing before it*.") (emphasis added) (all cases cited by *Dean Witter* court).

Indeed, the Fifth Circuit has held in another context that courts *lack* the authority to intervene and sanction counsel in arbitration. *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 462 (5th Cir. 2010). In that case, the Fifth Circuit noted that "[a] district court has the inherent authority to impose sanctions 'in order to control the litigation before it'" and reversed the lower court's order imposing sanctions on counsel for conduct in arbitration. *Id.* at 460 (citation omitted). The court found that the lower court's sanction order broke with Fifth Circuit precedent and was "in serious tension with the Federal Arbitration Act." *Id.* at 461. "Under the FAA, the district court has the authority to determine (1) whether arbitration should be compelled and (2) whether an arbitration award should be confirmed, vacated, or modified. Beyond those narrowly defined procedural powers, the court has no authority to interfere with an arbitration proceeding." *Id.* at 461–62 (citations omitted); *see also id.* at 462 ("Finally, and perhaps most importantly, the sanctions order threatens unduly to inflate the judiciary's role in arbitration. . . . [B]y using its power to sanction, a court could seize control over substantive aspects of arbitration. The court would, in effect, become a roving commission to supervise a private method of dispute resolution.").

The court further cautioned that "[i]f inherent authority were expanded to cover [the relevant] conduct, there would be nothing to prevent courts from inserting themselves into the thicket of arbitrable issues—precisely where they do not belong.

Such an expansion would also threaten the integrity of federal arbitration law in the name of filling a gap that does not exist." *Id.* at 463. The *Dean Witter* court did not engage with any of these concerns—or with the FAA, to which the Humana-Walgreens arbitration agreement is subject—and based its determination that disqualification issues are inappropriate for arbitration (addressed further below, *see* Sec. III) on an unsupported expansion of the rule the Fifth Circuit articulated in *American Airlines*.

The D.C. Superior Court does not retain plenary supervisory authority over lawyers' conduct regardless of the forum, jurisdiction, or proceeding in which that conduct occurs. In fact, it is *this* Court that "has the ultimate authority for disciplining members of the District of Columbia Bar for violations of the D.C. Rules of Professional Conduct," https://www.dcbar.org/attorney-discipline/board-on-professional-responsibility, and the Superior Court plays *no role* in disciplinary proceedings, *see* Rule XI of the Rules of the Court of Appeals Governing the Bar. The district court's decision in *Dean Witter* does not support expanding the Superior Court's authority.

Walgreens next relies on *Morgan Stanley*, 2002 WL 34382748, which similarly provides no support for reversing the Superior Court's order. As in *Dean Witter*, the defendant law firm was not a party in arbitration, unlike Humana. *See id.* at *1. And as in *Dean Witter*, the court did not face or address the arguments that

Humana raises here. In particular, the law firm defendant in *Morgan Stanley* argued based on the language of the relevant arbitration agreement that it "considers itself an 'agent' of [plaintiff's adversary in arbitration] and asserts that [plaintiff] has agreed to arbitrate this dispute." *Id.* at *2. In just two sentences of analysis, the court found that because "the arbitration agreement was not between [Plaintiff] and Defendant, Plaintiff cannot be compelled to arbitrate this matter," then relied on the *Dean Witter* opinion (without providing any additional analysis) to conclude that "the issue of possible attorney disqualification should be decided, not by the arbitrators, but by the courts." *Id.*

Humana does not (and need not) rely on the arguments raised by the law firm defendant in *Morgan Stanley*, and the court did not consider arbitrability issues or whether the relevant arbitration provision would require the plaintiff to arbitrate its disqualification effort had the other party to the agreement brought a motion to compel arbitration. And in a published opinion from the same district, the Southern District of Florida quoted the Fifth Circuit's decision in *Positive Software Solutions* for the proposition that "[w]here 'conduct [is] neither before the district court nor in direct defiance of its orders, the conduct is beyond the reach of the court's inherent authority to sanction." *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, 861 F. Supp. 2d 1346, 1355 (S.D. Fla. 2012) (second alteration in original) (quoting *Positive Software*, 619 F.3d at 461). That court determined that courts may look to

conduct in other forums—such as arbitrations—"where relevant, as evidence in determining whether conduct *properly before the Court* is sanctionable." *Id.* (emphasis added). *Morgan Stanley* thus, like *Dean Witter*, provides no basis for reversing the Superior Court.[7]

