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 APPELLANT

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DATED: August 23, 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, Respondent-Appellant Walgreen Co. provides the following list of parties, intervenors, amici curiae, and their counsel in the Superior Court and this Court:

Superior Court:

Walgreen Co. – Plaintiff in No. 2021 CA 00861 B; Defendant in No. 2021 CA 001581 B
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This Court:

Walgreen Co. – Respondent-Appellant
Frederick Robinson
Selina P. Coleman
James F. Segroves
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Matthew Kaiser
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Humana Health Plan, Inc. – Movant-Appellee
Humana Insurance Company – Movant-Appellee
Humana Pharmacy Solutions, Inc. – Movant-Appellee
Graeme W. Bush
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* Denotes an attorney who did not enter an appearance in No. 2021 CA 001581 B.

Humana Insurance Company –
Intervenor in No. 2021 CA 00861 B;
Plaintiff in No. 2021 CA 001581 B
Humana Pharmacy Solutions, Inc. –
Intervenor in No. 2021 CA 00861 B;
Plaintiff in No. 2021 CA 001581 B
Graeme W. Bush
Casey Trombley-Shapiro Jonas
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* Denotes an attorney who did not enter an appearance in No. 2021 CA 001581 B.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28(a)(2)(B) of the Rules of the District of Columbia Court of Appeals, Respondent-Appellant Walgreen Co. states that it is a wholly owned subsidiary of Walgreens Boots Alliance, Inc., which is a holding company incorporated in Delaware that has issued shares to the public that are listed on NASDAQ (trading symbol "WBA").

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under D.C. Code § 16-4427(a)(1) because this is an appeal of an Order of the Superior Court granting a motion to compel arbitration. *See* Joint Appendix ("JA") 41 (the "Order"). The Order was entered on May 27, 2021. *Id.* The Notice of Appeal was timely filed on May 28, 2021. JA 47.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a client of a law firm can be compelled to arbitrate a professional ethics claim against that law firm when there is no arbitration agreement between the client and the law firm, but there is an arbitration clause in a contract between the client and another client of the law firm, and it is the other client that seeks to compel arbitration.

2. Whether the District of Columbia Rules of Professional Conduct permit a client to be compelled to arbitrate a professional ethics claim against its former counsel without the client having given its informed consent to arbitrate such disputes.

STATEMENT OF THE CASE

This appeal involves two Superior Court cases. In the first case, Walgreen Co. ("Walgreens") sued its former law firm Crowell & Moring LLP ("Crowell & Moring") alleging, in relevant part, that Crowell & Moring had breached its fiduciary duty to its former client by, among other things, representing third parties—Humana

Health Plan, Inc., Humana Insurance Company, and Humana Pharmacy Solutions, Inc. (collectively, "Humana")—in an arbitration against Walgreens involving the same legal issue on which Crowell & Moring previously had provided legal advice to Walgreens. That arbitration was based in part on a contract between Walgreens and Humana that contained an arbitration clause (the "Walgreens-Humana Agreement"). Crowell & Moring was not party to the Walgreens-Humana Agreement. Walgreens, which never entered into an arbitration agreement with Crowell & Moring, filed a motion for a preliminary injunction in the first Superior Court case seeking an order prohibiting Crowell & Moring from continuing to breach its fiduciary duty to Walgreens.

Humana then initiated the second Superior Court case at issue, seeking an order compelling Walgreens to arbitrate its request for a preliminary injunction against Crowell & Moring. It is undisputed that Walgreens and Crowell & Moring never entered into an arbitration agreement. Despite this, the Superior Court (Hiram E. Puig-Lugo, J.) granted Humana's motion on the basis that the arbitration provision in the Walgreens-Humana Agreement gave the arbitrator the power to decide which disputes are covered by the Walgreens-Humana Agreement. The Superior Court then issued an order staying Walgreens' motion for a preliminary injunction in the first case. This appeal by Walgreens followed.

STATEMENT OF FACTS

Walgreens and Crowell & Moring never entered into an arbitration agreement. Walgreens does, however, have an arbitration agreement with Humana, as part of its commercial contract for pharmacy services. JA 16–19. Section 12.2 of the Walgreens-Humana Agreement 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. . . .

