

## NOTES

### EQUITABLE ESTOPPEL TO COMPEL ARBITRATION IN NEW YORK: A DOCTRINE TO PREVENT INEQUITY

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#### I. INTRODUCTION

Arbitration, as a favored alternative to court systems, finds its validity in both state and federal law. The Federal Arbitration Act (“FAA”)<sup>1</sup> was enacted in 1925 unopposed,<sup>2</sup> reflecting a strong favored alternative by the federal government to the Article III courts.<sup>3</sup> This presumption was established in Section 2 of the FAA, which provides that contracts that include an arbitration clause “shall be valid, irrevocable, and enforceable”<sup>4</sup> unless a court finds “grounds as exist at law or in equity for the revocation of any contract [or clause].”<sup>5</sup>

While, as a default rule, the FAA preempts all conflicting state laws under the Supremacy Clause of the United States Constitution,<sup>6</sup> parties may contract as to whether a particular state’s arbitration act or the FAA will control the proceedings.<sup>7</sup> Regardless of which law governs, and as a general proposition, consent is an important feature of arbitration clauses and is paramount to their enforceability. The Supreme Court has stated:

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<sup>1</sup> See generally, 9 U.S.C. §§ 1-3 (2011).

<sup>2</sup> IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 15, 115 (1992).

<sup>3</sup> *Id.* at 80, 109-20.

<sup>4</sup> 9 U.S.C. § 2 (2011).

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. art. VI, cl. 2.

<sup>7</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 481 (1989).

Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.<sup>8</sup>

New York has always been at the forefront of enforcing arbitration as a way to settle contract disputes.<sup>9</sup> In fact, the New York legislature was the first in the United States to recognize the validity of arbitration as an alternative to the court system.<sup>10</sup> Now, New York's legislature has codified a law similar to a provision in Section 2 of the FAA:<sup>11</sup>

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.<sup>12</sup>

In general, a third-party to an arbitration agreement, or to a contract containing an arbitration clause, is not bound by the arbitration agreement,<sup>13</sup> but New York recognizes the existence of third-party beneficiaries to a contract.<sup>14</sup> A third-party beneficiary is defined as a person who is a non-signatory to a contract and who has not furnished any consideration for the contract but nonetheless can enforce the contract against the signatories.<sup>15</sup> In order to be considered a third-party beneficiary in New York, the purported third-party beneficiary has the burden of proving (i) that a valid contract exists among signatories, (ii) that the contract was in-

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<sup>8</sup> *Id.* at 469.

<sup>9</sup> Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 856 (1961).

<sup>10</sup> *Id.*

<sup>11</sup> See *Matter of Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49 (1997).

<sup>12</sup> N.Y. C.P.L.R. § 7501 (McKinney 2011).

<sup>13</sup> 4 AM. JUR. 2D. *Alternative Dispute Resolution* § 83 (2011).

<sup>14</sup> 22 N.Y. JUR. 2D. *Contracts* § 311 (2011) (“New York follows the nearly universal rule that a third person may, in his or her own right and name, enforce a promise made for his or her benefit even though he or she is a stranger both to the contract and to the consideration. New York also follows the rule that the contract must have been intended for the benefit of the third person in order to entitle him or her to enforce it. Finally, New York follows the prevailing modern rule that there is need for neither consideration from, nor privity with, nor obligation to, the third person.”).

<sup>15</sup> See *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38 (1985).

tended for his or her benefit, and (iii) that the benefit to him or her is immediate, rather than incidental.<sup>16</sup>

Given that state law governs the formation of a contract, the existence of an enforceable arbitration agreement derives similarly from state common law doctrines.<sup>17</sup> New York courts have adopted various equitable contract-related theories to allow contract signatories to compel third-party beneficiaries to arbitrate a claim arising under the contract, if such a clause exists. In Sections II, IV, V, and VI, this note will lay out the background on equitable estoppel, the debate surrounding its usage, and why New York's courts should explicitly adopt Strand B, where a non-signatory compels a signatory to arbitrate. In Section III, this note will define and discuss other equitable theories used by the courts to force a party to arbitrate, namely incorporation by reference,<sup>18</sup> assumption,<sup>19</sup> agency,<sup>20</sup> and alter ego/veil-piercing.<sup>21</sup>