Rejecting Walgreens' attempt to use *Dean Witter* and *Morgan Stanley* to reverse the Superior Court would place this Court in good company. Other parties seeking in court to disqualify counsel in arbitration have also cited *Dean Witter* and *Morgan Stanley* for the very propositions for which Walgreens invokes them here, and courts have found them unpersuasive. *See, e.g.*, *SOC-SMG, Inc. v. Day & Zimmerman, Inc.*, No. 5375-VCS, 2010 WL 3634204, at *2 n.12 (Del. Ch. Sept. 15, 2010) ("SMG's reliance on [*Dean Witter*] for the proposition that '[t]he Court similarly finds that overarching policy considerations preclude arbitrators . . . from interpreting and applying the applicable rules of professional conduct for attorneys' is undermined by the fact that in that case there was no broadly drafted arbitration clause calling for 'arbitration of all controversies arising out of [the parties'] business relationship.'") (all but first alteration in original) (citations omitted); *compare* Brief

[7] Walgreens also cites *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002), to support its noncontroversial argument that parties who have not agreed to submit disputes to arbitration may not be compelled to do so, Walgreens' Br. 12–13. That case also does not support reversal of the Superior Court's order, as (1) the EEOC was not a party to the arbitration agreement at issue, unlike Walgreens and Humana here; and (2) the EEOC had a separate, statutory basis for bringing its claims in court. *See EEOC*, 534 U.S. at 294.

of Appellants & Petition for Writ of Mandamus, 2014 WL 6488912, at *37–38 (Nov. 17, 2014) (relying on *Dean Witter* to argue that "[t]he Court has the power (and the duty) to police attorneys concerning matters governed by the Rules [of Professional Conduct], and the Court is not stripped of this power because of any arbitration agreement, let alone one to which [defendant lawyer and law firm] are not parties and cannot enforce"), *with Chi. Bridge & Iron Co. (Del.) v. Delman*, No. 09-14-468-CV, 2015 WL 1849669 (Tex. App. Apr. 23, 2015) (not expressly addressing *Dean Witter* but denying appeal and petition); *compare* Appellant's Initial Brief, 2020 WL 3086447, at *13–16 (May 26, 2020) (relying on *Dean Witter* and *Morgan Stanley* to argue that "the real issue in dispute is between the law firm and the former client"), *with Ryals v. Bosshardt Realty Servs., LLC*, No. 1D20-1468, 2020 WL 7054161, at *1 (Fla. Dist. Ct. App. Dec. 2, 2020) (affirming without opinion lower court's order compelling arbitration); *see also* Order Granting Def.'s Mots. to Compel Arbitration & Stay Litig. 1, *Ryals v. Bosshardt Realty Servs., LLC*, No. 01-2019-CA-002859, Filing No. 106042006 (Fla. Cir. Ct. Apr. 8, 2020) (ordering that "[t]he Court is without jurisdiction to decide whether any conflict of interest exists between Defendant and its former counsel as these issues must be resolved in arbitration").

D. Walgreens Ignores Authority Directly Supporting the Superior Court's Order

It is true, as Walgreens states, that "[f]ew courts have been called upon to address" arbitrability principles "in a case involving a dispute between a client and

its former firm." Walgreens' Br. 14. But Walgreens conveniently ignores the fact that at least one court—faced with similarly situated parties and the same arguments Walgreens raises here—has come to the very opposite conclusion as the *Dean Witter* and *Morgan Stanley* courts. *See Canaan Venture Partners, L.P. v. Salzman*, No. CV 950144056S, 1996 WL 62658 (Conn. Super. Ct. Jan. 28, 1996).[8] In that case, after actions had been filed in court, one party demanded binding arbitration pursuant to an agreement, and the parties agreed to arbitrate the disputes. *Id.* at *1. One party to the arbitration then filed in court a motion to disqualify the other party's counsel due to a conflict of interest. *Id.* The respondent "argue[d] that the proper forum for resolution of the motion is before the American Arbitration Association (AAA) proceeding." *Id.* Just as here—but unlike in *Dean Witter* and *Morgan Stanley*—the party arguing that the disqualification motion must be decided in arbitration *was a party to the arbitration*. *Id.* And just as here, the party resisting arbitration "argue[d] that Connecticut courts will not permit arbitrators to determine issues involving well-defined public policies which can only be determined by reference to the laws and legal proceedings, a policy that is particularly applicable to matters involving attorney disqualification." *Id.* The same party also argued, as Walgreens does here,

