No. 19-623

IN THE

Supreme Court of the United States

SHRINIVAS SUGANDHALAYA LLP,

Petitioner,

v.

BALKRISHNA SETTY, INDIVIDUALLY AND AS GENERAL PARTNER IN SHRINIVAS SUGANDHALAYA PARTNERSHIP WITH NAGRAJ SETTY, AND SHRINIVAS SUGANDHALAYA (BNG) LLP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

BENJAMIN J. HODGES
DEVRA R. COHEN
FOSTER GARVEY PC
1111 Third Avenue,
Suite 3000
Seattle, WA 98101
(206) 447 4400

SCOTT S. BROWN
Counsel of Record
SARAH ROSE DALEY
MAYNARD COOPER & GALE, PC
1901 6th Avenue North, Suite 2400
Birmingham, AL 35243
(205) 254-1232
scottbrown@maynardcooper.com

Counsel for Respondents

293390

QUESTIONS PRESENTED

1. Does the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the "New York Convention") permit a nonsignatory to an arbitration agreement to compel arbitration on the doctrine of equitable estoppel, where the alleged misconduct has no relation to the arbitration agreement?

2. Does a district court have the discretion to deny a stay under Section 3 of the Federal Arbitration Act ("FAA") when it is requested by a nonsignatory of an arbitration agreement who does not have the right to compel arbitration under that agreement?

CORPORATE DISCLOSURE STATEMENT

Respondent Shrinivas Sugandhalaya (BNG) LLP is an Indian limited liability partnership organized under the laws of the State of Karnataka, India.

The following individuals are the designated partners of Shrinivas Sugandhalaya (BNG) LLP:

(a) Balkrishna Setty, an individual who resides in Bangalore, India.

Shrinivas Sugandhalaya (BNG) LLP has no parent corporation and no publicly held corporation owns 10 percent or more of Shrinivas Sugandhalaya (BNG) LLP's stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTRODUCTION

Petitioner Shrinivas Sugandhalaya LLP's ("SS Mumbai") Petition for a Writ of Certiorari should be promptly denied. The issues raised in the petition will not impact the resolution of the issues on appeal (much less the underlying merits of this dispute). Even if the petition is granted and SS Mumbai obtains a favorable ruling from this Court, the final outcome of this case will not change. The district court's decision denying SS Mumbai's motion to compel arbitration will still be affirmed on the other grounds not at issue in SS Mumbai's petition. Granting the petition or delaying a ruling on SS Mumbai's petition serves only to delay the resolution of this matter. Indeed, despite this case having been filed in December 2016, SS Mumbai has successfully avoided even answering the complaint over the course of three years. Further delay is not warranted; for, the petition fails to present any question dispositive of the issues on appeal.

STATEMENT OF THE CASE

This action arises from a dispute between two Indian-based incense manufacturers. Mr. K.N. Satyam Setty formed an incense manufacturing and distribution partnership in India (the "Partnership") and marketed the Partnership's incense under the mark SHRIVINAS SUGANDHALAYA. *See* Pet. App. 14. After his death, Mr. Setty's sons, Messrs. Balkrishna and Nagraj Setty, executed the Partnership Deed to continue the partnership formed by their father and split the profits equally. *See id.*; *see also* Pet. App. 22-28. In 2014, the partnership between the two brothers broke down, and each began

manufacturing incense products through his own company. *See* Pet. App. 14. Mr. Balkrishna Setty formed Shrinivas Sugandhalaya (BNG) LLP ("SS Bangalore"), while Mr. Nagraj Setty formed SS Mumbai. *See id.*

After the separate entities were formed, SS Mumbai began misrepresenting where it manufactured its products by putting SS Bangalore's address on its packaging. *See* Pet. App. 15. Additionally, SS Mumbai interfered with SS Bangalore's business by sending cease and desist letters to its customers stating that SS Bangalore was infringing on SS Mumbai's trade dress rights. *See id.* SS Mumbai also fraudulently obtained trademark registrations for the SHRIVINAS SUGANDHALAYA mark that had previously been used by the Partnership. *See id.*

Respondents filed this action on December 15, 2016, against Petitioner SS Mumbai and R. Expo (USA), Inc. ("R. Expo").[1] *See* Pet. App. 6. Respondents' claims stem from SS Mumbai's anticompetitive actions in the United States. *See id.* at 16. SS Mumbai filed a motion to dismiss or stay this action seeking to enforce the arbitration clause of the Partnership Deed signed by Messrs. Balkrishna and Nagraj Setty. *See id.* The district court denied this motion on June 21, 2018, holding SS Mumbai could not enforce the arbitration agreement because (i) it was not a signatory of the Partnership Deed; (ii) it was not a third-party beneficiary of the Partnership Deed; and (iii) equitable estoppel did not apply. *See id.* SS

[1] R. Expo was not a party to the Ninth Circuit opinion below and is not a party to the Petition. *See* Pet. App. 1.