## II. BACKGROUND ON EQUITABLE ESTOPPEL

Equitable estoppel is most commonly defined as “a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.”<sup>22</sup> With respect to arbitration clauses in contracts, equitable estoppel has developed alternative meanings, with two distinct doctrines. Historically, equitable estoppel was employed to “compel a non[-]signatory to arbitrate because the non[-]signatory had previously claimed that other provisions of the contract should be enforced to

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<sup>16</sup> See *Airco Alloys Div., Airco Inc. v. Niagara Mohawk Power Corp.* 76 A.D.2d 68, 79 (N.Y. App. Div. 1980) (citations omitted).

<sup>17</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

<sup>18</sup> See, e.g., *ADC Constr., LLC v. Empire City Subway Co., Ltd.* 736 N.Y.S.2d 6, 7 (N.Y. App. Div. 2002); *General Ry. Signal Corp. v. L.K. Comstock & Co., Inc.*, 254 A.D.2d 759, 759 (N.Y. App. Div. 1998); *Fidelity and Deposit Co. of Maryland v. Parsons & Whittemore Contractors Corp.*, 48 N.Y.2d 127, 131 (1979).

<sup>19</sup> See, e.g., *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 803 N.Y.S.2d 118, 120 (N.Y. App. Div. 2005).

<sup>20</sup> See, e.g., *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Jefferies & Co., Inc. v. Infinity Equities I, LLC*, 887 N.Y.S.2d 81, 81 (N.Y. App. Div. 2009).

<sup>21</sup> See, e.g., *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 337 (1998); *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966).

<sup>22</sup> BLACK'S LAW DICTIONARY (9th ed. 2009).

benefit him.”<sup>23</sup> This type of equitable estoppel has been referred to as the “direct benefits theory.”<sup>24</sup> Hereinafter, this doctrine will be referred to as “Strand A.”

Another equitable estoppel theory has developed within the federal circuits and in some states. This doctrine compels a signatory to arbitrate against a non-signatory. In *MS Dealer Services Corp. v. Franklin*,<sup>25</sup> the Eleventh Circuit delineated two particular usages of this theory of equitable estoppel: (1) when the signatory to a written agreement containing an arbitration clause relied on the written agreement’s terms in asserting its claims against the non-signatory, or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one of the signatories to the contract.<sup>26</sup> Stated another way, a signatory is compelled to arbitrate against a non-signatory when “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 contractual obligations.’”<sup>27</sup> These similar characterizations will be termed collectively as “Strand B”.

State courts have divergent opinions concerning whether to accept Strand A and/or Strand B. State courts in Mississippi<sup>28</sup>, Nevada<sup>29</sup>, Ohio<sup>30</sup>, and Texas<sup>31</sup> have expressly adopted Strand A.

<sup>23</sup> Alexandra Anna Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 712, 714 (2007).

<sup>24</sup> *MKI Sec. Corp.*, 92 N.Y.2d at 337.

<sup>25</sup> *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

<sup>26</sup> Hui, *supra* note 23 (citing *MS Dealer Serv.*, 177 F.3d at 947).

<sup>27</sup> *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994) (citing *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984)).

<sup>28</sup> *See, e.g.*, *Qualcomm Inc. v. Am. Wireless License Group, LLC*, 980 So.2d 261 (Miss. 2007), *cert. denied*, 128 S.Ct. 1890 (2008). The court stated that, “a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies.” *Id.* at 269 (citing *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703). But note that, in order to invoke Strand A in Mississippi, a signatory must show detrimental reliance. *See B. C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005).

<sup>29</sup> *See, e.g.*, *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 59 (2008).