[8] Walgreens attempts to address *Canaan* in one sentence of a footnote at the end of its brief, claiming that the opinion "contains no substantive analysis" and no "citation of any authority." Walgreens' Br. 23–24 n.3. Even a cursory review of the court's analysis and citations belies Walgreens' odd assertions.

"that the dispute is between [defendant] and [former counsel], and the parties did not agree to submit this motion to arbitration." *Id.* at *2.

The court rejected the movant's arguments and required the disqualification issue to be raised in arbitration. *Id.* at *3. The court began with the arbitration agreement and concluded that it was "sufficiently broad that it may not be said with positive assurance that this dispute is not covered by arbitration" and that "use of the broad language demonstrated an intention to have the arbitrators make that determination." *Id.* at *2. The court determined that "[t]he dispute is between [defendant] and [plaintiff], relating to [plaintiff's] choice of counsel to represent it in this suit." *Id.* The court further concluded that "the parties agreed to submit issues involved in this action to arbitration, which includes choice of counsel." *Id.*

Finally, the court addressed the public-policy argument at length, noting that "public policy exceptions to arbitral authority should be narrowly construed" and that "[t]he public policy defense will not often succeed, particularly if the party using it did not challenge the arbitration process at an earlier stage, such as by moving for a stay of arbitration." *Id.* (citations omitted). After acknowledging that New York has a public-policy exception to disqualification motions being decided in arbitration, *see id.* (citing *Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401 (N.Y. App. Div. 1991)),[9] the court cited two federal court opinions

[9] The *Bidermann* decision is discussed further below. *See* Sec. III.B.1.

coming out the other way, *id.* (citing *Wurttembergische Fire Ins. Co. v. Republic Ins. Co.*, No. 86 Civ. 2696-CSH, 1986 WL 7773 (S.D.N.Y. July 9, 1986); *Cook Chocolate Co. v. Salomon Inc.*, No. 87 CIV. 5705(RWS), 1988 WL 120464 (S.D.N.Y. Oct. 28, 1988)). The court then relied on a Connecticut court decision "granting a motion to stay court proceedings on the ground that issues involving attorney conduct are referable to arbitration," *id.* at *2, to hold that "the public policy exception is to be construed narrowly, and . . . attorney disqualification is not within the scope of the exception," *id.* at *3.

The *Canaan* opinion directly supports the Superior Court's order below, which should be affirmed. Unlike in the cases Walgreens cites, the parties appearing before the court had an arbitration agreement that required the dispute to be arbitrated, just as here. And the court properly rejected the argument that arbitrators can never decide attorney disqualification issues for public-policy reasons, just as this Court should, as discussed in the following section.

III. There Is No Rule Barring Arbitrators from Deciding Disqualification Issues, and the Court Should Reject Walgreens' Attempt to Impose One

Again arguing that it has no arbitration agreement with Crowell and therefore cannot be compelled to arbitrate any claims based on allegations of violations of the Rules of Professional Conduct, Walgreens troublingly cites opinions where courts outside of the District of Columbia "have altogether disallowed arbitration of

disqualification motions." Walgreens' Br. 19–22. Without saying so directly, Walgreens appears to argue that arbitrators can never address attorney disqualification issues such as the one Walgreens raises here. *See* Walgreens' Br. 19–23. But no such blanket rule exists in the District of Columbia, *see, e.g.*, *Airbus S.A.S.*, 2007 WL 5084428, at 5 ("Typically, the challenge to the attorney's qualifications must be made in the forum in which the underlying suit is being litigated.") (dismissing action seeking to enjoin law firm "in breach of their fiduciary duty" from representing party in proceedings before World Trade Organization), and this Court should reject Walgreens' implied invitation to impose one.[10]

