No. 15-1121

In the Supreme Court of the United States

NEUSOFT MEDICAL SYSTEM COMPANY, LTD.;
NEUSOFT MEDICAL SYSTEMS, U.S.A., INC.;
TOM BUSE; AND KEITH MILDENBERGER

Petitioners,

v.

NEUISYS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) This Court will not review a state court judgment unless the petitioner properly raised a substantial federal question before the state court. Neusoft China did not argue to either the trial court or the North Carolina Court of Appeals that the "substantial change in circumstances" standard for motions for reconsideration conflicted with the FAA or the Convention, and the Court of Appeals did not address that issue. Should this Court nonetheless grant certiorari?

(2) A claim is not subject to arbitration unless the parties agree to arbitrate. NeuIsys claimed that Neusoft China breached a non-disclosure agreement ("NDA"). The NDA did not contain an arbitration clause. NeuIsys alleged that Neusoft China's use of confidential information obtained under the agreement violated both the NDA and North Carolina's unfair trade practice statute. Did the North Carolina Court of Appeals err in declining to order arbitration of those claims?

(3) A respondent may defend a judgment on any ground properly raised below. The trial court held in the alternative that Neusoft China waived the ability to seek arbitration by actively participating in the litigation. The Court of Appeals did not reach that issue, which NeuIsys fully briefed. Does the trial court's finding of waiver provide an alternative basis for affirmance of the Court of Appeals' decision?

CORPORATE DISCLOSURE STATEMENT

Respondent NeuIsys, LLC is a privately-held North Carolina limited-liability company. No parent or publicly-held company owns 10 percent or more of NeuIsys, LLC.

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BRIEF IN OPPOSITION

NeuIsys, LLC respectfully submits this brief in opposition to the petition for writ of certiorari filed by Petitioners Neusoft Medical System Company, Ltd. ("Neusoft China"), Neusoff Medical Systems, U.S.A., Ltd. ("Neusoft USA"), Tom Buse, and Keith Mildenberger.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 774 S.E.2d 851. The relevant orders of the North Carolina Supreme Court and the North Carolina General Court of Justice, Superior Court Division, are unpublished and reproduced in Petitioners' Appendix at App-19-35.

JURISDICTION

As detailed below, the Court lacks jurisdiction to grant the petition due to Petitioners failure to raise and preserve a federal question for review.

STATEMENT OF THE CASE

A. The Relationship Between NeuIsys and Neusoft China.

Neusoft China manufactures and distributes medical CT scanners. R.209, 243. In 2003, NeuIsys became a distributor of Neusoft China's equipment in the United States. R.209. Neusoft China provided a one-year, post-sale warranty for each CT scanner. R209, 215. As part of its responsibilities pursuant to its IDA with Neusoft China, NeuIsys provided this one-year warranty service. *Id.* The IDA did not require NeuIsys to provide any additional warranty service to the purchaser after the one-year period, nor did the IDA even contemplate such an arrangement. *Id*.

NeuIsys soon realized, however, a business opportunity existed to provide purchasers maintenance service on their CT scanners after the one-year manufacturer's warranty period. R.215, ¶30. Independent of its obligations as a Neusoft China distributor, NeuIsys often entered into multi-year, post-warranty service contracts with many of the purchasers. *Id.*[1] NeuIsys generated nearly all of its revenue from these multi-year service contracts, and these service contracts were the life-blood of NeuIsys' business. *Id.*, ¶31. Up until 2009, NeuIsys never shared with Neusoft China the existence of these service contracts, the names of the purchasers of the service contracts, the amounts of the contracts, their duration or anything that would enable Neusoft China to know NeuIsys' profitability on these contracts. *Id.*, ¶30.

In late 2009, Neusoft China awarded NeuIsys its "International Distributor of the Year Award" for outstanding sales. R.213, ¶¶25-26. At the same time, Neusoft China approached NeuIsys to discuss NeuIsys' interest in being acquired. *Id.* In September 2009, as part of the due diligence for the potential acquisition, Neusoft China requested all of NeuIsys' confidential financial information, including but not limited to all of NeuIsys' information about its multi-year service contracts. R.214, ¶29. Before it

[1] The IDA did not address post-warranty service in any fashion. R.143-65.

provided any financial information, NeuIsys consciously decided the parties' arrangement would not be governed by the IDA, but instead insisted on the parties entering into a new agreement, the NDA. R.214, ¶27-30.[2] Neusoft China agreed and the parties signed the NDA in September 2009.

The NDA specifically precluded Neusoft China from using NeuIsys' confidential information for any purpose other than "evaluating, negotiating and implementing" Neusoft China's potential acquisition of NeuIsys. R.214, ¶29. The NDA also differed markedly from the IDA in two critical ways relevant to the petition: 1) while the IDA contained an arbitration clause, the NDA contained no arbitration provision; 2) while the IDA was governed by Chinese law, the NDA was governed by North Carolina law. R.66.

In full reliance on the NDA, NeuIsys then disclosed its sensitive and confidential financial information to Neusoft China, including but not limited to all of the information about its multi-year service contracts. R.215, ¶30. From reviewing the confidential information, Neusoft China realized that the bulk of NeuIsys' revenues did not and would never come from sales of the CT scanners, but from its multi-year service contracts. R.215, ¶31. The acquisition talks

[2] A copy of the NDA is provided in Appendix A to this Brief in Opposition.

ultimately broke down by the end of December 2009. *Id*., ¶32.

Recognizing that NeuIsys' service contracts were outside of the IDA, Neusoft China thereafter engaged in a multi-pronged attack designed to drive NeuIsys out of business and to secure the service market for itself. R.216, ¶34. Neusoft China used the confidential information obtained as a result of the NDA to assists its efforts. *Id*. Neusoft China's actions included, but were not limited to: establishing its subsidiary, Neusoft Medical Systems, USA ("Neusoft USA"), to compete unfairly against NeuIsys by providing information from NDA-produced documents to Neusoft USA (R.219, ¶46; R.238, ¶171; R.238, ¶173); formulating a plan to force NeuIsys out of business, again using NDA-related information (R.236, ¶155; R.238, ¶171); threatening NeuIsys' business activities with information learned from documents produced pursuant to the NDA, including the multi-year service contracts (R.217, ¶41); scheming to steal strategic NeuIsys' employees, whose identity and importance Neusoft China learned about from NDA-related documents (R.219, ¶¶49, 54; R.238, ¶171); and scheming to steal NeuIsys' customers using information obtained from the NDA (R.238, ¶171). In short, Neusoft China's unethical and unfair actions originated from Neusoft China's use of information obtained under the NDA for a purpose other than evaluating and negotiating the potential acquisition. As a result of Neusoft China's

actions, NeuIsys suffered extensive damage. R.236, ¶158-59; R.239, ¶¶178-179.

Ultimately, the relationship between all parties broke down. In November 2011, Neusoft USA filed suit against NeuIsys, alleging that NeuIsys' CEO, without authorization, accessed Neusoft USA's employees' computers and copied various confidential and trade secret information. *See* R.5-24. In December 2011, NeuIsys filed its answer and asserted a counterclaim against Neusoft USA. NeuIsys also asserted six claims against Neusoft China, four claims related to the IDA and two claims related to the NDA. In its two NDA-related claims (the breach of contract and the statutory unfair trade practice claim) NeuIsys sought damages against Neusoft China for its improper use of the confidential information obtained pursuant to the NDA; specifically to compete unfairly against NeuIsys in an effort to destroy its business, rather than for the sole purpose of evaluating and negotiating a potential acquisition.

B. Neusoft China Files Its First Motion to Compel Arbitration

On September 26, 2012, Neusoft China filed a motion to dismiss or stay NeuIsys' counterclaims pending arbitration (the "Original Arbitration Motion"). R.139-69. In its Original Arbitration Motion, Neusoft China contended that the IDA's arbitration clause

required arbitration of all six of NeuIsys' claims, including the two NDA-related claims. R.140.

On October 29, 2012, the trial court granted the motion as to the four (4) IDA-related claims and ordered those claims to arbitration. R.172. The trial court denied the motion as to NeuIsys' two NDA-related claims for breach of contract and unfair trade practices. *Id*.