<sup>30</sup> *See, e.g.*, *Cleveland-Akron-Canton Adver. Coop. v. Physician’s Weight Loss Ctrs. of Am., Inc.*, 184 Ohio App. 3d 805 (8th Dist. Cuyahoga County 2009).

<sup>31</sup> *See, e.g.*, *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182 (Tex. 2009). The court here refers to Strand A as the “direct benefits equitable estoppel,” where a non-signatory may be compelled to arbitrate its claims against a signatory where the non-signatory “seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.” *Id.* at 184 n.2 (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005)).

Other states' courts including Delaware,<sup>32</sup> Florida,<sup>33</sup> Texas,<sup>34</sup> and Georgia<sup>35</sup> have all explicitly adopted Strand B. Many of these opinions often make reference to federal case law, when deciding whether to adopt Strand A or Strand B.

Some states' courts, however, have refused to adopt either Strand A or Strand B. Illinois, for example, has refused to invoke the principal of equitable estoppel where there is no showing of "clear, concise, and unequivocal evidence of prejudicial reliance [by the signatory, in this case, the aggrieved party],"<sup>36</sup> thereby rejecting Strand B.<sup>37</sup> A Minnesota appellate court has also rejected Strand B.<sup>38</sup> One of Louisiana's appellate courts is in accord with Illinois in that it requires "justifiable reliance" to be shown to invoke equitable estoppel, making it a pre-requisite for a party to use Strand A.<sup>39</sup> Mississippi is in accord with both Illinois and Louisiana.<sup>40</sup> California's state appellate courts have split in their deci-

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<sup>32</sup> See, e.g., *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, No. Civ. A. 2037-N, 2006 WL 2473665 (Del. Ch. 2006); *Ishimaru v. Fung*, No. Civ. A. 929, 2005 WL 2899680 (Del. Ch. 2005).

<sup>33</sup> See, e.g., *Shetty v. Palm Beach Radiation Oncology Associates-Sunderam K. Shetty, M.D., P.A.*, 915 So.2d 1233 (Fla. Dist. Ct. App. 4th Dist. 2005).

<sup>34</sup> See, e.g., *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759 (Texas 2006); *Woodhaven Homes, Inc. v. Alford*, 143 S.W.3d 202 (Tex. App. Dallas 2004), *reh'g overruled* (Sept. 23, 2004).

<sup>35</sup> See, e.g., *Price v. Ernst & Young, LLP*, 274 Ga. App. 172, 617 S.E.2d 156 (2005).

<sup>36</sup> *Ervin v. Nokia, Inc.*, 349 Ill. App.3d 508, 514-15 (5th Dist. 2004), *appeal denied*, 211 Ill.2d 574 (2004) (citing *In re Marriage of Smith*, 347 Ill.App.3d 395, 399 (2004)) (internal citation omitted).

<sup>37</sup> The court in *Ervin v. Nokia* stated that in Illinois, "[a] claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person. The party asserting a claim of estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the facts, and such reliance must have been reasonable." *Id.* However, "Nokia does not contend that the facts of this case satisfy the requirements for equitable estoppel as defined by Illinois courts. When Ervin entered into the WSG with AT&T for cell phone service in July of 2000, he took no action from which Nokia could have reasonably relied on to its detriment that Ervin had agreed to arbitrate any claim he had against Nokia." *Id.* at 515. The court then refused to adopt Strand B, as discussed by the court in *MS Dealer Serv. Corp.*, 177 F.3d at 942, because it found that court's characterization of Strand B as "inconsistent with the basic principle of arbitration that 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 516 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353 (1960)).

<sup>38</sup> See, e.g., *St. Paul Fire and Marine Ins. Co. v. API, Inc.*, 2004 WL 2161181 (Minn. Ct. App. 2004).

<sup>39</sup> See *Billieson v. City of New Orleans*, 863 So.2d 557 (La. Ct. App. 4th Cir. 2003), *writ denied*, 870 So.2d 303 (La. 2004); *Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc.*, 871 So.2d 380 (La. Ct. App. 4th Cir. 2004), *writ denied*, 876 So.2d 834 (La. 2004).