A. Federal and State Courts Across the Country Allow Arbitrators to Decide Attorney Disqualification Issues

Walgreens represents that "several other jurisdictions have altogether disallowed arbitration of disqualification motions," Walgreens' Br. 19, but identifies only New York as a jurisdiction with such a blanket rule, *see id.* at 20. This is not surprising because New York is, in fact, the *only* jurisdiction with such a blanket

[10] Moreover, even if such a blanket rule did exist, Walgreens would *still* be required to submit this dispute to arbitration, as there is no "wholly groundless" exception to the FAA's requirement that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S. Ct. at 529; *cf. also Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.") (footnote omitted). All of the cases Walgreens cites for the contention that disqualification motions should be decided only by courts were decided before *Henry Schein* and do not address questions of arbitrability.

rule. Numerous other jurisdictions and courts have determined that arbitrators may decide questions of attorney misconduct, including motions to disqualify counsel, including, for example:

- *Dyntel Corporation v. Ebner*, 120 F.3d 488, 491 (4th Cir. 1997) (noting that "[i]f [plaintiff] had any objections to [lawyer's] participation in the underlying disputes, *it could have moved for her disqualification* before any of the four forums that had substantial familiarity with the relevant facts and a direct interest in [lawyer's] professional conduct," including "*the American Arbitration Association*") (emphasis added);
- *McMillan v. Unique Places, LLC*, No. 14 CVS 2179, 2015 WL 2168896, at *5 (N.C. Super. Ct. May 7, 2015) ("[P]articularly in light of the strong North Carolina public policy favoring arbitration, the Court is of the same view as the Delaware Chancery Court in *SOC–SMG*—that judicial resolution of [the motion to disjoin (which included disqualification argument)] 'would show disrespect toward the arbitration proceeding, which has the broad authority to decide these issues in the first instance, and would be contrary to our state's—and our nation's—strong public policy favoring arbitration.'") (alterations omitted) (quoting *SOC-SMG*, 2010 WL 3634204, at *3);

- *Freilich v. Shochet*, 96 So. 3d 1135, 1137, 1139 (Fla. Ct. App. 2012) (affirming order compelling arbitration of effort "to disqualify appellee's attorney from representation of appellee in a pending arbitration proceeding" where "[t]he arbitration agreement extended to any dispute regarding the terms of the agreement" and finding disqualification issue "a term of the agreement" and "subject to arbitration");
- *SOC-SMG*, 2010 WL 3634204, at *2–3 (responding to argument "that public policy requires that this court, rather than the arbitrators, must rule on the . . . lawyer's conduct," and holding that to have a "court inject itself into this situation would show disrespect toward the Arbitration panel, *which has the broad authority to address these issues in the first instance*") (emphasis);
- *Reuter Recycling*, 993 So. 2d at 1179 (holding that "*[t]he issue of disqualification is within the jurisdiction of the arbitrators*," and "[t]he purpose and intent of this kind of arbitration agreement would be frustrated and made ineffectual if such matters were subject to judicial intervention") (emphasis added);
- *Canaan*, 1996 WL 62658, at *3 (holding that "[t]his court will not interfere with and interrupt the process of arbitration," and that "the

public policy exception is to be construed narrowly, and . . . *attorney disqualification is not within the scope of the exception*") (emphasis added);

- *Cook Chocolate Co.*, 1988 WL 120464, at *1 (where party *moved in court to disqualify counsel in arbitration*, reasoning that "judicial intervention into arbitration proceedings would frustrate the purpose of arbitration to resolve disputes quickly and economically" and declining to review "*the decision by the panel not to disqualify [respondent party's] attorney* on the grounds that the law firm representing [respondent party] also represented [moving party]") (emphasis added); and
- *Wurttembergische*, 1986 WL 7773, at *1 (finding that court "lack[ed] the power" to "grant plaintiffs the preliminary injunctive relief prayed for" because it would require the court to "interfere directly in a pending arbitration," which "would deny [party] counsel of its choice in that arbitration, at least during the pendency of plaintiffs' motion to disqualify defendants' counsel in this litigation, thereby bringing the arbitration to a dead stop"; "find[ing] nothing in the [FAA] sanctioning such judicial interference"; and noting "[i]t is for the arbitrators to control their internal procedures").