Neusoft China chose not to appeal the October 2012 Order. Instead, Neusoft China began to participate actively in the case. Shortly after the October 2012 Order was entered, Neusoft China agreed to an August 2013 trial date. R.173. NeuIsys served discovery on Neusoft China, which provided incomplete responses. In February 2013, NeuIsys filed a motion to compel against Neusoft China, which Neusoft China opposed but which the trial court ultimately granted. R.194-204, 206-07. In March 2013, Neusoft China consented to NeuIsys amending its counterclaim. R.208-41.[3]

[3] The Amended Counterclaim made no changes to the claims against Neusoft China, but instead added as named parties Petitioners Buse and Mildenberger, and asserted claims against these new defendants. R.208-241; R. Supp. 242.

C. Neusoft China Actively Participates in the Litigation

In June 2013, Neusoft China served discovery requests on NeuIsys. R. Supp. 280-92. Neusoft China then propounded more interrogatories at the beginning of July 2013. Neusoft China then filed a motion with the trial court, asking that the August 2013 trial date be moved so it could conduct further discovery. R.293-309. The trial court granted the motion over NeuIsys' objection. R.310-19, 320. Neusoft China then entered into a Consent Discovery Scheduling Order, which reset the timeline to complete discovery and set the matter for trial on January 21, 2014, a date that specifically took into account the availability of Neusoft China's witnesses who were expected to testify at trial. R.321-22.[4]

Neusoft China continued its active participation in discovery. In September 2013, Neusoft China took the depositions of four (4) NeuIsys employees. R.567, ¶12. Neusoft China also filed a Motion to Compel on September 27, 2013. R.323.

On October 25, 2013, Neusoft China filed a series of motions seeking to: (i) again postpone

[4] Neusoft China had originally scheduled the depositions of NeuIsys' CEO, Kim Russell, and its Chief Medical Officer, Joe Jenkins for July 2013. Neusoft China postponed the depositions after the Court granted Neusoft China's Motion to Continue the trial from the August 13, 2013 trial calendar.

trial and extend the discovery period, which was denied (R.389-400; 426-27); (ii) substitute counsel, which was allowed; (R.329, 423); and (iii) designate the case as "exceptional" under North Carolina General Rule of Practice 2.1, which was denied. (R.373, 426-27.)[5]

All parties thereafter continued to participate in discovery. On November 14, 2013, in the very first deposition with its new counsel, Neusoft China's new counsel asserted that discovery was improper because NeuIsys' NDA-related claims were subject to arbitration. *See* Rule 9(b)(5) Supp. at 113.[6] Numerous additional depositions were taken thereafter, and each time Neusoft China's new counsel voiced the same objection. Neusoft China then capped off its involvement in the case by filing a motion for summary judgment at the close of discovery. R.433-38. That same day, Neusoft China filed its Renewed Motion to Dismiss or Stay Claims and Compel Arbitration and

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[5] The effect of a "Rule 2.1" designation would have been to assign the case to a single judge for all further proceedings.

[6] References to "Rule 9(b)(5) Supp." refer to NeuIsys' Rule 9(b)(5) Supplement to the Printed Record on Appeal filed with the Court of Appeals.

Neusoft China continued to assert this same objection in the additional depositions that were taken after November 1, 2013 and before the four-day long deposition of Kim Russell, where Neusoft China contended below that it discovered NeuIsys had changed its theory. *See, e.g.,* Rule 9(b)(5) Supp. at 107, 119-20, 127.

Alternative Motion for Reconsideration and Alternative Motion to Stay (the "Reconsideration Motion.") R.439-48.

In the 15 months between the order denying the Original Arbitration Motion and Neusoft China's Reconsideration Motion, the parties conducted 14 lay witness depositions and 7 expert depositions. R. Supp. 21-55; 82-126; 347-447. Neusoft China's counsel participated in all of the depositions. *Id*. In addition, Neusoft China propounded 60 Requests for Production of Documents, 27 Interrogatories (including an additional 25 subparts), and 29 Requests for Admission. R.492.[7]

D. Neusoft China's Appeal to the Court of Appeals

On January 9, 2014, the trial court heard and denied Neusoft China's Reconsideration Motion, entering a written order the next day (the "Reconsideration Order"). R.506-510. Neusoft China immediately noticed its appeal. R.515-17. Neusoft China limited its appeal only to the Reconsideration Order. *Id.*

Before the Court of Appeals, Neusoft China contended the trial court erred in failing to find that NeuIsys had changed its theory of the case. *See* Brief of Appellant Neusoft Medical

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[7] Neusoft China did not voice any objection to participating in discovery—either when it was propounding discovery or responding to it—prior to obtaining new counsel in November 2013.

Systems Co., Ltd. at 14-20.[8] As a result of this purported "new theory," Neusoft China contended the trial court should have reversed the October 2012 Order and concluded that NeuIsys' NDA-related claims were subject to arbitration. At no point, however, did Neusoft China argue that the FAA or Convention precluded the Court of Appeals from applying the "substantial change in circumstances" test generally applicable to motions for reconsideration in North Carolina state courts. To the contrary, Neusoft China embraced that standard. *See id*. at 36.

The Court of Appeals rejected Neusoft China's arguments, ultimately concluding that Neusoft China had failed to both prove that NeuIsys had asserted a new theory or that a substantial change of circumstances existed. 774 S.E.2d at 857-58. The Court of Appeals also held the trial court did not err in refusing to stay NeuIsys' NDA-related claims until after NeuIsys had arbitrated the four (4) IDA-related claims. *Id*.

From the Court of Appeals' decision, Neusoft China filed a Notice of Appeal and a Petition for Discretionary Review to the North Carolina Supreme Court. Petitioners Neusoft USA, Buse and Mildenberger also filed Petitions for Discretionary Review. NeuIsys opposed the Petitions for Discretionary Review

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[8] Available at https://www.ncappellatecourts.org/show-file.php?document_id=160966#page=22.

and moved to dismiss Neusoft China's Notice of Appeal. *See* Appendix B. On November 5, 2015, the North Carolina Supreme Court entered an order allowing NeuIsys' motion to dismiss the Notice of Appeal and denying Neusoft China's Petition for Discretionary Review. Pet. App'x at App-20. The court also denied Neusoft USA, Buse and Mildenberger's Petitions for Discretionary Review. *Id*. at App-22-25.

SUMMARY OF ARGUMENT

The Court should deny the petition for the following reasons:

1. Although the Petition for Certiorari repeatedly intones that the North Carolina courts "disregarded" the FAA and the Convention, it studiously avoids the fact that Neusoft China never actually argued to the North Carolina Court of Appeals its federal question (i.e., that the FAA and Convention preclude application of the "substantial change in circumstances" test applied by the Court of Appeals). Petitioners' omission is understandable, as this defect is fatal to the petition.

Under the Court's long-standing precedent, a petitioner must have presented a federal question for review by the state court, and that question must have been necessary to the determination of the case. *See*, *e.g.*, *Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *Adams v.*

Robertson, 520 U.S. 83, 86 (1997); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937).

In this case, Neusoft China never argued before the Court of Appeals or the trial court that the FAA or Convention precluded application of the "substantial change in circumstances test." Instead, Neusoft China raised that issue for the first time in its Petition for Discretionary Review and Notice of Appeal to the North Carolina Supreme Court. Significantly, Respondent moved to dismiss Neusoft China's Notice of Appeal on the basis that it had failed to raise its pre-emption argument below. The North Carolina Supreme Court granted the motion to dismiss and denied Neusoft China's petition for discretionary review. Accordingly, the federal question was never properly raised below, and this Court lacks jurisdiction to grant the petition.

2. "[A]rbitration 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." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The agreement that is the subject of NeuIsys' two pending claims—the NDA—does not contain an arbitration clause. If a party has not agreed to arbitrate a claim, neither the FAA nor the courts can force a party to arbitrate. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 599 U.S. 662, 684 (2010).

NeuIsys never agreed to arbitrate any NDA-related claims. The Court of Appeals therefore correctly held that NeuIsys' NDA-related claims were not arbitrable.