JA 17.

In accordance with the Walgreens-Humana Agreement, Walgreens and Humana are currently arbitrating a dispute arising from their business relationship, which involves Humana reimbursing Walgreens for prescription drugs that Walgreens dispenses to beneficiaries of Humana-sponsored insurance plans. JA 135–39. Crowell & Moring represents Humana in that arbitration. JA 135, 174. A few months before the liability hearing in that arbitration (which began in June 2021), Walgreens' outside counsel discovered that Crowell & Moring previously advised Walgreens on the very same legal issues underlying Humana's arbitration claims against Walgreens. JA 176. Therefore, Walgreens sought judicial relief against Crowell & Moring in the Superior Court, which included filing a motion for

a preliminary injunction precluding Crowell & Moring from breaching its fiduciary duties to Walgreens by, among other things, representing Humana in the ongoing arbitration. JA 115–17. Humana sought to intervene in that action, JA 281, 283, and commenced a separate action against Walgreens, seeking to compel Walgreens to arbitrate its motion for a preliminary injunction against Crowell & Moring, JA 5. Walgreens opposed Humana's motion to compel arbitration because, among other reasons, Walgreens never entered into an arbitration agreement with Crowell & Moring, and Crowell & Moring did not obtain Walgreens' informed consent to arbitrate any dispute as required by the Rules of Professional Conduct. JA 20, 29–30, 37–38.

The Superior Court granted Humana's motion to compel arbitration. JA 41–46 (Order). According to the Superior Court, the Walgreens-Humana Agreement "contains clear and unmistakable evidence that Humana and Walgreen[s] intended to compel the question of arbitrability to arbitration." JA 44–45. In so ruling, the Superior Court did not address the fact that Walgreens and Crowell & Moring are not parties to an arbitration agreement, nor did the Superior Court address the Rules of Professional Conduct. *See* JA 41–46. This appeal followed.[1]

[1] Shortly after noticing this appeal, Walgreens filed an Emergency Motion for Summary Reversal, which this Court denied on June 16, 2021. Crowell & Moring continues to breach its fiduciary duties to Walgreens by, among other things, representing Humana in the arbitration—and Walgreens, via the Superior Court

SUMMARY OF ARGUMENT

This Court and the Supreme Court of the United States (among many others) have made clear that, subject to certain exceptions not relevant here, one cannot be compelled to arbitrate a dispute with another party unless both parties have entered into an arbitration agreement. The Superior Court's Order ignored that fundamental legal principle by requiring Walgreens to arbitrate certain aspects of its dispute with its former law firm Crowell & Moring despite the undisputed fact that Walgreens and Crowell & Moring never entered into an arbitration agreement. The fact that there is an arbitration agreement between Walgreens and Humana is legally irrelevant under binding precedent.

Furthermore, Crowell & Moring never secured Walgreens' informed consent to arbitrate any disputes concerning professional ethics, which the Rules of Professional Conduct require before such claims between a client and its attorney can be submitted to arbitration. Accordingly, even if the Walgreens-Humana Agreement somehow reached the relationship between Walgreens and Crowell & Moring—which it does not—the Superior Court erred in compelling Walgreens into arbitration with its former law firm.

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litigation, continues to seek permanent injunctive relief barring Crowell & Moring from doing so.

STANDARD OF REVIEW

The Superior Court's Order is subject to *de novo* review. *See Jahanbein v. Ndidi Condo. Unit Owners Ass'n*, 85 A.3d 824, 827 (D.C. 2014) (reviewing *de novo* a Superior Court decision granting a motion to compel arbitration).

ARGUMENT

I. Walgreens Cannot Be Compelled to Arbitrate Any Claim Against Crowell & Moring Because the Two Are Not Parties to an Arbitration Agreement

District of Columbia law provides that an agreement to arbitrate is a contract and should be interpreted accordingly. Thus, a party cannot be required to submit to arbitration any dispute that it has not agreed to submit to arbitration. Arbitrators, in turn, derive their authority to resolve disputes only to the extent that specific parties have agreed to submit specific grievances to arbitration. It follows that the question of whether an agreement to arbitrate exists is a threshold question for a court to answer, not an arbitrator. Before compelling arbitration, a court must find that the relevant parties have an enforceable agreement to arbitrate. In the absence of such an agreement, arbitration cannot be compelled. Because Walgreens and Crowell & Moring never agreed to arbitrate any dispute, the Superior Court's Order compelling them to do so should be reversed.