See also Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, No. 16 C 8306, 2017 WL 1397553, at *2, *6 (N.D. Ill. Apr. 19, 2017) (confirming arbitration award and finding no issue where "the Arbitrator denied [a] motion [to disqualify counsel] based on a finding that [counsel] had implemented a sufficient ethical screen to prevent conflicts which would warrant disqualification"); *UBS Painewebber Inc. v. Stone*, No. Civ.A. 02-471, 2002 WL 377664, at *3 (E.D. La. Mar. 8, 2002) (denying injunctive relief due to general unavailability of such relief in the middle of arbitration).[11]

And, indeed, there are numerous instances where disqualification motions are decided in arbitration proceedings. *See, e.g.*, *In the Matter of the Arb. Between Bosc, Inc. v. Goldberg*, No. 12-01127, 2013 WL 4507795 (Aug. 21, 2013) (Connaway, Arb.); *In the Matter of the Arb. Between Hullett v. TD Ameritrade, Inc.*, No. 11-01519, 2012 WL 5954972 (Nov. 19, 2012) (Benade, Arb.); *In the Matter of the Arb.*

[11] Walgreens insists that "any argument by Humana suggesting that arbitrators may address questions of attorney discipline is unpersuasive," then attempts in a footnote to portray most of the above-cited cases as "clearly inapposite." Walgreens' Br. 23 & n.3. However, Humana is not arguing that arbitrators may discipline attorneys (nor may the Superior Court), and despite Walgreens' assertion otherwise, the cases cited above show plainly that state and federal courts throughout the country have upheld arbitrators' authority to decide attorney disqualification issues in arbitration and have rejected invitations to intervene and disqualify counsel themselves, as Walgreens asks the Superior Court to do with its request for relief and motion for a preliminary injunction. Walgreens' efforts to distinguish the cases are misguided, as explained in the parentheticals above and as made plain by a review of the opinions.

Between Mahoning Cnty. Child Supp. Enf't Agency & Int'l Bhd. of Teamsters, Local No. 377, 2003 WL 26556069 (Dec. 15, 2003) (Ruben, Arb.).

B. A Rule Prohibiting Arbitrators from Deciding Attorney Disqualification Issues Would Undermine Arbitration and Should Be Rejected

This Court should reject Walgreens' implied invitation to adopt New York's rule barring arbitrators from deciding disqualification motions. The original decision that created New York's public-policy exception to arbitrable issues and upon which most of the other cases rely is minimally and ill-reasoned; the opinions Walgreens cites do not contain any analysis of the arbitrability question central to this dispute (and all were decided before the Supreme Court issued *Henry Schein*); and the imposition of such a blanket rule would have a significant negative effect on arbitration.

1. The *Bidermann* Case upon Which Walgreens and the Other Cases It Cites Rely Is Misguided

In *Bidermann Industries Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401 (N.Y. App. Div. 1991), the court, citing existing public-policy exceptions to the universe of arbitrable issues, determined that attorney disqualification issues are "intertwined with overriding public policy considerations" and so, in just three sentences, created a new public-policy exception to arbitrability and concluded that "[i]ssues of attorney disqualification . . . cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries

engaged in," *id.* at 402. The court, however, did not consider whether the parties had agreed to arbitrate disqualification issues or whether the court was the proper adjudicator of that question. *See Henry Schein*, 139 S. Ct. at 528–29. The court also failed to afford the proper weight due to (or even to acknowledge) the "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Indeed, the court did not address whether the relevant arbitration agreement was governed by the FAA, and it did not discuss whether and how, if so, that would have affected the court's analysis.