Mumbai appealed this order to the Ninth Circuit. *See* Pet. App. 3-4.

SS Mumbai then filed two additional motions to stay. The first of SS Mumbai's motions asked the district court to stay the proceedings pending the outcome of the Ninth Circuit appeal. *See* Pet. App. 6. This stay was granted by the district court. *See* Pet. App. 9. The second motion to stay asked the district court to stay the proceedings pending the outcome of an arbitration proceeding in India initiated by Mr. Nagraj Setty. *See id.* This motion was denied by the district court. *See* Pet. App. 11.

The Ninth Circuit affirmed the district court's denial of SS Mumbai's original motion to dismiss or stay on June 6, 2019. *See* Pet. App. 1. It is this Ninth Circuit opinion which SS Mumbai petitions this Court to review. Because the Ninth Circuit granted SS Mumbai's motion for stay of mandate pending the outcome of SS Mumbai's Petition for Writ of Certiorari, the proceedings in the district court have remained at a standstill since June 2018.

REASONS FOR DENYING THE PETITION

I. THE DISPUTE BETWEEN SS BANGALORE AND SS MUMBAI IS THE WRONG CASE IN WHICH TO RESOLVE WHETHER A NONSIGNATORY MAY COMPEL ARBITRATION UNDER THE NEW YORK CONVENTION.

SS Mumbai first contends that review should be granted on the question of whether nonsignatories to an arbitration agreement can compel arbitration under the New York Convention under the doctrine of equitable estoppel. Respondents do not dispute that

this is an important question or that there is a split of authority among the Courts of Appeal on this question. The Court already confirmed the significance of this issue by granting review in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S. Ct. 2776 (Mem) (2019), in which the sole question under consideration is whether nonsignatories can compel arbitration under the New York Convention by invoking the equitable estoppel doctrine. *See GE Energy*, Case No. 18-1048, Petition for Writ of Certiorari. While the underlying question may be important, certiorari is not warranted in this case because regardless of how this issue is resolved, SS Mumbai's efforts to compel arbitration will fail. [2]

Equitable estoppel may be used to compel arbitration in two circumstances: (1) when the claims rely on the terms of the written agreement or are "'intimately founded in and intertwined with' the underlying contract;" and (2) where "the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (quoting *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 221, 92 Cal. Rptr. 3d 534 (2009)); *see also Griswold v. Coventry First LLC*, 762 F.3d 264, 272 (3d Cir. 2014) (citing *E.I. DuPont de*

[2] Despite SS Mumbai's repeated references to India law, it is well-settled that federal common law governs the arbitrability of a dispute under the Convention. *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016) (citing *Certain Underwriters of Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577-78 (7th Cir. 2007)) (stating that the arbitrability of a dispute brought under the New York Convention was a matter of federal common law).

Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates S.A.S., 269 F.3d 187, 199 (3d Cir. 2001)) (finding equitable estoppel applied where "the non-signatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement" and where "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non[-]signatory's obligations and duties in the contract… and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations."); *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012) (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)) ("Equitable estoppel allows a nonsignatory to enforce the provisions of a contract against a signatory in two circumstances: (1) when the signatory to the contract relies on the terms of the contract to assert his or her claims against the nonsignatory; and (2) when the signatory raises allegations of interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 708 (10th Cir. 2011) (citing *MS Dealer Serv. Corp.*, 177 F.3d at 947) (adopting the Eleventh Circuit's standards for equitable estoppel and holding that the signatory "must rely on the terms of the written agreement in asserting [its] claims" or must allege "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract"); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126-27 (2d Cir. 2010) (quoting *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001))

("Under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of 'the relationship among the parties, the contracts they signed ..., and the issues that had arisen' among them discloses that 'the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'"); *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 834-35 (8th Cir. 2010) (citing *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005)) (stating that equitable estoppel applies "to allow a nonsignatory to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement" or where the claims are "so intertwined with the agreement containing the arbitration clause" that it would be unfair "to disavow availability of the arbitration clause of that same agreement"); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003)) ("Federal courts 'have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'"). Neither circumstance applies in this case.