A. Parties Can Only Be Compelled to Arbitrate If They Have Agreed to Arbitrate

The rule of law, established by this Court and many others, is crystal clear and has been so for decades: "arbitration is a matter of contract." *Jahanbein*, 85 A.3d at 827 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). Whether parties have contracted to arbitrate is the threshold question from which courts begin their analysis in deciding a motion to compel arbitration. As this Court has explained: "We start with the basic principle that 'arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.'" *Bank of Am., N.A. v. District of Columbia*, 80 A.3d 650, 663 (D.C. 2013) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

"[B]ecause 'arbitration is a matter of contract[,]'" this Court "may not require a party 'to submit to arbitration any dispute which he has not agreed so to submit.'" *Jahanbein*, 85 A.3d at 827 (alteration supplied by *Jahanbein*) (quoting *Howsam*, 537 U.S. at 83). In other words, if the answer to the threshold question of whether parties have agreed to arbitrate is negative, a court must deny a motion to compel arbitration. As this Court has made plain, "[b]efore compelling arbitration under District of

Columbia law, a court must find that the parties have an enforceable agreement to arbitrate . . . ." *Jahanbein*, 85 A.3d at 827.[2]

B. This Court's Opinion in *Jahanbein* Requires Reversal of the Superior Court's Order

Jahanbein is instructive here, not to mention controlling. There, the owner of a condominium unit sued his condominium association and another condominium unit owner for negligence after water pipes in the second unit owner's apartment burst and damaged the first unit owner's apartment. *Jahanbein*, 85 A.3d at 826. The condominium association and the second unit owner moved to compel arbitration, claiming that the association's bylaws created an enforceable agreement requiring the first condominium unit owner to arbitrate all of his claims. *Id.* The Superior Court agreed and granted the motions to compel arbitration. *Id.* at 826–27.

This Court reversed in relevant part. "Before compelling arbitration under District of Columbia law," the Court explained, "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.*

[2] As with all contracts, traditional common-law principles allow a contract (including an arbitration agreement) to be enforced, in limited circumstances, by or against third parties through, for example, "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Sakyi v. Estee Lauder Cos.*, 308 F. Supp. 3d 366, 382 (D.D.C. 2018) (quoting *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 631 (2009)). None of those exceptions apply here.

Ohev Sholom Talmud Torah, 869 A.2d 343, 354 (D.C. 2005)). A presumption in favor of arbitration "attaches only *after* the trial court has determined that a valid agreement to arbitrate exists." *Id.* at 831 (citation omitted).

Applying the foregoing principles, this Court reversed the portion of the Superior Court's order compelling the first condominium unit owner to arbitrate his claims against the second unit owner because "[n]othing in the Bylaws assures us that the unit owners are direct parties to each other's agreements with the Condo Association." *Jahanbein*, 85 A.3d at 831. This Court found that an arbitration agreement existed between the first condominium unit owner and the condominium association. *Id.* at 828. Importantly, however, the fact that an arbitration agreement between those two parties contained language that arguably covered the claims asserted by the first unit owner against the second unit owner did not mean that the first unit owner could be forced to arbitrate those claims. *See id.* at 831. In ordering Walgreens to arbitrate its claims against Crowell & Moring in the absence of an arbitration agreement between Walgreens and Crowell & Moring, the Superior Court's Order ran directly contrary to this Court's ruling in *Jahanbein*.