Finally, the court cited prior existing public-policy exceptions to arbitration, but such exceptions were already becoming increasingly limited when *Bidermann* was decided and have only become more so over the past 30 years. *Compare Matter of Aimcee Wholesale Corp.*, 237 N.E.2d 223 (N.Y. 1968) ("[E]nforcement of our State's antitrust policy cannot be left to commercial arbitration"), *with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (allowing arbitration of antirust claims in international arbitration), *and Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (allowing arbitration of claims under Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act (RICO)); *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976) (concluding public policy prohibited award of punitive damages in arbitration), *superseded by statute as stated in Mastrobuono v. Shearson Lehman Hutton, Inc.*,

514 U.S. 52, 59 (1995) (concluding FAA preempts "*Garrity* rule"); *see also, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (claims under Credit Repair Organization Act arbitrable); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that FAA preempts state rule regarding unconscionability of class arbitration waivers in consumer contracts); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 31 (1991) (allowing arbitration of claims under the Age Discrimination in Employment Act (ADEA) and noting that Supreme Court has "found to be arbitrable . . . RICO and antitrust claims"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (allowing arbitration of claims under the Securities Act of 1933).[12]

2. The Other Cases Walgreens Cites Do Not Support Prohibiting Arbitrators from Deciding Disqualification Issues

The other cases Walgreens cites in support of the proposition that "arbitrators cannot decide questions of attorney disqualification," Walgreens' Br. 21, largely rely on *Bidermann*, do not consider whether the parties intended to submit arbitrability questions to arbitration, and were decided before the Supreme Court clarified that

[12] The *Bidermann* court also derived its ruling in significant part from *Matter of Erdheim (Selkowe)*, in which the court overruled a private arbitration board's censure of lawyers who had agreed to "submit grievances by each against the other" to arbitration, because "nothing . . . authoriz[es] or empower[s] this privately chosen arbitration board to censure members of the academy." 51 A.D.2d 705, 705 (N.Y. App. Div. 1976). It is undisputed that arbitrators may not discipline attorneys. But disqualification is not discipline, *see supra* Sec. II.A, and the *Bidermann* court extrapolated from *Erdheim* an overbroad and ill-conceived rule.

there is no "wholly groundless" exception where such intent is manifested. *Henry Schein*, 139 S. Ct. at 529. As such, they similarly provide no support for imposing the blanket rule Walgreens impliedly suggests.

Walgreens first quotes language from *Northwestern National Insurance Company v. Insco, Ltd.*, No. 11 Civ. 1124(SAS), 2011 WL 4552997, at *5 (S.D.N.Y. Oct. 3, 2011), that comes directly from *Bidermann*, *see* Walgreens' Br. 20 (quoting *Nw. Ins. Co.*, 2011 WL 4552997Insc, at *5 (quoting *Bidermann*, 173 A.D.2d at 402)). But as in *Bidermann*, the *Insco* court did not engage with the arbitration agreement at issue or consider whether the parties to the agreement had intended to delegate arbitrability questions to arbitration. The court thus did not consider the arguments or authorities Humana raises here, *see id.* at *5 (noting that party seeking arbitration "fail[ed] to cite any relevant precedent for leaving this matter to the arbitration panel"), and unlike here, where Walgreens never afforded the arbitrator a chance to address the disqualification question, the court relied in part on the fact that that "the [arbitration] panel in this case ha[d] already indicated that it is not interested in considering this matter," *id.* Finally, the court relied on the proposition that "[c]ourts, rather than insurance industry experts, decide issues of attorney discipline," *id.*, but as discussed above, *see* Sec. II.C, in this jurisdiction the Superior Court plays no role in "decid[ing] issues of attorney discipline."

In *Simply Fit of North America, Inc. v. Poyner*, the court had granted a motion to compel arbitration of all claims raised in litigation, stayed the action, and "retain[ed] jurisdiction over any subsequent petition for judicial review of any award." 579 F. Supp. 2d 371, 382, 387 (E.D.N.Y. 2008). The plaintiff moved to disqualify defendants' counsel *in the litigation*. Because the parties were required to arbitrate the plaintiff's claims, the court summarily noted that "[c]ourts within this Circuit have found that 'disqualification of an attorney for an alleged conflict of interest, is a substantive matter for the courts and not the arbitrator'" and concluded, "[a]ccordingly, the Court must decide this issue prior to submitting this matter for arbitration." *Id.* at 383, 84. The parties before the court did *not* request that the arbitration panel decide the disqualification motion, *see id.* at 383, and the court did not consider whether the arbitration agreement would require the arbitrator (and not the court) to decide whether the disqualification motion was arbitrable, *see id.* at 382–84; *see also id.* at 377–8 (analyzing itself whether plaintiff's claims were arbitrable).