3. The trial court's finding that Neusoft China waived its right to compel arbitration provides an alternate basis for affirmance. Under both North Carolina and federal law, a party waives the right to compel arbitration when it takes actions inconsistent with arbitration that result in prejudice to the other party. *See Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 321 S.E.2d 872, 876 (N.C. 1984); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987); *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009). Examples of prejudice include protracted delay, the incurring significant litigation expenses, loss of evidence, and a party's use of discovery procedures unavailable in arbitration.

In this case, Neusoft China both engaged in protracted delay and took actions inconsistent with arbitration that resulted in prejudice to NeuIsys. Neusoft China chose not to appeal the original arbitration order and actively participated in the litigation for the next 15 months. In total, Neusoft China either took or otherwise participated in 21 depositions—14 lay witnesses and 7 experts—and propounded 60 Requests for Production, 27 Interrogatories (including an additional 25 subparts), and 29

Requests for Admission. R. 492. In addition to conducting discovery, Neusoft China actively invoked the assistance of the trial court by filing a motion to compel (R. 323) and seeking multiple continuances. R. 293, 389. Much of this discovery would never have been available to Neusoft China under the CIETAC arbitration rules, especially not a four-day long deposition of NeuIsys' CEO. *See* R. Supp. 134-167.

As a result of Neusoft China's active participation in the litigation, NeuIsys incurred over $500,000 in legal fees. Having litigated for 15 months, and only a few months before trial, Neusoft China then hired new counsel and filed its "renewed" motion to compel arbitration. Because Neusoft China plainly waived the right to seek arbitration through its unreasonable delay and transparent gamesmanship, the Court should deny the petition.

4. Petitioner Neusoft USA, Buse, and Mildenberger ("Counterclaim Petitioners) have not presented a federal question for this Court's review, and in any event, their motions to stay were properly denied.

The FAA does not govern a court's authority to stay non-arbitrable claims. Although Section 3 of the FAA requires a stay of arbitrable issues, it does not govern a court's decision to stay non-arbitrable claims. *See* 9 U.S.C. § 3. That decision is left to the sound discretion of

the trial court. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21, n.23 (1983). Because there is no dispute that NeuIsys' claims against Neusoft USA, Buse and Mildenberger are non-arbitrable, there is no federal question for this Court's review.

Moreover, the trial court and Court of Appeals did not err in refusing to stay the claims against Neusoft USA, Buse and Mildenberger. The claims against Neusoft USA, Buse and Mildenberger arise out of Neusoft USA's hiring of Tom Buse, who—despite acknowledging specific instructions not to take NeuIsys' confidential or proprietary information—did precisely that. Neusoft USA then actively conspired with NeuIsys' then-current employees to steal its customers and ultimately hired away two of NeuIsys' three service engineers, including Mildenberger, who also accessed and copied NeuIsys' confidential and proprietary information. R.22, ¶56-58. As a result of these actions, Neusoft USA was able to aid its own business development. R.221, ¶60. Counterclaim Petitioners also disparaged NeuIsys to some of the very customers that were identified in the confidential information they took from NeuIsys. R.223-24, ¶¶69-80.

These acts form the basis for Respondent's counterclaims against the Counterclaim Petitioners for conversion of its confidential and proprietary information and property, misappropriation of its trade secrets, tortious interference with its current and expectant

business advantage, unjust enrichment and unfair and deceptive trade practices claims. NeuIsys has not asserted any claims against the Counterclaim Petitioners arising under the NDA, and the May 2010 amendment and the IDA do not address and are not relevant to the relationship and rights between Respondent and Counterclaim Petitioners, and have no bearing on whether Counterclaim Petitioners' conduct violated North Carolina law. Accordingly, the trial court and Court of Appeals did not err in denying the motions to stay.

REASONS FOR DENYING THE PETITION

I. NEUSOFT CHINA FAILED TO CHALLENGE THE "SUBSTANTIAL CHANGE IN CIRCUMSTANCES" TEST BEFORE THE COURT OF APPEALS.

"[For this Court] to review a decision of the court of a State, it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the case." *Honeyman v. Hanan,* 300 U.S. 14, 18 (1937). In the instant case, Petitioners have failed to satisfy either requirement, and their petition should be denied for lack of jurisdiction.

With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), the Court

"will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). *See also Howell v. Mississippi*, 543 U.S. 440, 443 (2005). "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

The North Carolina Supreme Court dismissed Neusoft China's Notice of Appeal and denied its Petition for Discretionary Review. Petitioners have asked this Court to review the Court of Appeals' decision. Under *Adams,* Petitioners were required to have presented their federal question (i.e., whether the FAA or Convention displaces North Carolina's "substantial changes in circumstances" test) to the Court of Appeals. However, Petitioners never presented this question to either the Court of Appeals or to the trial court, as a review of the various filings below confirms.

Petitioners do not and cannot cite to any portion of the record in the trial court or the North Carolina Court of Appeals where Neusoft China argued that North Carolina's "substantial change in circumstances" test

conflicted with the FAA or the Convention. In its brief to the trial court, Neusoft China did not argue that the FAA should displace North Carolina's long-standing "substantial change in circumstances" test. Similarly, neither Neusoft China's "Proposed Issues on Appeal" to the Court of Appeals, R.575, nor its merits briefs to the Court of Appeals argued that the "substantial change in circumstances" test must yield to the FAA or the Convention.[9]

Instead, Neusoft China embraced the test, stating in its opening brief to the Court of Appeals that it had satisfied the "substantial change in circumstances" test and that its "motion should have been granted due to the substantial change in circumstances between Judge Cromer's order and Judge Bray's hearing." Brief of Appellant Neusoft Medical Systems Co., Ltd. at 36.[10] Neusoft China then doubled-down on that argument in its Reply Brief, arguing "'the disclosure of the 'threat' in December 2013 constituted a substantial change in circumstances with respect to Count [IV] and the 'associated UDP claim' in Count VI." Reply Brief of Appellant Neusoft Digital

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[9] North Carolina's Rules of Appellate Procedure allow a party to expand its "Issues to be Decided" in its merits brief even after filing its "Proposed Issues on Appeal." *See* N.C. R. App. P. 10(b) ("Proposed issues on appeal . . . shall not limit the scope of the issues presented on appeal in an appellant's brief.")

[10] Available at https://www.ncappellatecourts.org/show-file.php?document_id=160966#page=44

Systems Co., Ltd at 9.[11] Neusoft China summarized the only issue for the Court of Appeals to decide, "Thus, the only issue remaining is whether [Respondent] raised a new theory of the case." *Id.* at 8. Simply put, at no point prior to filing its Notice of Appeal to the Supreme Court did Neusoft China ever present its federal question to any court.

Having twice lost the argument that it had satisfied the "substantial change in circumstances" test, Neusoft China decided to "swap horses" before the North Carolina Supreme Court. In its Notice of Appeal to the North Carolina Supreme Court—and for the first time in the case—Neusoft China argued that the "substantial change in circumstances" test was, in fact, pre-empted by the FAA and Convention. Notice of Appeal at 2.[12]

Respondent filed a Motion to Dismiss Neusoft China's Notice of Appeal on the basis that Neusoft China failed to raise or preserve that question in either the trial court or the Court of Appeals. *See* Appendix B. The North Carolina Supreme Court granted Respondent's

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[11] Available at https://www.ncappellatecourts.org/show-file.php?document_id=164410#page=14. Neusoft China made similar arguments in the trial court, pointing to evidence it contended showed NeuIsys had changed its theory of the case. *See*, *e.g.*, R.442-43, ¶¶10, 14-16

[12] Available at https://www.ncappellatecourts.org/show-file.php?document_id=175275#page=9

motion and dismissed Neusoft China's Notice of Appeal. Pet. App'x at App-20.

Changing theories during the appeals process is insufficient to preserve the issue for review under North Carolina law and, in such circumstances, the North Carolina Supreme Court will not pass on the newly asserted question. *See Higgins v. Simmons*, 376 S.E.2d 449, 452 (N.C. 1989) ("Because a contention not made in the court below may not be raised for the first time on appeal, the bank's contention was not properly presented to the Court of Appeals for review and is therefore not properly before this Court.") (internal citation omitted); *State v. Sharpe*, 473 S.E.2d 3, 5 (N.C. 1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.") (internal citations omitted).