C. It Is the Role of Courts to Decide If Parties Have Agreed to Arbitrate

Because arbitration is a matter of contract and only binds parties upon mutual assent, "arbitrators derive their authority from the consent of the parties, as expressed through their agreement to arbitrate." *Wash. Teachers' Union v. D.C. Pub. Schs.*,

77 A.3d 441, 446 (D.C. 2013). It follows that it is for courts, not arbitrators, to decide whether an agreement to arbitrate exists between the relevant parties. *See Hossain v. JMU Props., LLC*, 147 A.3d 816, 821 (D.C. 2016). A contrary rule would improperly delegate to arbitrators threshold authority that the parties have not contractually granted to them. This is a long-standing proposition. *Ballard & Assocs., Inc. v. Mangum*, 368 A.2d 548, 551 (D.C. 1977) (holding that "the determination of whether the parties have consented to arbitrate is a matter to be determined by the courts on the basis of the contracts between the parties").

Even when parties are subject to an arbitration agreement, resolution of the threshold question of what issues they contracted to commit to arbitration may be delegated to the arbitrator only if "the parties' agreement does so by 'clear and unmistakable evidence.'" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (citations omitted); *see also Howsam*, 537 U.S. at 83 (same). Such "clear and unmistakable evidence" requires an agreement to arbitrate between the relevant parties, which is absent here. *See Jahanbein*, 85 A.3d at 827 (explaining that the preference for arbitration "is limited . . . because arbitration is a matter of contract, and we therefore may not require a party to submit to arbitration any dispute which he has not agreed to submit" (citations, internal quotations, and alterations omitted)).

D. Federal Jurisprudence Is Consistent with District of Columbia Law

District of Columbia law controls this appeal. Although the Walgreens-Humana Agreement refers to the Federal Arbitration Act ("FAA"), "it would be premature to enforce the choice of law provision [in that agreement] before deciding whether an agreement exists" between the relevant parties. *Amirmotazedi v. Viacom, Inc.*, 768 F. Supp. 2d 256, 261 n.2 (D.D.C. 2011) (applying District of Columbia law as the law of the forum "where one party . . . alleg[ed] that no contract was formed . . . ."); *see also Kaplan*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Samenow v. Citicorp Credit Servs.*, 253 F. Supp. 3d 197, 202 (D.D.C. 2017) (stating that where one party challenges the validity of an arbitration agreement, "the Court would first need to determine whether a valid and enforceable agreement exists, by application of District of Columbia law").

Although District of Columbia law controls, this Court has "often found federal precedents interpreting the [FAA] to be highly persuasive in cases involving the right to arbitration." *TRG Customer Sols., Inc. v. Smith*, 226 A.3d 751, 756 n.3 (D.C. 2020) (citing *Hercules & Co. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1073 (D.C. 1991)). The Supreme Court of the United States, in turn, has explained

that the "FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

For example, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282, 292–94 (2002), rejected an assertion, similar to that advanced by Humana here, that the Equal Employment Opportunity Commission ("EEOC") could only pursue victim-specific remedies against an employer in arbitration where the victim, but not the EEOC, had entered into an arbitration agreement with the employer. The Supreme Court emphasized that "[a]rbitration . . . is a matter of consent, not coercion," *id.* at 294 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), and held that the EEOC was not constrained by an employee's separate agreement to arbitrate claims against an employer because, in part, "[n]o one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims," *id.* at 294.

In so holding, the Supreme Court observed that "the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements.'" *Id.* at 294 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)). Therefore, the FAA "does not require parties to arbitrate when they have not agreed to do so." *Id.* at 293 (quoting *Volt*, 489 U.S. at 478).

The Supreme Court has also spoken directly to the threshold task of a court faced with a motion to compel arbitration: "[B]efore referring a dispute to an

arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein*, 139 S. Ct. at 530 (citing 9 U.S.C. § 2).

E. The Superior Court Erred in Compelling Walgreens to Arbitrate Its Dispute with Crowell & Moring

Given this precedent, the Superior Court erred in compelling Walgreens to arbitrate its motion for a preliminary injunction against Crowell & Moring.

1. The Superior Court Failed to Analyze the Dispositive Fact That Walgreens and Crowell & Moring Never Entered Into an Arbitration Agreement

District of Columbia law does not permit compelling Walgreens to arbitrate any of its claims against Crowell & Moring in the absence of an agreement between the two of them to do so. Accordingly, this Court's analysis should begin—and end—with a simple, undisputed fact that requires reversal of the Superior Court's Order: Walgreens and Crowell & Moring never agreed to arbitrate any dispute.