Mr. Balkrishna Setty and SS Bangalore's claims in the underlying action relate to intellectual property rights. They have no relationship with the Partnership Deed containing the arbitration agreement at issue in this appeal. As the district court correctly pointed out, "[t]he Partnership Deed did not

assign intellectual property rights." *See* Pet. App. 17. Rather than being "intimately founded in and intertwined with" the Partnership Deed, Respondents' claims emanate from "how the new entities—SS Bangalore and SS Mumbai—manufacture and advertise their products, compete with each other, and whether SS Mumbai properly registered its trademark." *Id.* The fact that the Partnership Deed exists is, by and large, irrelevant to the current dispute between the parties.

The second theory of equitable estoppel likewise fails to support SS Mumbai's motion to compel arbitration. In their original complaint, Mr. Setty and SS Bangalore do not "allege[] substantially interdependent and concerted misconduct by the nonsignatory and another signatory." *Kramer*, 705 F.3d at 1128 (quoting *Goldman*, 173 Cal. App. 4th at 221). Misconduct is alleged only against SS Mumbai and R. Expo, both of whom are nonsignatories to the Partnership Deed. *See* Pet. App. 18.

In short, even if SS Mumbai may invoke the theory of equitable estoppel under the New York Convention, equitable estoppel will fail to salvage SS Mumbai's motion to compel arbitration. The question of whether a nonsignatory may invoke equitable estoppel under the New York Convention, therefore, is not dipositive to the resolution of this action. This Court should immediately deny certiorari on this question as it is not an issue that will have any impact on the ultimate outcome of this litigation.

II. THE DENIAL OF A STAY UNDER SECTION 3 OF THE FAA WAS WITHIN THE DISTRICT COURT'S DISCRETION AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

This Court should decline to grant certiorari on SS Mumbai's second question presented because it was not the issue decided or presented below. Contrary to SS Mumbai's suggestion, the Ninth Circuit did not hold that SS Mumbai "categorically had no right to a Section 3 stay because, as a non-signatory, it cannot compel arbitration under the Convention." Pet. 20. Instead, the Ninth Circuit held that the district court did not *abuse its discretion* in denying the stay because the New York Convention did not permit SS Mumbai to compel arbitration. Pet. App. 3-4.

Even if the Ninth Circuit had, for argument's sake, made such a categorical holding, review would still not be warranted because the decision does not conflict with this Court's precedent, nor is there any split in courts below. SS Mumbai contends that this Court already decided the Section 3 stay issue in its favor in two prior proceedings: *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935), and *The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42 (1944). *See* Pet. 20. But neither *Shanferoke Coal* nor *The Anaconda* concerned the New York Convention—which did not yet exist—and both cases involved only a single plaintiff and a single defendant who were both signatories to the arbitration agreement. Neither case addressed a situation like the one here, where the party moving for the stay of litigation is a nonsignatory to the

arbitration agreement. *Shanferoke* and *The Anaconda* are thus inapplicable to this case.

This Court in *Shanferoke* did make clear that the right to compel arbitration and the right to stay litigation are not necessarily coextensive. *See* 293 U.S. at 453 ("We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with section 4 of the act…."). The Court in *The Anaconda* made a similar statement. *See* 322 U.S. at 45 ("The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration."). Neither case, however, remotely suggests what SS Mumbai says it holds—that "a *nonsignatory* party's right to obtain a Section 3 stay is not conditioned upon that party's right to compel arbitration." Pet. 25-26 (emphasis added). The question of whether and when a nonsignatory to an arbitration agreement can stay litigation was never at issue in either case, and neither case invites expansion or inference from its clear and logically bounded holding. The Ninth Circuit's decision therefore does not conflict with either *Shanferoke* or *The Anaconda*.