Because neither the North Carolina Court of Appeals nor the North Carolina Supreme Court passed upon the federal question, this Court lacks jurisdiction over the petition. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945) (holding that the Court lacked jurisdiction to consider issue raised for first time on writ of error to state supreme court, where the state

supreme court did not pass upon the issue in denying the writ).[13]

II. THE NDA DOES NOT CONTAIN AN ARBITRATION AGREEMENT.

Petitioners contend that Respondent's NDA-related claims arise "from a contract containing a valid arbitration clause," Pet. at i. From this premise, Petitioners argue that the Court of Appeals' decision has lasting detrimental impact, jeopardizing "international commerce and trade," Pet. at 2-3, such that this Court must intervene "to prevent evasion of binding arbitration agreements." *Id*. at 30. However, Petitioners' basic premise is incorrect: the NDA has no arbitration clause.

Respondent's two active claims—breach of contract and unfair and deceptive trade practices—arise solely from the NDA. The NDA does not contain an arbitration clause. *See* Appendix A.[14] "[A]rbitration is simply a

[13] Petitioners also request the Court grant their petition to "address the legal standard that governs renewed motions to compel." Pet. at 29. Petitioners never made this request to any of the courts below.

[14] The IDA and the NDA differ markedly. The IDA is governed by Chinese law, contains an arbitration agreement, and requires arbitration to proceed under the China International Economic and Trade Association Commission ("CIETAC"). In contrast, the NDA contains no arbitration provision and is explicitly governed by North Carolina law.

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." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *see also EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289 (2002) (noting that a court cannot "compel arbitration of any issue or by any parties, that are not already covered in [an agreement to arbitrate]."). If a party has not agreed to arbitrate a claim, neither the FAA nor the courts can force a party to arbitrate. "From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 599 U.S. 662, 684 (2010) (emphasis in original).

Respondent did not agree to arbitrate claims arising under or relating to the NDA. When Respondent decided to share its financial and other highly sensitive corporate information with Neusoft China in 2009, Respondent consciously decided that this aspect of the parties' relationship would not be governed by the IDA, but instead would be governed by a new agreement. In drafting the NDA, Respondent consciously decided not to subject any NDA-related dispute to arbitration, not to have any NDA-related dispute be governed by CIETAC, and not to have Chinese law control the NDA. Instead, arbitration was never mentioned and all NDA-related claims

were to be governed by North Carolina law. Nesuoft China agreed to this arrangement, signing the NDA in September 2009.

Thereafter, Neusoft China used the information obtained via the NDA to compete unfairly against Respondent, attempting to drive it out of business.[15] Simply put, Respondent never agreed to arbitrate its NDA-related claims.

Finally, even if this Court determines the Court of Appeals should have analyzed the FAA, Petitioners have failed to show that the Court of Appeals' decision would have been any different when the FAA is considered. The FAA requires a written agreement to arbitrate. *See* 9 U.S.C. § 2, 3 and 4. The NDA, while in writing and signed by both parties, contains no provision or agreement about arbitration. Petitioners have offered no evidence that Respondent agreed in writing to arbitrate claims arising from the NDA. Because there is no evidence of a written agreement to arbitrate, the FAA would not require Respondent to arbitrate its NDA-related claims. The decision of the Court of Appeals would therefore be no different.

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[15] Respondent has alleged a laundry list of bad acts Neusoft China took after obtaining its confidential information under the NDA. *See infra*, p.4-5.

III. THE TRIAL COURT'S FINDING OF WAIVER PROVIDES AN ALTERNATE GROUND FOR AFFIRMANCE

Assuming *arguendo* that NeuIsys' claims under the NDA and § 75-1.1 were subject to the IDA's arbitration provision, the trial court's finding that Neusoft China waived its right to seek arbitration by actively participating in the litigation (R. 509, ¶2) provides an alternate grounds for affirmance.

Whether a party has waived the right to arbitrate depends on the facts of each case. *See*, *e.g.*, *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576 (5th Cir. 1991) ("The question of what constitutes a waiver of the right of arbitration depends on the facts of each case….") (citation omitted); *Youngs v. Am. Nutrition, Inc.*, 537 F.3d 1135, 1142 (10th Cir. 2008) ("There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of the facts.") (citation omitted); *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197, 1199 (9th Cir. 2003) ("We consider the question of whether Aden defaulted in arbitration to be one of fact, as acknowledged by the parties, and we review the factual findings of a district court for clear error.")

Although the trial court's determination of waiver is reviewed *de novo*, the trial court's factual findings are reviewed only for clear

error. *See Sink*, 352 F.3d at 1199; *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 342 (4th Cir. 2009). ("We review a district court's decision as to default of arbitration *de novo* but defer to the district court's underlying factual findings."); *Menorah Ins. Co., Ltd. v. INX Reins. Corp.*, 72 F.3d 218, 220 (1st Cir. 1995) ("The findings upon which the legal conclusion of waiver is based are predicate questions of fact, which may not be overturned unless clearly erroneous.") (internal brackets and citation omitted). *See generally Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976) ("Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here.")

In determining whether a party has waived its right to seek arbitration, North Carolina and federal courts apply the same standard—whether a party has taken actions inconsistent with arbitration that result in prejudice to the other party. *Compare Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 321 S.E.2d 872, 876 (N.C. 1984) (holding that a party "impliedly waive[s] its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration") *with Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("The essential question is whether, under the totality of the circumstances, the defaulting

party has acted inconsistently with the arbitration right.") *and Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009) ("The court finds waiver when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (internal quotation and citation omitted).

North Carolina and federal courts also consider the same factors in determining whether a party has suffered prejudice. *Compare Cyclone Roofing Co.*, 321 S.E.2d at 876

> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial, . . . a party's opponent takes advantage of judicial discovery procedures not available in arbitration, or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

(internal citations omitted), *with PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997):

> [W]e have found that a party waived its right to arbitration where it engaged in extensive pre-trial discovery and forced its adversary to respond to substantive motions, delayed invoking arbitration rights by filing multiple appeals and

> substantive motions while an adversary incurred unnecessary delay and expense, and engaged in discovery procedures not available in arbitration.

(internal citations omitted).

In this case, Neusoft China both engaged in protracted delay and took actions inconsistent with arbitration that resulted in prejudice to NeuIsys. Specifically, the trial court made the following relevant findings of fact:

> 5. Neusoft China did not appeal the October 2012 Order.
>
> . . . .
>
> 7. Over the course of the next fourteen (14) months, all parties participated in extensive discovery. Neusoft China propounded numerous document requests, interrogatories, and requests for admission. Neusoft China has also responded to numerous interrogatories and request for documents, propounded by NeuIsys. Neusoft China has participated in all of the depositions in this matter, including having individual and corporate witnesses deposed . . . .
>
> 8. To the extent arbitration must be conducted pursuant to the IDA's arbitration clause, such arbitration

must be conducted pursuant to the arbitration rules of CIETAC. Under the arbitration rules of CIETAC, there is no way for the arbitration panel to compel document exchange, pre-hearing depositions, or to compel a party to testify. As such, Neusoft China has made use of discovery procedures that are not available under CIETAC.

9. Since the entry of the October 2012 Order, NeuIsys has incurred more than $500,000 in legal costs. Most of these costs would not have been incurred had this matter not continued after entry of the October 2012 Order.

10. As such, NeuIsys has been prejudiced by Neusoft China's delay in seeking to stay Claims IV and VI pending arbitration.

R. 507-09, ¶¶ 5, 7-10. These findings were supported by ample evidence, and Neusoft China never challenged the sufficiency of these findings on appeal.

In total, Neusoft China either took or otherwise participated in 21 depositions—14 lay witnesses and 7 experts—and propounded 60 Requests for Production, 27 Interrogatories (including an additional 25 subparts), and 29 Requests for Admission. R. 492. In addition to

conducting discovery, Neusoft China actively invoked the assistance of the trial court by filing a motion to compel (R. 323) and seeking multiple continuances. R. 293, 389. Its request to substitute counsel was permitted on November 1, 2013. R. 423-25. Much of this discovery would never have been available to Neusoft China under the CIETAC arbitration rules, especially not a four-day long deposition of NeuIsys' CEO. *See* R. Supp. 134-167.