That outcome follows as a matter of course from this Court's decision in *Jahanbein*. 85 A.3d at 830–31 (reversing, in part, an order granting a motion to compel arbitration, reasoning that the moving party needed but failed to show that he and the party being compelled to arbitrate were parties to an arbitration agreement). And, as *Jahanbein* explains, Walgreens' agreement to arbitrate *with Humana* is legally irrelevant to Walgreens' separate dispute *with Crowell & Moring*. *See id.* at 827–28, 830–31 (analyzing separately, first, whether a condo owner and condo association had an enforceable agreement to arbitrate and, second, whether

that agreement also applied to the condo owner and another condo owner, and holding that the arbitration agreement did not apply to the two condo owners, who had not independently agreed to arbitrate with each other).

Few courts have been called upon to address application of these principles in a case involving a dispute between a client and its former law firm. Those courts that have done so after performing a substantive analysis, however, have reached the opposite conclusion of the Superior Court's Order in this case.

The federal district court's decision in *Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, L.L.P.*, No. H-99-1882, 2000 U.S. Dist. LEXIS 22852 (S.D. Tex. Sept. 8, 2000), is directly on point. There, an attorney with the defendant law firm had represented the plaintiff financial brokerage for decades against claims brought by "disappointed investors alleging that" the plaintiff had committed financial irregularities. *Id.* at *1–2. The plaintiff claimed that its former law firm later sought out a third-party client of the plaintiff, and initiated a National Association of Securities Dealers, Inc. arbitration on behalf of the new client against the plaintiff, with "exactly the kind of claims against which" the law firm "for years had defended" the plaintiff. *Id.* at *2–3. As Walgreens has done here, the plaintiff argued that the law firm's representation of the new client in the arbitration was a conflict of interest and sought to disqualify it. *Id.* at *3. The law firm, in turn, argued the disqualification issue should be decided by arbitrators pursuant to an arbitration

provision in a customer agreement between the plaintiff and the third-party client. *Id.* at *4–8.

From the outset, the *Dean Witter* court noted "the axiom that, absent an agreement between the parties to arbitrate a dispute, a court may not compel arbitration." *Id.* at *6–7 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626). As this Court has also held, the *Dean Witter* court observed that "[t]his cardinal rule arises out of the principle that 'arbitration is a matter of contract,' and, as such, 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit . . . .'" *Id.* at *7 (internal citations omitted) (quoting *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 (1998)).

The *Dean Witter* court concluded that the plaintiff and the new client were, like Walgreens and Humana through the Walgreens-Humana Agreement, "bound to the arbitration provision" of their agreement, and that the new client's "substantive claims . . . are subject to arbitration." *Id.* at *7–8. "The reason for this is clear: both [the plaintiff] and the [new client] explicitly bound themselves 'to determine by arbitration' 'all controversies' that would arise between them." *Id.* at *8 (original alterations omitted). However, "with regard to resolving disputes between [the plaintiff] and its former lawyers . . . no evidence exists in the record showing that [they] entered into a similar arbitration agreement." *Id.* Accordingly, the *Dean*

Witter court concluded that "arbitration of the present dispute between [the two] is not appropriate because" they "never contracted to arbitrate [their] disputes." *Id.*

Importantly, the *Dean Witter* court also expressly rejected the law firm's argument that "the present disqualification dispute is inextricably connected to the underlying claims of the . . . arbitration, and as such, it is subsumed into the arbitration." *Id.* at *9. That argument "fundamentally disregards the fact that arbitration is founded on principles of contract . . . . [T]he Supreme Court has held that a party cannot be required to submit to arbitration in the absence of an arbitration agreement . . . ." *Id.* (citations omitted).

Another federal district court reached the same conclusion in *Morgan Stanley DW, Inc. v. Kelley & Warren, P.A.*, No. 02-80225-CIV-RYSKAMP/VITUNAC, 2002 U.S. Dist. LEXIS 28107 (S.D. Fla. May 9, 2002). There, the plaintiff's former attorneys represented a third party in an arbitration against the plaintiff. *Id.* at *2. The plaintiff sought to enjoin the attorneys from doing so, claiming a conflict of interest barred them from representing their new client. *Id.* The attorneys moved to dismiss, arguing "that the disqualification dispute [should] be resolved in arbitration." *Id.* at *5. As in *Jahanbein* and *Dean Witter*, the district court rejected that assertion, noting "that the arbitration agreement was not between [plaintiff] and [its former attorneys]." *Id.* at *6.