<sup>40</sup> See *B. C. Rogers Poultry, Inc.*, 911 So.2d 483 (Miss. 2005).

sions, with some deciding that justifiable reliance is a prerequisite to invoking Strand A or Strand B, while others have not.<sup>41</sup>

Alabama's Supreme Court has expressly rejected Strand A where a signatory attempted to enforce an arbitration clause against a non-signatory.<sup>42</sup> The court reasoned that when a relationship arises out of a particular agreement, it would be wholly unfair for a signatory to compel a non-signatory to arbitrate given that the non-signatory was not part of the original agreement and never agreed to arbitrate.<sup>43</sup> However, the court has officially adopted Strand B in cases where a non-signatory seeks to compel arbitration on a signatory, as long as it is clear from the arbitration provision that the signatories foresaw that non-signatories could compel arbitration.<sup>44</sup> Yet, the Court also said that a non-signatory who seeks to compel a signatory to arbitrate the portion of Strand B concerning "intertwined claims" theory must show that an arbitration proceeding between the signatories is pending or currently occurring.<sup>45</sup>

It is clear, therefore, that there are considerable disagreements over equitable estoppel theory within each particular state, among the states, and between the states and the federal government. On the one hand, there is general agreement in most jurisdictions that Strand A is a valid theory because a "party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him,"<sup>46</sup> given the rationale that not doing so "would both disregard equity and contravene the pur-

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<sup>41</sup> See, e.g., *Coachmen Indus., Inc. v. Freightliner LLC*, No. C045709, 2005 WL 1714234 (Cal. App. 3d Dist. 2005) (example of rejecting Strand A); *California Chiropractic Ass'n v. Am. Specialty Health Plans, Inc.*, No. D039238, 2003 WL 1870963 (example of rejecting Strand B); cf. *EDS Inv. Co. I, L.L.C. v. Fortrend Intern., L.L.C.* No. A111334, 2006 WL 933645 (Cal. App. 1st Dist. 2006) (accepting Strand A); *Metalclad Corp. v. Ventana Envtl. Org. P'ship*, 109 Cal. App. 4th 1705 (4th Dist. 2003) (applying federal law) (accepting Strand B).

<sup>42</sup> See, e.g., *Allied Williams Cos., Inc. v. Davis*, 901 So. 2d 696 (Ala. 2004).

<sup>43</sup> See *id.* See also *SouthTrust Bank v. Ford*, 835 So.2d 990 (Ala. 2002).

<sup>44</sup> See, e.g., *ECS, Inc. v. Goff Group, Inc.*, 880 So.2d 1140 (Ala. 2003). The contract at issue contained the requirement of arbitration of any dispute arising out of the agreement, "including its formation, validity, or applicability to the dispute . . ." *Id.* at 1142. The court found that the scope of the agreement was "not so restrictive as to preclude arbitration by [ECS]." *Id.* at 1147 (citing *Ex parte Stamey*, 776 So.2d 85, 89 (Ala. 2000)).

<sup>45</sup> See, e.g., *Fountain v. Ingram*, 926 So.2d 333 (Ala. 2005); *Ex parte Cox*, 828 So.2d 295 (Ala. 2002).

<sup>46</sup> *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).

poses of the Arbitration Act.”<sup>47</sup> Strand B, on the other hand, has been attacked for not following sound contractual principles given that a non-signatory should not have a right to compel arbitration when there is no agreement between it and a signatory.<sup>48</sup>

Strand B, however, is grounded in sound contractual principles. While it is true that no party can be compelled to arbitrate, finding intent to arbitrate is not cut and dry.<sup>49</sup> Following a federal policy favoring arbitration, intentions are construed liberally with respect to finding an agreement to arbitrate.<sup>50</sup> One example is when a signatory tries to avoid a valid arbitration clause by recasting what appears to be a breach of contract claim against a non-signatory as a tort claim.<sup>51</sup>