Simply put, under any standard, Neusoft China waived its right to seek to compel arbitration when it chose not to appeal the original arbitration order and actively participated in the litigation for the next 15 months. Because Neusoft China's waiver provides an alternate basis for affirmance, the Court should deny the petition.

IV. NEUSOFT USA, BUSE AND MILDENBERGER'S MOTIONS TO STAY WERE PROPERLY DENIED.

Petitioners Neusoft USA, Buse and Mildenberger ("Counterclaim Petitioners") were not parties to either the IDA or the NDA. Counterclaim Petitioners have never asserted that any of them had an agreement to arbitrate with Respondent. Nonetheless, Counterclaim Petitioners request this Court to "reverse the North Carolina Courts' denial of motion to stay

pending arbitration." Petition at 33.[16] Counterclaim Petitioners' petition should be denied.

As a threshold matter, Counterclaim Petitioners fail to identify any federal question involved in their motion to stay pending arbitration. Such a motion involving non-arbitrable claims does not involve a federal question, even if the FAA were involved.

The FAA does not govern a court's authority to stay non-arbitrable claims. Although § 3 of the FAA requires a stay of arbitrable issues, it does *not* govern a court's decision to stay non-arbitrable claims. *See* 9 U.S.C. § 3. That decision is left to the sound discretion of the trial court. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21, n.23 (1983). The mere fact that allowing non-arbitrable claims to proceed may result in maintenance of separate proceedings in different forums is of no moment. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985).

Finally, the Counterclaim Petitioners' suggestion that an arbitration panel in China

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[16] Counterclaim Petitioners filed a Petition for Discretionary Review with the North Carolina Supreme Court, seeking a stay of Respondent's non-arbitrable claims until such time as Respondent completed arbitration of its four IDA-related claims. Respondent opposed the petition. The North Carolina Supreme Court denied Counterclaim Petitioners' petition.

must first apply Chinese law to "adjudicate [Respondent]'s challenge to the 2010 Amendment to the IDA before the claims against [Counterclaim Petitioners] can proceed", Pet. at 33, is neither meritorious nor presents a federal question. The Court of Appeals held that Respondent's claims against the Counterclaim Petitioners are not dependent on any factual issue to be decided in arbitration, and thus should not be stayed. 774 S.E.2d at 859. A mere cursory review of Respondent's allegations and evidence wholly support this decision.

Respondent's allegations and evidence establish that Neusoft USA hired Respondent's former Regional Vice President of Sales, Tom Buse, who—despite acknowledging specific instructions not to take Respondent's confidential or proprietary information—did precisely that. Buse downloaded extensive amounts of Respondent's confidential, proprietary and trade secret information, including Respondent's confidential financial information, customer contact information and confidential business plans. R.220, ¶¶51-53. He then provided that information to Neusoft USA. *Id*.

Neusoft USA then actively conspired with Respondent's then current employees to steal Respondents' customers and ultimately hired away two of Respondent's three service engineers, including Mildenberger, who also accessed and copied Respondent's confidential

and proprietary information. R.22, ¶56-58. As a result of these actions, Neusoft USA was able to aid its own business development. R.221, ¶60. Counterclaim Petitioners then disparaged Respondent to some of the very customers that were identified in the confidential information they took from Respondent. R.223-24, ¶¶69-80.

These acts form the basis for Respondent's counterclaims for conversion of its confidential and proprietary information and property, misappropriation of its trade secrets, tortious interference with its current and expectant business advantage, unjust enrichment and unfair and deceptive trade practices claims. The May 2010 amendment and the IDA do not address and are not relevant to the relationship and rights between Respondent and Counterclaim Petitioners, and have no bearing on whether Counterclaim Petitioners' conduct violated North Carolina law. There is nothing that a Chinese arbitration panel could decide about the IDA that would affects Respondent's claims against Counterclaim Petitioners.

Counterclaim Petitioners have failed to identify a federal question that was presented with their motion to stay. Pursuant to *Hanan*, this portion of the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

BRENT F. POWELL
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APPENDIX

APPENDIX A — NEUSOFT NEUISYS NON-DISCLOSURE AGREEMENT, DATED SEPTEMBER 3, 2009

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

This Confidentiality and Non-Disclosure Agreement (this "Agreement") is made as of September 3, 2009, by and between Neuisys Imaging Systems Solutions, LLC, with offices at 1500 Pinecroft Road, Greensboro, NC 27407 (the "Company") and Neusoft Medical Systems Company, Ltd, with offices at No. 16 Shiji Road, Hun Nan New District, Shenyang 110179 PRC ("Recipient").

RECITALS

WHEREAS, Recipient and the Company (together "the parties") are engaged in discussions in contemplation of a business relationship or in furtherance of a business relationship (such relationship being referred to herein as the "Transaction");

WHEREAS, in the course of dealings between Recipient and the Company, Recipient and the Company may have access or have disclosed to the other party information relating to such disclosing party which is of a confidential nature; and

WHEREAS, the parties desire to establish and set forth the obligations with respect to Confidential Information (as defined below) of Recipient and the Company with respect to such Confidential Information received by them.

NOW, THEREFORE, in consideration of the disclosure by the Company and Recipient of Confidential Information to the other party, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Recipient and the Company mutually agree:

AGREEMENT

1. "Confidential Information" as used in this Agreement shall mean any and all information (whether written or oral and regardless of whether it is specifically designated as confidential) disclosed or made available to a party by or on behalf of the Company or Recipient with respect to the

a party or its affiliates, including, without limitation, financial statements, projections and financial information, employment information, information or specifications regarding current or proposed products or services, customer information, market information and business plans, as well as all memoranda, summaries, notes, analyses, compilations, studies or other documents prepared by a party which contain or reflect such information. The term "Confidential Information" will not, however, include information that a party can demonstrate: (a) is or becomes publicly available other than as a result of a breach of this Agreement by the non-disclosing party; (b) is or becomes available to the non-disclosing party from a source that, to the best of such party's knowledge after reasonable inquiry, is free of any obligation of confidence; or (c) was developed by employees, affiliates or agents of a non-disclosing party

independently of and without access or reference to any information communicated to such non-disclosing party by the disclosing party.

2. Each party agrees that it will use the Confidential Information solely for the purpose of evaluating, negotiating and implementing the Transaction.

3. Neither party will disclose Confidential Information of the other party to any other party without the disclosing party's prior written consent and will use all commercially reasonable efforts to protect the confidentiality of such information; provided, however, that a party may disclose Confidential Information to those of its employees and agents (including attorneys and accountants) (collectively, the "Representatives" of a party) who need to know such information and who have first agreed to be bound by the terms of this Agreement. Each party will be responsible for any disclosure or use of the Confidential Information by any of its Representatives in a manner not authorized by this Agreement.

4. Each party represents that it shall treat all Confidential Information with the same degree of care it accords to its own Confidential Information of similar nature, and each party further represents that it exercises reasonable care to prevent the inadvertent disclosure of such Confidential Information to any third party.

5. If a party is requested or required by law or by legal or administrative process to disclose any Confidential Information, such party will promptly notify the other

party of such request or requirement so that it may seek an appropriate protective order or relief. If a protective order or other relief is not obtained by the such party within 30 days following the party's receipt of such notice, or if the non-disclosing party's legal counsel advises that it is necessary that it disclose the Confidential Information prior to the expiration of such 30-day period, such party may disclose Confidential Information provided that it (a) may disclose only

that portion of the Confidential Information which its legal counsel advises is required to be disclosed, (b) must use commercially reasonable efforts, at it's cost and expense, to ensure that the Confidential Information so disclosed is treated confidentially, and (c) must notify the other party as soon as reasonably practicable of the items of Confidential Information so disclosed.

6. All Confidential Information will remain the property of the disclosing party, and no right or license is granted to the non-disclosing party with respect to any Confidential Information. Upon the termination by either party of discussions relating to the Transaction, or sooner if so requested, each party agrees to immediately return to the disclosing party or destroy all Confidential Information, including copies of same, in whatever medium. Upon request, the fact of any such destruction will be certified in writing to the disclosing party by an officer of non-disclosing party.