These cases demonstrate the simple and well-established proposition that a party can only be compelled to arbitrate against another party if it has already contracted to do so. A contrary conclusion would convert arbitration from a voluntary matter of contract into a compulsory process. Permitting Humana to use the Walgreens-Humana Agreement to compel Walgreens to arbitrate its claims against Crowell & Moring would circumvent established law and allow parties to bootstrap claims into arbitration that parties did not agree to arbitrate.

2. The Superior Court Misconstrued the Question Before It as One of Arbitrability

The Superior Court also erred in basing its Order on the legal question of arbitrability, finding that the language of the Walgreens-Humana Agreement delegated that question to an arbitrator. That legal question would only be relevant *if* there were an arbitration agreement between Walgreens and Crowell & Moring. There is none.

"Arbitrability," this Court has explained, refers to the question of whether "the underlying dispute between the parties falls within the scope of the agreement" to arbitrate. *Jahanbein*, 85 A.3d at 827 (citations omitted). Logically, however, a court can only reach a question of arbitrability if it has first determined that "the parties have an enforceable agreement to arbitrate." *Id.* Accordingly, the Superior Court's observation in this case that "where the contract contains an arbitration clause, there is a presumption of arbitrability," JA 45 (quoting *AT&T Techs., Inc. v. Commc'ns*

Workers of Am., 475 U.S. 643, 650 (1986)), is inapposite here because there is no contract to arbitrate between Walgreens and Crowell & Moring—a threshold determination that the Superior Court did not reach. *See Jahanbein*, 85 A.3d at 831 (ruling that the presumption in favor of arbitration "attaches only *after* the [Superior Court] has determined that a valid agreement to arbitrate exists") (citation omitted) (emphasis supplied by *Jahanbein*).

Without an arbitration agreement between Walgreens and Crowell & Moring, the question of *who* decides arbitrability is irrelevant. And because there is no arbitration agreement between Walgreens and Crowell & Moring, the Superior Court's Order compelling Walgreens to arbitrate its motion for a preliminary injunction against its former counsel Crowell & Moring should be reversed.

II. Alternatively, Walgreens Cannot Be Compelled to Arbitrate Its Motion for a Preliminary Injunction Against Crowell & Moring Because Walgreens Did Not Give Its Informed Consent

A. The District of Columbia Rules of Professional Conduct Require That a Client Provide Informed Consent Before It Can Be Compelled to Arbitrate a Dispute with Counsel Over the Client's Objection

Rule 1.8 of the District of Columbia Rules of Professional Conduct protects clients by prohibiting a lawyer from entering into an agreement with a client to arbitrate legal professional liability claims unless "the client is fully informed of the scope and effect of the agreement." D.C. R. Prof'l Conduct 1.8 cmt. [13]. As the District of Columbia Bar has explained, "in order for a client to be 'fully informed'

about the 'scope and effect' of a mandatory arbitration provision, a lawyer should communicate 'adequate information and explanation about the material risks of and reasonably available alternatives' to entering into a fee agreement that contains such a provision." D.C. Ethics Op. 376 (2019) (quoting D.C. R. of Prof'l Conduct 1.0(e), defining "Informed Consent"). Reflecting Rule 1.8's underlying purpose of safeguarding clients, the District of Columbia Bar has detailed that before agreeing to arbitrate, "informed consent" requires counsel to review with a client key differences between litigation and arbitration, including, at least, the fees incurred, available discovery, the right to a jury, and differences in appeal rights. *Id.*

It is uncontested that Crowell & Moring did not obtain Walgreens' informed consent to arbitrate any professional liability claims. That Crowell & Moring did not do so is unsurprising given that Walgreens never entered into an agreement with Crowell & Moring that contained an arbitration provision. Accordingly, Crowell & Moring did not (and logically cannot) satisfy the heightened standard established by the Rules of Professional Conduct requiring a client's informed consent.

