PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3460

In re: ROTAVIRUS VACCINES ANTITRUST LITIGATION

SUGARTOWN PEDIATRICS, LLC;
SCHWARTZ PEDIATRICS SC;
MARGIOTTI & KROLL PEDIATRICS, PC

v.

MERCK SHARP & DOHME CORP.,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-18-cv-01734)
District Judge: Honorable J. Curtis Joyner

Argued on September 24, 2021

Before: CHAGARES, *Chief Judge*, HARDIMAN, and MATEY, *Circuit Judges*

(Filed: March 21, 2022)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

This appeal comes to us from an order denying a motion to compel arbitration. Appellant Merck contends the District Court should have compelled Sugartown Pediatrics, Schwartz Pediatrics, and Margiotti & Kroll Pediatrics (the Pediatricians) to arbitrate their claim that Merck's vaccine bundling scheme was anticompetitive. We agree. We will reverse and remand for the District Court to grant Merck's motion to compel arbitration.

I

This case involves two types of contracts. Both are part of Merck's loyalty program, whereby medical practices receive discounts if they buy sufficient vaccine quantities from Merck. The first type of contract is between Merck and Physician Buying Groups (PBGs). These loyalty contracts entitle PBG members to discounts if they buy a large enough percentage of their vaccines from Merck. The loyalty contracts also include an arbitration provision. The second type of

contract is between PBGs and medical practices. These membership contracts give medical practices discounts on Merck vaccines for enrolling in PBGs. PBGs thus form the bridge between medical practices and Merck, contracting with both Merck and medical practices. They are middlemen in all but one relevant sense: PBGs never possess the vaccines. Medical practices buy their vaccines directly from Merck, but they receive discounts for belonging to a PBG.

Though they were members of PBGs that contracted with Merck,[1] the Pediatricians never signed contracts containing an arbitration clause. So the Pediatricians filed federal suits alleging Merck's vaccine bundling program was anticompetitive. Merck responded with a motion to compel arbitration based on the arbitration clause contained in its loyalty contracts with the PBGs, which the District Court denied under the summary judgment standard. *In re Rotavirus Vaccines Antitrust Litig.* (*Rotavirus I*), 362 F. Supp. 3d 255, 261, 264–65 (E.D. Pa. 2019). The first time this case came before us, we vacated the order of the District Court, holding that it should have allowed discovery on arbitrability. *In re Rotavirus Vaccines Antitrust Litig.* (*Rotavirus II*), 789 F. App'x 934, 938 (3d Cir. 2019).

After the parties conducted discovery, Merck renewed its motion to compel arbitration and the Pediatricians cross-moved for summary judgment on arbitrability. *In re Rotavirus Vaccines Antitrust Litig.* (*Rotavirus III*), 2020 WL 6828123, at *1 (E.D. Pa. Nov. 20, 2020). The District Court once again

[1] Schwartz was a member of Children's Community Physicians Association Purchasing Partners (CCPAPP). Sugartown and Margiotti & Kroll were members of Main Street Vaccines (MSV).

denied Merck's motion to compel arbitration and granted summary judgment for the Pediatricians. *Id.* at *15. The Court concluded, as relevant here, that the Pediatricians were not bound under an agency theory because they had not authorized the PBGs to enter into arbitration agreements. *Id.* at *13–14. This appeal followed.

II

The District Court had jurisdiction over the Pediatricians' antitrust claims. *See* 28 U.S.C. § 1331; 15 U.S.C. § 4. We have jurisdiction to review the order denying a motion to compel arbitration under 9 U.S.C. § 16(a)(1)(B). For jurisdictional purposes, motions to compel arbitration and motions for summary judgment on arbitrability—both of which are at issue in this appeal—are equivalent. *See Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590, 598–99 & n.4 (3d Cir. 2020).

Our review of the District Court's decision, including its legal conclusion that the PBGs were not the Pediatricians' agents, is plenary. *O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 766 n.5 (3d Cir. 2021). We apply the summary judgment standard, so "[t]he party opposing arbitration is given the benefit of all reasonable doubts and inferences that may arise." *Griswold v. Coventry First LLC*, 762 F.3d 264, 270 (3d Cir. 2014) (quoting *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 620 (3d Cir. 2009)). No material facts are in dispute.

III

The Federal Arbitration Act (FAA) "'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S.

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