SS Mumbai also asserts that the decision below "directly contradicted" this Court's holding in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Pet. 34. This statement is false. *Arthur Andersen* does not mention the New York Convention, let alone discuss, analyze, or decide the right of a nonsignatory to an arbitration agreement to obtain a litigation stay

under the Convention's provisions. *Arthur Andersen* provides no guidance on when a stay may be available under the New York Convention. Thus, nothing in the Ninth Circuit's decision below could conflict with *Arthur Andersen*.

SS Mumbai asserts that "[t]he only thing a defendant has to show to obtain a Section 3 stay is that the plaintiff's claims involve an issue that the plaintiff has agreed to arbitrate, whether or not that defendant will be a party to the arbitration." Pet. at 26. Not only is SS Mumbai's position unsupported by this Court's precedent, but if accepted, its formulation of Section 3 leads to absurd results.

Suppose, for example, that A has an exclusive license agreement with B, which grants B the right to use A's mark. The A-B contract has an arbitration clause in which A and B agree to arbitrate any and all matters relating to the mark. B learns that C is using A's mark without permission. B sues C for trademark infringement in federal court. Under SS Mumbai's interpretation of Section 3, C could stay the litigation because use of the trademark is an issue that is "referable to arbitration" under A-B's contract despite the fact that (1) C is not a signatory to A-B contract, and (2) C does not have a contract or an arbitration agreement with B.

Neither the language of Section 3 nor this Court's case law permits such an absurd conclusion, yet this is the outcome under SS Mumbai's formulation of the statute. Allowing a nonsignatory to an arbitration agreement to prevent litigation because of an arbitration proceeding in which it is not involved, and in fact may never exist, would provoke significant

disruption of the judicial system and the pursuit of justice. It may also result in undesirable indefinite stays, because if the party seeking the stay cannot compel arbitration, there is no guarantee that arbitration will ever occur or that it will occur in a timely manner.

Aside from the above issues, SS Mumbai offers no compelling reason why, even if the Ninth Circuit had made a definitive statement, this case would be the appropriate vehicle to review the issue. The Ninth Circuit found that the denial of a stay was within the trial court's discretion. *See* Pet. App. 4. SS Mumbai has not identified any rule or discrepancy in application between different courts applying their broad discretion in granting a stay under Section 3. Instead, SS Mumbai overstates the issues involved and their potential importance. In effect, SS Mumbai wants to eliminate the ability of the courts below to, in their discretion, consider whether the party seeking a stay can even arbitrate the issue. However, before taking the drastic step of staying litigation, and thus depriving litigants of their rights under Article III, courts *should* consider whether the party seeking a stay can compel arbitration along with other factors, such as whether the issue will actually be resolved by arbitration.

The Court should deny certiorari on this question. This issue has not occurred often enough to warrant the drastic step of having this Court review and issue a broad, controlling mandate. And, finally, as the Ninth Circuit noted, the district court was well within its discretion to deny the grant of a stay under Section 3 of the FAA.

CONCLUSION

Mr. Balkrishna Setty and SS Bangalore filed the underlying action on December 15, 2016. *See* Pet. App. 6. Through SS Mumbai's repeated filings concerning arbitration, the underlying district court action has yet to move beyond the pleadings stage in the more than three years that this action has been pending. *See id.*

Following through on its strategy of delay, SS Mumbai has now petitioned this Court for further review of its meritless request to stop proceedings in the United States. In doing so, SS Mumbai (i) first raises an issue under the New York Convention that cannot salvage SS Mumbai's motion to compel arbitration and (ii) asks this Court to weigh in on an issue where the lower court's decision does not conflict with this Court's precedent. Neither question merits this Court's attention in this case. This Court should deny SS Mumbai's petition and allow the underling case to proceed straightaway. Any other decision simply affirms SS Mumbai's strategy of delay.

Respectfully submitted,

BENJAMIN J. HODGES
DEVRA R. COHEN
FOSTER GARVEY PC
1111 Third Avenue,
Suite 3000
Seattle, WA 98101
(206) 447-4400
ben.hodges@foster.com

SCOTT S. BROWN
Counsel of Record
SARAH ROSE DALEY
MAYNARD COOPER & GALE, PC
1901 6th Avenue North,
Suite 2400
Birmingham, AL 35243
(205) 254-1232
scottbrown@maynardcooper.com

Counsel for Respondents Balkrishna Setty and Sugandhalaya (BNG) LLP

December 23, 2019