B. The District of Columbia Rules of Professional Conduct Are Consistent with Persuasive Case Law

Recognizing the essential role of the judiciary in policing alleged attorney misconduct, several other jurisdictions have altogether disallowed arbitration of disqualification motions.

In New York, for example, "matters of attorney discipline are beyond the jurisdiction of arbitrators." *Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401, 402 (N.Y. App. Div. 1st Dep't 1991) (citing *Erdheim v. Selkowe*, 51 A.D.2d 705 (N.Y. App. Div. 1st Dep't 1976)). *Bidermann* based this ruling on several compelling justifications. First, arbitrators do not have the power to censure members of the bar. *See id.*; *see also Erdheim*, 51 A.D.2d at 705 ("[W]e find nothing in the record before us authorizing or empowering this privately chosen arbitration board to censure members of the academy; and the power to censure attorneys as members of the Bar is reserved to the Appellate Division of the Supreme Court in each department."). Second, the courts are responsible for interpreting and applying relevant rules of professional ethics. *See Bidermann*, 173 A.D.2d at 402. Third, arbitrators are selected by the parties for their expertise in particular industries, not with regard to attorney ethics. *Id.*

Federal district courts in New York routinely reach the same conclusion. They have held that attorney disqualification is typically not settled by arbitration, because "[m]atters of attorney discipline are beyond the jurisdiction of arbitrators . . . . Issues 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." *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 11 Civ. 1124, 2011 U.S. Dist. LEXIS 113626, at *15 (S.D.N.Y. Oct. 3, 2011) (omissions in

original) (citation omitted); *see also Simply Fit of N. Am., Inc. v. Poyner*, 579 F. Supp. 2d 371, 383–84 (E.D.N.Y. 2008) (holding that attorney disqualification is for the courts, not arbitrators); *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F. Supp. 2d 272, 275 (S.D.N.Y. 2007) (same).

Federal district courts in Pennsylvania, Florida, and New Mexico have also held that arbitrators cannot decide questions of attorney disqualification. *See Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 900–01 (E.D. Pa. 1991) (noting it is the "court's responsibility to focus on the preservation of the integrity of the arbitration process," and holding it had jurisdiction over the action to disqualify counsel); *Morgan Stanley*, 2002 U.S. Dist. LEXIS 28107, at *7 ("Although the disqualification dispute arises from [an ongoing arbitration] . . . the issue of possible attorney disqualification should be decided, not by the arbitrators, but by the courts." (citations omitted)); *United States ex rel. Baker v. Cmty. Health Sys.*, No. CIV 05-279 WJ/WDS, 2011 U.S. Dist. LEXIS 153427, at *21 (D.N.M. Dec. 15, 2011) ("Matters of attorney disqualification should be, and have been, addressed by the Court as opposed to a private arbitrator, despite the broad language in the engagement letter between the parties.").

The federal district court's decision in *Dean Witter* is again instructive. As described above, *Dean Witter* held that an arbitration agreement between two parties did not apply to "resolving disputes between" one of the parties and its former

lawyers, because "no evidence exists in the records showing that" they "entered into a similar arbitration agreement." 2000 U.S. Dist. LEXIS 22852, at *8. The court also addressed whether questions of attorney discipline could be properly delegated to arbitrators at all. *Dean Witter* concluded "that overarching policy considerations preclude arbitrators, who are often non-lawyers, from interpreting and applying the applicable rules of professional conduct for attorneys." *Id.* at *14–15.

Dean Witter's reasoning is consistent with the jurisprudence of this Court. *Dean Witter* first noted that it "is particularly mindful of the principle that trial courts are obligated to police the rules of ethical conduct." *Id.* at *11. "Clients and fellow attorneys," the *Dean Witter* court explained by quoting Fifth Circuit jurisprudence, "have little incentive to file formal complaints with disciplinary boards, and the evidence suggests that they in fact do not. This is especially true in cases of alleged conflicts of interest. To a very large extent, unless a conflict of interest is addressed by courts upon a motion for disqualification, it may not be addressed at all. More to the point, it is our business—our responsibility." *Id.* at *12–13 (quoting *In re Am. Airlines, Inc.* 972 F.2d 605, 611 (5th Cir. 1992)). The *Dean Witter* court also rejected any argument that the disqualification issue was intrinsically connected to the arbitration in a way that mandated it be addressed in arbitration. *Id.* at *9–10. Instead, the court found that "at its core, the disqualification dispute lies between" the former client and its former counsel. *Id.* at *11.