7. This Agreement shall govern all communications between the parties that are made during the period from

the effective date of this Agreement to the date on which either party receives written notice from the other party that subsequent communications shall not be so governed; provided, however, that each party's obligations under this Agreement with respect to Confidential Information which it has previously received shall continue for a period of five (5) years from the effective date of this Agreement.

8. Each party acknowledges that remedies at law may be inadequate to protect the disclosing party against any actual or threatened breach of this Agreement by a party or any of its Representatives. Without prejudice to any other rights and remedies otherwise available to the each party, each party agrees it will not oppose the granting of injunctive relief in the non-disclosing party's favor on the basis that remedies at law may be inadequate to protect the non-disclosing party against any actual or threatened breach of this Agreement by a party or its Representatives. In the event of litigation between the parties concerning an alleged breach of this Agreement, the nonprevailing

party will be responsible for the prevailing party's costs and expenses in such litigation, including reasonable attorney's fees.

9. This Agreement is the complete and exclusive statement of Agreement regarding confidentiality between the parties and supersedes all prior written and oral communications relating to the subject matter hereof.

10. This Agreement shall be construed in accordance with the laws of the state of North Carolina, without giving

effect to the principles of conflicts of law. This Agreement may be introduced in any proceeding to establish the rights of either party under this Agreement.

11. Any notice required to be given under this Agreement shall be deemed received upon personal delivery or three (3) days after mailing if sent by registered or certified mail to the addresses of the parties set forth above, or to such other address as either of the parties shall have furnished to the other in writing.

12. In the event of the invalidity of any portion of this Agreement, the parties agree that such invalidity shall not affect the validity of the remaining portions of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

_____

Kim Russell, CEO, on behalf of
Neuisys Imaging LLC

_____

Mr. Lui Jian, Executive Vice President
On behalf of Neusoft

Date: September 3, 2009

APPENDIX B — EXCERPTS FROM NEUISYS RESPONSE TO PETITION OF NEUSOFT CHINA

SUPREME COURT OF NORTH CAROLINA

From Guilford County
No. COA 14-779

NEUSOFT MEDICAL SYSTEMS, USA, INC.,

Plaintiff and Counterclaim Defendant/Appellant,

v.

NEUISYS, LLC,

Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff/Appellee

v.

NEUSOFT MEDICAL SYSTEM, CO., LTD.,

Third-Party Defendant/Appellant

NEUISYS, LLC,

Third-Party Plaintiff,

v.

Appendix B

TOM BUSE AND KEITH MILDENBERGER

Counterclaim-Defendants/Appellees

NEUISYS, LLC'S RESPONSE IN OPPOSITION TO APPELLANT NEUSOFT MEDICAL SYSTEM CO., LTD.'S NOTICE OF APPEAL AND PETITION FOR DISCRETIONARY REVIEW

* * *

ARGUMENT

I. THE COURT SHOULD DISMISS NEUSOFT CHINA'S NOTICE OF APPEAL.

In a transparent attempt to manufacture a basis for mandatory appellate review, Neusoft China argues that this case involves a substantial constitutional question under G.S. §7A-30(1). (Notice of Appeal, p.2). Neusoft China's theory fails for two reasons: (1) the decision below did not involve a substantial constitutional question; and (2) Neusoft China failed to raise the purported constitutional question before the courts below.

A. The Court of Appeals' Decision Involves a Straightforward Issue of State Law, Not a Substantial Constitutional Question.

Jurisdiction pursuant to G.S. §7A-30(1) is proper only where the decision of the Court of Appeals "directly involves a substantial question arising under

the Constitution of the United States or of this State."[18] The burden rests with Neusoft China to prove that the decision directly involved a question arising under the U.S. Constitution. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968); *Bundy v. Ayscue*, 276 N.C. 81, 171 S.E.2d 1 (1969). If Neusoft China fails to carry its burden, this Court should dismiss the appeal. *Id*. In this case, Neusoft China has failed to meet its burden in numerous ways.

1. The Court of Appeals' decision involved only a state law issue

The Court of Appeals' decision did not involve a question under the U.S. Constitution. Instead, it involved a straightforward issue of state law; i.e., whether Neusoft China established a substantial change of circumstances sufficient to enable the trial court to reconsider the October 2012 Order. (Op. at 12.)[19] In fact, Neusoft China described the Court of Appeals' decision as affirming "the trial court on procedural grounds." (Notice of Appeal., p.3.) These state law "procedural grounds," which Neusoft China references, involve whether Neusoft China had proven there was a "substantial change of circumstances."[20] Thus,

18. Neusoft China does not allege a question arising under the Constitution of the State of North Carolina. As a result, NeuIsys will not address this portion of the statute.

19. Neusoft China does not dispute that this was its first issue on appeal and that the Court of Appeals' decision addressed this issue.

20. Neusoft China's own Petition for Discretionary Review makes clear that the decision of the Court of Appeals involved only

by its own description, Neusoft China admits the Court of Appeals' decision involved North Carolina law, not the U.S. Constitution.[21]

2. Neusoft China's Notice of Appeal involves federal statutes, not the U.S. Constitution

Its description of the Court of Appeals' decision notwithstanding, Neusoft China contends jurisdiction under G.S. §7A-30(1) is appropriate because the Court of Appeals' decision should have involved both the FAA and the Convention. (Notice of Appeal, p.2.) Neusoft China admits, however, that neither were involved in the decision. ("The Court of Appeals failed even to acknowledge or apply [the FAA or the Convention]."). (*Id.*, p.3). Assuming, *arguendo,* that the failure to "acknowledge or apply" a law can satisfy G.S. §7A-30(1) "involvement" requirement (which NeuIsys disputes), the "controlling laws" that Neusoft China contends are involved are federal *statutes*, the FAA and the Convention. (*Id.*). Neither statute satisfies the Constitutional requirement of G.S. §7A-30(1).

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whether Neusoft China had proven that a "substantial change in circumstances" existed. (Pet. at 28-29.)

21. Neusoft China admits that the Court of Appeals decision did not even "acknowledge or apply" the two federal statutes which it contended were applicable, the FAA and the Convention. (Notice of Appeal, p.3.) This admission is further evidence that the Court of Appeals decision did not involve any federal law.

3. The Supremacy Clause is not directly involved.

In a desperate attempt to satisfy the constitutional requirement, Neusoft China simply declares that the Court of Appeals' decision is in "violation of the Supremacy Clause." (Notice of Appeal, p.2.) In doing so, however, Neusoft China fails to explain anywhere in its Notice of Appeal how the Supremacy Clause is directly involved in this case. Neusoft China identifies no state law that the Court of Appeals decision has purportedly elevated over federal law, a necessary element to involve the Supremacy Clause.[22]

The case Neusoft China relies upon, *Nitro-Lift Technologies, LLC v. Howard*, ---U.S.---133, S.Ct. 500 (2012), is factually distinguishable from the instant case. In *Howard*, the Oklahoma Supreme Court held that state law permitted a court to determine the validity of a non-competition agreement that contained an arbitration clause, thereby removing the "validity" determination from the arbitrator. *Howard*, 133 S.Ct. at 503. However, the Supreme Court had previously interpreted the FAA to require such determination be made by the arbitrator. *Id*. The Supreme Court therefore recognized a conflict existed between state law (allowing a court to determine the validity of a non-competition agreement) and federal law (the FAA requiring an arbitrator to make said determination). Because a true conflict existed between

22. Neusoft China fails to explain how the Court of Appeals' decision even violates the FAA or the Convention.

state law and federal law, the Supremacy Clause was directly involved.

In contrast, Neusoft China fails to identify any state law in its Notice of Appeal that is in conflict with the FAA or the Convention. In fact, as Neusoft China admits, these two statutes are never even "acknowledged or applied" by the Court of Appeals. (Notice of Appeal, p.3). In reality, the Court of Appeals' decision neither involves the Supremacy Clause nor violates the FAA or the Convention. Rather, the Court of Appeals' decision involves only an issue of state law—whether a substantial change of circumstance had been proven.