In *Munich Reinsurance America, Inc. v. ACE Property & Casualty Insurance Co.*, 500 F. Supp. 2d 272 (S.D.N.Y. 2007), the court considered the "disqualification of an attorney for an alleged conflict of interest" to be "a substantive matter for the courts and not arbitrators," *id.* at 275, which is true "*[u]nless the parties clearly and unmistakably provide otherwise*," *AT&T Techs.*, 475 U.S. at 649 (emphasis added).

The decisions in *Dean Witter* and *Morgan Stanley* are discussed at length above, *see* Sec. II.C, and neither supports a blanket prohibition on allowing arbitrators to decide attorney disqualification questions. The court in *Morgan Stanley* stated that "the issue of possible attorney disqualification should be decided, not by the arbitrators, but by the courts," 2002 WL 34383748, at *2, without analyzing whether that agreement designated arbitrability questions to arbitration. And in *Dean Witter*, the court's conclusion was based on improperly extended Fifth Circuit precedent and did not address whether the relevant arbitration agreement required arbitrability disputes to be arbitrated.

The final two cases Walgreens cite are entirely inapposite and provide even less support for imposing the blanket rule Walgreens suggests. In *Action Air Freight, Inc. v. Pilot Air Freight Corporation*, 769 F. Supp. 899 (E.D. Pa. 1991), the court did not consider whether the relevant arbitration provision designated arbitrability issues to arbitration and granted a motion to dismiss an action "seeking to enjoin defense counsel's alleged *ex parte* contacts with its former employees," *id.* at 900, 904. And in *United States ex rel. Baker v. Community Health Systems, Inc.*, No. CIV 05-279 WJ/WDS, 2011 WL 13151981 (D.N.M. Dec. 15, 2011), a qui tam case, one party moved to disqualify the other's counsel "from its representation of Plaintiff in this case" and also sought to compel arbitration of the disqualification issue pursuant to the engagement letter it had with its former counsel, *id.* at *1–2. The court thus

did not consider whether it should intervene in *ongoing arbitration* to disqualify counsel, nor did it assess whether the arbitration provision at issue designated arbitrability questions to arbitration.

3. Prohibiting Arbitrators from Deciding Disqualification Issues Would Have a Significant, Negative Impact on Arbitration

Maintaining the status quo and allowing arbitrators to decide attorney disqualification issues where the parties have agreed to submit such issues to arbitration would honor the "national policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 346 (citation omitted), and preserve the cost-effectiveness, efficiency, and confidentiality interests that form the foundation of that policy. The Court thus should reject Walgreens' implied invitation to create a rule prohibiting arbitrators from deciding attorney disqualification issues.

As the Supreme Court has explained, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 344–45. Requiring parties alleging attorney conflicts of interest to raise such claims in the arbitration proceedings where the conflict is asserted is consistent with the nation's pro-arbitration policy and would not undermine courts' ability to review arbitration awards or to regulate attorneys.

On the one hand, prohibiting arbitrators from deciding attorney disqualification issues would have significant negative consequences on arbitration. Parties (essentially) never have arbitration agreements with opposing parties' counsel, so if Walgreens prevails, all a party to arbitration would have to do to delay arbitration proceedings is file a motion in court—even on the eve of trial, after almost two years of proceedings, as Walgreens did here. *See Ambush*, 282 F. Supp. 3d at 62 (emphasizing that disqualification motions should be subject to "particularly . . . [s]trict scrutiny . . . because such motions may be used as procedural weapons to advance purely tactical purposes") (internal quotation marks and citation omitted). Even if completely meritless, filing such a motion would *require* the court to analyze the disqualification question, which could require extensive briefing, time, and expense (as has occurred here just with the hundreds of pages of briefing and exhibits associated with Walgreens' motion for a preliminary injunction, which also required filing under seal).

Additionally, the party to arbitration whose counsel is targeted would not necessarily be named as a party to the action seeking to disqualify its counsel—as also occurred here. To participate in the disqualification proceedings in court, that party would have to move to intervene (as here, *see* Opposed Mot. of Humana to Intervene, J.A. 281), which may be opposed (as here, *see* Walgreen Co.'s Opp'n to Humana's Mot. to Intervene, J.A. 290), which would not be guaranteed to succeed,

and which would almost certainly require the hiring of additional outside counsel (as here).