The same is true here. Walgreens' claims against Crowell & Moring are just that—claims against Crowell & Moring, not Humana. That those claims might collaterally affect Humana does not bring them within the ambit of the arbitration between Walgreens and Humana. Regardless, any argument by Humana suggesting that arbitrators may address questions of attorney discipline is unpersuasive.[3]

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[3] With one minor exception that contains no substantive analysis, the nonbinding judicial authorities cited by Humana in the Superior Court are clearly inapposite. *See DynTel Corp. v. Ebner*, 120 F.3d 488, 490–93 (4th Cir. 1997) (finding company had engaged in harassing litigation against an individual attorney with whom it never had an attorney-client relationship, and never addressing a legal question similar to one at issue here); *Hibbard Brown & Co. v. ABC Family Tr.*, 772 F. Supp. 894, 897 n.4 (D. Md. 1991) (declining to reach question of attorney disqualification raised by party that never had an attorney-client relationship with the counsel whose disqualification was sought, and never addressing legal question similar to one at issue here); *UBS PaineWebber Inc. v. Stone*, No. 02-471 SECTION: E/3, 2002 U.S. Dist. Lexis 5162, at *3–8 (E.D. La. Mar. 8, 2002) (declining to decide disqualification question predicated on alleged violation of attorney-witness rule in underlying arbitration, and never addressing legal question similar to one at issue here); *Cook Chocolate Co. v. Salomon Inc.*, No. 87 Civ. 5705 (RWS), 1988 U.S. Dist. Lexis 11929, at *1–4 (S.D.N.Y. Oct. 28, 1988) (declining to conduct interlocutory review of arbitration panel's decision not to disqualify counsel); *Wurttembergische Fire Ins. Co. v. Republic Ins. Co.*, No. 86 Civ. 2696-CSH, 1986 U.S. Dist. LEXIS 23032, at *1–2 (S.D.N.Y. July 9, 1986) (declining to reach question of attorney disqualification and never addressing legal question similar to one at issue here); *Reuter Recycling of Fla., Inc. v. City of Hallandale*, 993 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 2008) (declining to reach question of attorney disqualification and never addressing legal question similar to one at issue here); *SOC-SMG, Inc. v. Day & Zimmermann, Inc.*, No. 5375-VCS, 2010 Del. Ch. LEXIS 195, at *1–18 (Del. Ch. Sept. 15, 2010) (addressing different legal question of whether attorney-disqualification question must always be decided by a court instead of an arbitrator, and never addressing a legal question similar to one at issue here). The one exception—an unpublished Connecticut trial court decision—contains no substantive analysis. *See Canaan Venture Partners v. Salzman*, No. CV 950144056S, 1996 Conn. Super. LEXIS 245, at *4–5 (Conn. Super. Ct. Jan. 28,

The District of Columbia Rules of Professional Conduct clearly provide that questions of alleged attorney misconduct may be subject to arbitration only if the client has provided its informed consent to forgo use of a judicial forum to resolve such disputes. Crowell & Moring never sought that consent, and Walgreens never provided it. Accordingly, and consistent with the findings of many courts that matters of attorney discipline are beyond the jurisdiction of arbitrators, Humana cannot force Walgreens to arbitrate any claim against its former law firm Crowell & Moring.

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1996) (addressing without citation of any authority the argument that a disqualification question could not be arbitrated because no arbitration agreement existed between the movant and the law firm sought to be disqualified for unspecified conflicts of interest).

CONCLUSION

For the foregoing reasons, the Court should reverse the Order of the Superior Court.

Dated: August 23, 2021

Respectfully submitted,

/s/ Frederick Robinson

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I electronically filed the foregoing Brief of Appellant and, with the consent of counsel, served a copy of same via email upon the following:

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Court of Appeals

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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
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

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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/ Frederick Robinson
Signature

21-cv-370
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