4. Preemption does not create jurisdiction under G.S. §7A-30(1).

Neusoft China's Notice of Appeal suggests that any time the Supremacy Clause is involved in a Court of Appeals' decision, it necessarily "directly involves a substantial constitutional question" under G.S. §7A-30(1). (Notice of Appeal, p.2). Neusoft China has provided no case law to support such a proposition (and NeuIsys has found none). Moreover, taken to its logical extension, Neusoft China's position would establish a rule that any case involving a claim that a federal law preempts a state law (per the Supremacy Clause) necessarily creates an automatic right of appeal for the aggrieved party to this Court pursuant to G.S. §7A-30(1). This Court has never recognized such a rule, and it should not do so now for obvious reasons.

5. Neusoft China's remaining issues do not satisfy G.S. §7A-30(1).

Finally, Neusoft China lists four other issues that it contends satisfy G.S. §7A-30(1)'s automatic right of appeal other than its purported Supremacy Clause issue. (Notice of Appeal, p.4.) However, none of these issues directly involve the U.S. Constitution, a fact tacitly admitted by Neusoft China's own failure to cite any article or section of the U.S. Constitution that is purportedly involved. *Id.*; *see* N.C.R.A.P. 14(b)(2)(requiring specification of article or section of constitution purported to be involved). Any review of these issues pursuant to G.S. §7A-30(1) should likewise be denied.

B. Neusoft China Failed to Address The Constitutional Question At The Trial Court.

In addition to requiring that the decision directly involve a substantial question arising under the U.S. Constitution, this Court also requires that the constitutional question be first raised and passed upon in the trial court and the Court of Appeals. *State v. Mitchell*, 276 N.C. 404, 172 S.E.2d 527 (1970). Failure to raise the issue in the courts below requires dismissal of the appeal. *Id.*

The only constitutional provision identified by Neusoft China in its Notice of Appeal is the Supremacy Clause. (Notice of Appeal, p.2). However, in its Notice of Appeal, Neusoft China fails to explain the basis of its constitutional claim; specifically, it fails to identify the state law that is purportedly at odds with the FAA or the Convention such

that the Supremacy Clause would be directly involved. As such, Neusoft China has provided no basis in its Notice of Appeal for this Court to review any Supremacy Clause claims.

However, in its Petition for Discretionary Review, Neusoft China seems to identify a state vs. federal law conflict that purportedly exists which might invoke a Supremacy Clause claim: "the Court of Appeals should not have applied 'the substantial change in circumstances' test as a bar to *de novo* consideration of the [Reconsideration Motion]'s merits." (Pet. at 28-29.) In other words, it appears Neusoft China contends that North Carolina's state law governing when a second superior court judge can overturn another judge's ruling[23] should yield when the FAA and/or the Convention are at issue. However, contrary to the vanilla affirmation in its Notice of Appeal that its constitutional issue was raised at the trial court and the Court of Appeals, Neusoft China has never made this argument until now.

At no point in the trial court or in the Court of Appeals did Neusoft China ever argue that North Carolina's "substantial change in circumstances" test

23. North Carolina state law permits one superior court judge to modify, overrule or change the order of another superior court judge only when there has been a substantial change of circumstances since the entry of the prior order. *Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 189, 697 S.E.2d 449, 456 (2010). It was this "procedural" state law that Neusoft China bemoaned in its Notice of Appeal. (Notice of Appeal, p.3).

should yield to the FAA or the Convention.[24] In fact, Neusoft China embraced the test before both lower courts, repeatedly presenting arguments and pointing to evidence it contended showed NeuIsys had changed its theory of the case.[25] Because of this new theory, Neusoft China contended it had satisfied the "substantial change in circumstances" test and thus the trial court could reconsider the October 2012 Order.

Yet, Neusoft China never argued or presented any analysis that, pursuant to the Supremacy Clause, the

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24. Neusoft China's only reference to the Supremacy Clause in its Motion for Reconsideration or at the Court of Appeals was made in arguing that NeuIsys' claims for breach of the NDA and its UDP claim were subject to arbitration (even though the NDA did not contain an arbitration provision). Neusoft China contended that, pursuant to the FAA, these claims were subject to arbitration. However, Neusoft China never argued that the Supremacy Clause should trump North Carolina's procedural law, a position which it now obviously asserts.

25. Neusoft China's Reconsideration Motion is replete with references to how NeuIsys had purportedly changed the theory of its case, including its case for damages, thereby permitting the trial court to revisit the October 2012 Order. *See*, *e.g.,* (R.442-43, ¶¶10, 14-16). Similarly, in its opening brief to the Court of Appeals, Neusoft China titled Section I of its Argument as "The Trial Court Erred By Not Finding That Counts IV and VI Should Be Stayed Pending International Arbitration Based on NeuIsys' Changed Theory." Later in that same section, Neusoft China devoted several pages to a subsection it titled "NeuIsys' Changed Theory of the Case." In its Reply brief, Neusoft China summarized the sole issue that remained for the Court of Appeals to determine, "Thus, the only issue remaining is whether NeuIsys raised a new theory of the case."

"substantial change in circumstances" test should yield to the FAA or the Convention. Neusoft China made no preemption analysis between state procedural law and the FAA as to whether the state law should be preempted. Neusoft China never argued that, pursuant to the Supremacy Clause, the state law test should fall. Simply put, Neusoft China never argued the substantial constitutional question about the Supremacy Clause that it now seeks to serve as its foundation for mandatory appellate review pursuant to G.S. §7A-30(1). This Court should not permit Neusoft China to "swap horses" as to its legal theory in the middle of this case. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.") (internal citation omitted).

Because Neusoft China has failed to satisfy the requirements of G.S. §7A-30(1), this Court should deny Neusoft China's Notice of Appeal.

II. THE COURT OF APPEALS DID NOT ERR IN FAILING TO APPLY THE FAA OR THE CONVENTION

It is undisputed that in October 2012, Neusoft China argued in its Original Arbitration Motion that NeuIsys' NDA-related claims were subject to arbitration pursuant to the FAA and the Convention. (*See* R.139-69.) It is also undisputed that Judge Cromer denied Neusoft China's

Original Arbitration Motion as it related to NeuIsys' NDA-related claims. (R.170-72.) Finally, it is undisputed that Neusoft China (or at least its former counsel) strategically decided not to immediately appeal from the October 2012 Order, choosing instead to actively litigate NeuIsys' NDA-related claims in state court. Despite these undisputed facts, Neusoft China nonetheless contends the trial court and the Court of Appeals should have applied the FAA and the Convention in evaluating its Reconsideration Motion. In addition—and for the very first time before any Court—Neusoft China argues that North Carolina's law concerning when one superior court judge can overrule another should yield to the FAA and the Convention, pursuant to the Supremacy Clause. Neusoft China's arguments—including its newest one—are without merit.

A. The Court of Appeals Correctly Evaluated Whether Neusoft China Had Proven a Substantial Change In Circumstances Before Reconsidering the October 2012 Order.

The law in North Carolina is clear. Before one superior court judge can modify, overrule or reconsider another superior court judge's interlocutory order, "the party seeking to alter that prior ruling [must make] a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." *Duvall*, 304 N.C. at 562, 284 S.E.2d at 499. As this Court has observed, "if the rule were otherwise, the normal reviewing function of appellate courts would be usurped and, in some instances,

the orderly process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge." *Id.*

In October 2012, Judge Cromer rejected Neusoft China's contention that that NeuIsys' NDA-related claims were subject to arbitration per the FAA or the Convention. (R.170-171.) Therefore, at the time Neusoft China lost its Original Arbitration Motion, it had two options: a) immediately appeal the decision; or b) litigate NeuIsys' NDA-related claim in state court and, if there were a substantial change in circumstances later, bring a motion for reconsideration of the October 2012 Order. Neusoft China (and/or its former counsel) chose the latter and litigated NeuIsys' NDA-related claims for the next fifteen (15) months at a cost of more than $500,000 to NeuIsys.

Although Neusoft China chose to switch counsel in late 2013 on the eve of trial, the law in North Carolina as it related to the October 2012 Order remained the same: in order for the October 2012 Order to be reconsidered, Neusoft China had to first prove a substantial change of circumstances. In other words, before any court could reconsider the prior decision that NeuIsys' NDA-related claims were not subject to arbitration pursuant to the FAA or the Convention, Neusoft China must first prove there had been a substantial change in circumstances. *Duvall*, 304 N.C. at 562, 284 S.E.2d at 499. None of the cases Neusoft China cites in its Petition for Discretionary Review or its Notice of Appeal hold to the contrary.