For example, the court in *Hughes Masonry*<sup>52</sup> found that the defendant, J.A., a non-signatory, could not simply recast his basic breach of contract claims as intentional and negligent interference with contract claims just to avoid the arbitration clause in the underlying contract to which it is a third party.<sup>53</sup> Although J.A. was not a signatory to the contract, it was mentioned in various sections of the agreement in question (as “Construction Manager”) and the agreement formed the basis for the plaintiff-signatory’s, Hughes’, claims against it.<sup>54</sup> Given that equitable estoppel is an equitable doctrine, the court reasoned that it would be wholly unfair for J.A., the non-signatory, to be sued for claims derived from the contract – cloaked in tort – and not be able to invoke the arbitration clause under the agreement.<sup>55</sup> The Seventh Circuit adopted the *Tepper*<sup>56</sup> rationale: “In short, [a plaintiff-signatory] cannot have it both ways. [It] cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage.”<sup>57</sup>

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<sup>47</sup> *Id.* (citing *Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)). *But see Ervin*, 349 Ill. App.3d at 542 (stating, in dicta, that it would refuse to expand the equitable to both Strand A and Strand B).

<sup>48</sup> *Hui*, *supra* note 23, at 737.

<sup>49</sup> *See, e.g., McBro Planning and Dev. Co. v. Triangle Elect. Const. Comp., Inc.* 741 F.2d 342, 344 (11th Cir. 1984) (agreement specifically disclaimed any third-party beneficiaries, yet the court found intent to be bound given that the contractor’s claims were “intimately founded in and intertwined with the underlying contract obligations”).

<sup>50</sup> *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>51</sup> *See, e.g., Hughes Masonry Co., Inc. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981).

<sup>52</sup> *See id.*

<sup>53</sup> *See id.* at 838-39. *See also McBro Planning*, 741 F.2d at 342, 344 n.5.

<sup>54</sup> *See Hughes Masonry*, 659 F.2d at 839.

<sup>55</sup> *Id.*

<sup>56</sup> *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp 688, 692 (S.D.N.Y. 1966).

<sup>57</sup> *Hughes Masonry*, 659 F.2d at 839 (citing *Tepper*, 259 F. Supp at 692).

Also, a non-signatory to a contract would have the ability to compel a signatory to arbitrate under very limited circumstances. While it is true that the right to compel arbitration is ordinarily reserved to those who mutually agree to arbitrate,<sup>58</sup> the cases where a court should invoke “Strand B” equitable estoppel would be exceptions to the rule, and only apply to situations that fit within the test set forth in *MS Dealer Services Corp. v. Franklin*<sup>59</sup>: (1) when the signatory to a written agreement containing an arbitration clause relied on the written agreement’s terms in asserting its claims against the non-signatory, or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one of the signatories to the contract.<sup>60</sup> The first sub-strand of Strand B is similar to the classical definition of equitable estoppel,<sup>61</sup> while the second strand requires the court “to determine whether those claims fall within the scope of the arbitration clause contained in the [agreement].”<sup>62</sup> Given that Strand B should be an exception to the general rule stated above, its limited usage would be warranted because it would give a court the flexibility to use equitable estoppel when it would prevent an unjust result. Moreover, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>63</sup>

While the Second Circuit and various appellate courts within New York have adopted Strand B, thereby compelling signatories to arbitrate their claims against non-signatories, the New York Court of Appeals has not officially ruled on the validity of Strand B.<sup>64</sup> This note will overview some of the equitable doctrines compelling arbitration that New York courts have adopted. Then, the

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<sup>58</sup> See 9 U.S.C. § 2 (2011).

<sup>59</sup> 177 F.3d at 947.

<sup>60</sup> *Id.*

<sup>61</sup> See *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (2006) (quoting *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 (1983)). The test, according to the aforementioned cases in this footnote, can be stated as follows: a party who claims to be a third-party beneficiary must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.