Indeed, this very case has borne all of this out, as Walgreens has laid bare the "purely tactical" strategy behind its efforts to disqualify Crowell. At every turn, Walgreens has fought to avoid allowing Humana to participate in any way in Walgreens' effort to deprive Humana of its chosen counsel. Walgreens refused to raise its disqualification effort in the arbitration to which Humana is a party; it did not name Humana as a party in its action against Crowell; it moved for an injunction on the eve of trial; and it opposed Humana's effort to intervene in that action. But even more, Walgreens turned to the courts in an effort to preserve a second bite at the arbitration apple. For example, after this Court denied Walgreens' emergency motion for summary reversal, Walgreens tried to use what should have been a noneventful praecipe withdrawing its request for a stay to claim that Humana had "admi[tted]" that the Superior Court's order did not "impos[e] an affirmative duty on Walgreens to now submit [the disqualification] issue to the arbitrator." J.A. 68, 69. Walgreens is trying to have it both ways: first seek disqualification in court without raising the issue in arbitration, then if that fails and Humana prevails in arbitration, re-open the arbitration on the grounds that Crowell's representation of Humana had tainted the arbitration from the start. This flies in the face of the

arbitration agreement Walgreens entered with Humana and the purpose of arbitration in general.

On the other hand, a disqualification motion decided in arbitration would allow arbitration proceedings to move forward efficiently while still preserving the opportunity for the party seeking disqualification of counsel to pursue claims in an independent action against that counsel, exactly as Walgreens has done here. *See, e.g.*, *Benasra v. Mitchell Silberberg & Knupp, LLP*, 116 Cal. Rptr. 2d 644, 647 (Cal. Ct. App. 2002). A narrowly focused disqualification motion thus would not foreclose claims of breach of fiduciary duty against former counsel (or prevent the initiation of disciplinary proceedings pursuant to local rules of professional conduct).

Finally, there are additional questions, completely unaddressed by Walgreens or in any of the cases it cites, regarding the impact such a prohibition would have on international arbitration, which may involve parties and counsel from numerous countries, with different ethical rules and considerations, among other things. *See, e.g.*, *Airbus S.A.S.*, 2007 WL 5084428, at 2, 5 (dismissing action "seek[ing] declaratory and injunctive relief to enjoin attorneys from defendant [law firm] from participating in ongoing proceedings before the World Trade Organization ('WTO')" and noting that "[t]he Court is particularly persuaded that the tribunal hearing the case—here the WTO—is best suited to determine whether there is an ethical violation especially where the tribunal has been created by international

agreement by sovereign nations, and the tribunal has a specialized expertise in the subject matter").

The very nature and purpose of arbitration counsels against imposing a blanket prohibition on arbitrators deciding attorney disqualification issues, particularly where arbitrators are better situated to assess the bases for disqualification (as here, for example, where factually complicated arbitration proceedings had been ongoing for almost two years before Walgreens filed its preliminary injunction motion and asked the Superior Court to determine whether Crowell's representations involved substantially similar matters) and to govern the proceedings before them.

CONCLUSION

For the foregoing reasons, Humana respectfully requests that the Court affirm the Superior Court's order compelling Walgreens to arbitrate its effort to disqualify Crowell from representing Humana in ongoing arbitration between Humana and Walgreens.

Dated: September 22, 2021

Respectfully submitted,

/s/ Graeme W. Bush

Graeme W. Bush
Casey Trombley-Shapiro Jonas
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
T: (202) 778-1800

F: (202) 822-8106
GBush@zuckerman.com
CJonas@zuckerman.com

Counsel for Appellees
Humana Health Plan, Inc.,
Humana Insurance Company, and
Humana Pharmacy Solutions, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2021, the foregoing Brief of Appellees Humana Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. was served electronically on all counsel of record.

/s/ Casey Trombley-Shapiro Jonas
Casey Trombley-Shapiro Jonas

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

s/ Casey Trombley-Shapiro Jonas
Signature

21-cv-370
Case Number(s)

Casey Trombley-Shapiro Jonas
Name

9/22/2021
Date

CJonas@zuckerman.com
Email Address