Thus, Neusoft China's argument that the trial court and the Court of Appeals erred by "failing to apply the FAA and the Convention" puts the proverbial cart before the horse. If and only if Neusoft China had proven a substantial change of circumstances could the trial court—and the Court of Appeals—have then reconsidered the prior order that held NeuIsys' NDA-related claims were not subject to arbitration. In this case, Neusoft China failed to make such a showing.

Neusoft China's sole evidence of a "substantial change in circumstances" is NeuIsys' CEO's testimony about a "threat" made in April 2010. (Pet. at 18-19.) This threat, according to Neusoft China, had never before been revealed and showed that NeuIsys had "changed its theory" about its NDA-based claims. (Pet. At 17-19.) As the Court of Appeals correctly determined, Neusoft China's argument is meritless.

NeuIsys' theory as it relates to its NDA-related claims has always been the same: Neusoft China used the NDA-related materials for a purpose other than evaluating and negotiating a potential acquisition and to NeuIsys' detriment. (Op. at 14). NeuIsys' theory has always been that Neusoft China used the confidential information to compete unfairly against NeuIsys, including but not limited to: formulating a plan to drive NeuIsys out of business (R.61, ¶151); stealing NeuIsys' employees (R.45-46); stealing NeuIsys' customers (R.49-50); and threatening NeuIsys' business activities that it learned about from the NDA (i.e., the multi-year service contracts) (R. 41-44, 63-65.) The Court of Appeals correctly

recognized that the "threat" was simply further evidence to support a previously existing theory. (Op. at 14).

Moreover, the sole "new" fact that Neusoft China points to as evidence of a "substantial change in circumstances" was not, in fact, new at all. Neusoft China's contention that NeuIsys' claim of a "threat" based upon information from the NDA materials was never before Judge Cromer is simply incorrect. Paragraph 41 of the NeuIsys' Third-Party Complaint specifically references the "threat" made by Neusoft China in April 2010, and explained the threat was based upon information Neusoft China learned solely from the NDA-related materials. (R.190-191.) That NDA-related information was about the multi-year service contracts. (R.188.) Paragraph 41 of NeuIsys' complaint against Neusoft China was the same allegation before Judge Cromer as it was before Judge Bray. The "threat" allegation has been there from the beginning.

Simply put, Neusoft China failed to prove a substantial change in circumstances. Based upon this Court's well-established precedent, both the trial court and the Court of Appeals were therefore precluded from reconsidering the October 2012 Order, and thus from re-analyzing NeuIsys' NDA-related claims per the FAA and the Convention. Neusoft China's contention that the Court of Appeals erred in finding no substantial change of circumstances is incorrect.

Moreover, Neusoft China has failed to explain why this Court's review of whether a substantial change

in circumstances existed in this case is of great public interest and/or of significant jurisprudence in this state. N.C. R. App. 15(a). Simply put, it is not. As evidence by this Court's decision in *Duvall* more than thirty (30) years ago, it is the well-established jurisprudence of this State that before any superior court judge can reconsider, modify or overrule another superior court judge's prior order, the moving party must prove a substantial change in circumstances. This case, therefore, raises no issue of public interest or significance to North Carolina jurisprudence, and Neusoft China's Petition for Discretionary Review should be denied.

B. Neusoft China's New Argument Concerning the FAA is Meritless.

Implicitly acknowledging that it failed to prove a substantial change in circumstances, Neusoft China seeks to remedy its situation by arguing—for the first time ever in this case—that this Court's "parochial, procedural law" as announced in *Duvall* should yield to the FAA and the Convention pursuant to the Supremacy Clause. (Pet. at 27-29) ("…[T]he Court of Appeals should not have applied the 'substantial change in circumstances' test as a bar to *de novo* consideration of the [Reconsideration Motion]."). Prior to its Petition, Neusoft China has never made this argument before. Moreover, the federal case upon which Neusoft China relies, *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015) is inapposite.

To claim that a state law should yield to a federal law pursuant to the Supremacy Clause invokes the doctrine

of preemption. "The pre-emption doctrine is a necessary outgrowth of the Supremacy Clause, which provides that the laws of the United States 'shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3d Cir. 2013). In evaluating a claim of preemption under to the Supremacy Clause, a court must apply a rigorous analytical framework. First, the court must interpret the state law and the federal law according to Supreme Court precedent to determine whether a true conflict exists. *Frisby v. Shultz*, 487 U.S. 474, 483 (1998) (recognizing how laws should be interpreted where possible Supremacy conflict exists); *Arizona v. United States,* 132 S.Ct. 2492, 2510, 183 L.E.2d 351 (2012) (accord). Second, if the Court finds that a conflict does exist, it must then determine which type of preemption is applicable. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, (1992) (recognizing the different types of preemption and the required elements for each). Only after the court determines whether there is a true conflict and what type of preemption is at issue can the court ultimately determine whether the state law is in conflict and therefore must yield to the federal law.

Unsurprisingly, neither the trial court nor the Court of Appeals undertook this sort of detailed preemption analysis, as Neusoft China never made any sort of preemption argument as to the "substantial change in circumstances" test. To the contrary, Neusoft China embraced the test and presented evidence it contended satisfied the test. Only now, when it has failed the test twice, does Neusoft China contend the test never should

have been administered. This Court has repeatedly refused to allow an appellant to "swap horses" in mid-stream, and should not permit Neusoft China to do so here. *See Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5.

In addition, the *Dillon* case cited by Neusoft China is easily distinguishable from the instant case. Federal courts do not have the "substantial change in circumstances" test, in part because the same judge typically handles the case from its commencement to final judgment. A federal court judge is empowered to review, reconsider and/or modify her own order any time before final judgment. *See, e.g.*, *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 118 F. App'x 942, 945 (6th Cir. 2004) ("District courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment. A district court may modify, or even rescind, such interlocutory orders.").

Thus, the federal court system does not have to guard against the same judge-shopping concerns that this Court raised in *Duvall*. In the instant case, a different judge heard Neusoft China's Reconsideration Motion than heard its Original Motion for Arbitration. For this reason, Neusoft China's reliance on *Dillon* is misplaced.[26]

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26. As Neusoft China acknowledges, the *Dillon* Court specifically held that it as aware of no law—the FAA, the Rules of Civil Procedure or anything else—that limits a party to one motion under §3 and §4 of the FAA, and such motions are only limited by default. (Pet. at 27-28.) However, the U.S. Supreme Court has recognized that §§ 3 and 4 of the FAA apply only to federal court proceedings. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland*

Because Neusoft China failed to prove a substantial change in circumstances, the Court of Appeals correctly refrained from reconsidering the prior order holding NeuIsys' NDA-related claims were not subject to arbitration per the FAA and Convention. Neusoft China's attempt to inject a never-before-asserted Supremacy Clause argument for the first time in this case should be denied.

* * *

CONCLUSION

Because the Court of Appeals' decision does not involve a substantial question arising under the U.S. Constitution (or at least one that was previously argued below), this Court should dismiss Neusoft China's Notice of Appeal pursuant to G.S. §7A-30(1). Because Neusoft China failed to prove a substantial change of circumstances, the Court of Appeals properly determined it could not reconsider the October 2012 Order and properly refrained from addressing the issue of "waiver." Moreover, the Court of Appeals properly determined that NeuIsys was not equitably estopped from asserting claims arising from and relating to the NDA, the benefits and duties of which are not dependent on the IDA. Finally, the Court of Appeals did not abuse its discretion in refusing to overturn the trial court's discretionary decision to deny

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Stanford Junior Univ., 489 U.S. 468, 477 n. 6 (1989). Unlike federal law, North Carolina law does impose limitations on when a prior order can be modified thru a motion can be reconsidered.

Neusoft China's alternative motion to stay. For all of these reasons, NeuIsys respectfully requests this Court dismiss Neusoft China's Notice of Appeal and deny its Petition for Discretionary Review.

/s/_____
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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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