<sup>62</sup> *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d at 947 (11th Cir. 1999) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d at 758 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994)).

<sup>63</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. at 626 (1985) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-5 (1983)).

<sup>64</sup> See, e.g., *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773 (2d Cir. 1995); The Court of Appeals encountered the issue in *Crawford v. Merrill Lynch, Pierce, Fenner & Smith*,

note will discuss in further detail the doctrine of equitable estoppel as it relates to Strands A and B. Finally, this note will set out arguments for why the New York Court of Appeals should officially adopt Strand B.

### III. EQUITABLE THEORIES COMPELLING ARBITRATION

Courts in New York have, for the most part, followed prevailing equitable theories compelling parties to arbitrate. The Supreme Court of the United States has set out a framework for how a federal court should determine whether there is an enforceable arbitration agreement when there is no express agreement between the parties.<sup>65</sup> First, a federal court should grant utmost deference to the contract and its four corners to determine the scope of the arbitration agreement.<sup>66</sup> Second, a federal court should defer to “ordinary state-law principles that govern the formation of contracts.”<sup>67</sup> Third, contracts must be enforced with respect to their terms and the intentions of the parties.<sup>68</sup>

Given this framework, the Second Circuit should defer to New York’s ordinary principles of contract law when determining if equitable estoppel is a proper theory enforcing a contract by or against a third-party.<sup>69</sup> The Second Circuit has stated that five theories exist for binding third parties to arbitrate agreements.<sup>70</sup> These theories are: (A) incorporation by reference, (B) assumption, (C) agency, (D) veil-piercing/alter-ego, and (E) equitable estoppel.<sup>71</sup>

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Inc., 35 N.Y.2d 291 (1974), but based its ruling on intent to be bound instead of equitable estoppel.

<sup>65</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>66</sup> See *id.* at 943 (“arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration”). See also *id.* at 942 (“a party who has not agreed to arbitrate will normally have a right to a court’s decision about the merits of its disputes”).

<sup>67</sup> *Id.* at 944.

<sup>68</sup> See *id.* at 947.

<sup>69</sup> See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” (emphasis in original)).

<sup>70</sup> *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995).

<sup>71</sup> *Id.*

A. *Incorporation by Reference*

New York recognizes a signatory's ability to compel a non-signatory to arbitrate by invoking the doctrine of incorporation by reference.<sup>72</sup> In the context of compelling arbitration, courts most often invoke incorporation by reference, when the signatories have one document that contains an arbitration clause, but such a clause does not exist in another contract covering the matter in dispute.<sup>73</sup> In order for this doctrine to be invoked, there must be a clear intention, or "specific intent," to arbitrate.<sup>74</sup> In the context of surety agreements and subcontracts, where only the subcontract has an arbitration clause, the New York Court of Appeals stated that:

[i]n defining the agreement made by the surety company it is accurate to say that it cannot be held to have agreed to participate in arbitration proceedings with respect to any dispute whatsoever. Certainly there is no language in the performance bond on which to base any argument that it was obligated to submit disputes arising under its performance bond (as distinguished from disputes arising under the subcontract) to resolution by arbitration. The arbitration clause in the subcontract provided only for arbitration of disputes arising under that contract. But that does not end the analysis of the obligations of the surety company. Although it did not agree to participate in any arbitration, it did accept the agreement of the general contractor and the subcontractor that disputes between them would be settled by arbitration. An implicit corollary of that acceptance was agreement by the surety company that for purposes of later determining its liability under its performance bond, it would accept and be bound by the resolution reached in the arbitration forum of any dispute between the general contractor and the subcontractor.<sup>75</sup>

Examples of New York courts using the incorporation by reference doctrine include construction contracts and contracts for

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<sup>72</sup> See *ADC Const., LLC v. Empire City Subway Co., Ltd.*, 736 N.Y.S.2d 6, 7 (N.Y. App. Div. 2002).

<sup>73</sup> See *United States Fid. and Guar. Co. v. W. Point Constr. Co.*, 837 F.2d 1507, 1508 (11th Cir. 1988).

<sup>74</sup> See *General Ry. Signal Corp. v. L.K. Comstock & Co., Inc.*, 678 N.Y.S.2d 208, 208 (N.Y. App. Div. 1998); See *In re Fidelity and Deposit Co. of Maryland v. Parsons & Whittemore Contractors Corp.*, 48 N.Y.2d 127, 131 (1979).

<sup>75</sup> See *In re Fidelity and Deposit Co. of Maryland v. Parsons & Whittemore Contractors Corp.*, 48 N.Y.2d 127, 131-32 (1979).

the purchase of goods.<sup>76</sup> For construction contracts, courts in New York generally agree that if a subcontract references a general contract with an arbitration clause, this clause will be enforceable because it was incorporated by reference.<sup>77</sup> For example, in *ADC Const., LLC v. Empire City Subway Co., Ltd.*,<sup>78</sup> the following passage was held to be incorporated by reference in an interference subcontract at issue:

Any dispute between the [utility] Company(ies) and the Contractor regarding any issue related to the performance of, or payment for, interference work, including but not limited to, any indirect or impact costs incurred by the Contractor due to the Interference Work and/or to the existence of facilities owned or operated by the Company(ies) on the line of the work', was to be arbitrated in accordance with specified procedures designed to prevent delay contained in paragraph 8.<sup>79</sup>

Although the subcontract did not contain an arbitration clause, the court found that the arbitration agreement in another section of the subcontract specifically stated that the subcontract arose out of and was made pursuant to the plaintiff's general contract with the city and therefore, the arbitration clause was incorporated by reference into the subcontract.<sup>80</sup>

With respect to contracts for the purchase of goods, confirmation orders referring to original purchase orders with arbitration clauses were also held to incorporate those clauses by reference.<sup>81</sup> The First Department reasons that the confirmation orders directly referenced the original purchase order, which contained the arbitration agreement, by including the words "Confirmation of Accepted Order" on the confirmations, referring specifically to each

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<sup>76</sup> See *In re Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 84 (1953) (contracts for purchase of textiles held to incorporate the arbitration clauses of standard cotton textile sales note by a statement that such a note "is incorporated as a part of this agreement and together herewith constitutes entire contract between buyer and seller"). See also *In re Wachusett Spinning Mills, Inc.*, 183 N.Y.S.2d 601, 603 (N.Y. App. Div. 1959), order affirmed, 6 N.Y.2d 948 (1959) (confirmations referring to original purchase orders, which contained an arbitration clause, were held to incorporate the arbitration clause by reference).

<sup>77</sup> See *ADC Const., LLC v. Empire City Subway Co., Ltd.* 736 N.Y.S.2d 6, 6 (N.Y. App. Div. 2002). See also *Walter Concrete Const. Corp. v. Lederle Labs*, 734 N.Y.S.2d 80 (N.Y. App. Div. 2001), order affirmed, 99 N.Y.2d 603 (2003) (extending incorporation by reference to surety bond contracts).

<sup>78</sup> See *ADC Const., LLC v. Empire City Subway Co., Ltd.* 736 N.Y.S.2d at 6 (N.Y. App. Div. 2002).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *In re Wachusett Spinning Mills*, 183 N.Y.S.2d at 603.

order by its unique number and including the statement, “[w]e have accepted your order subject to credit approval by our Factors, as follows.”<sup>82</sup> Thus, New York courts have used the doctrine of incorporation by reference in several circumstances.

### B. *Assumption*

A non-signatory could be bound to an arbitration agreement if his conduct demonstrates that he “has assumed an obligation to arbitrate,”<sup>83</sup> or in the business world context, “when one entity succeeds another.”<sup>84</sup> There is not much case law in New York courts with respect to the first strand of the doctrine, assuming an obligation to arbitrate; however, the second strand, where one entity succeeds another, has been litigated.

Although generally, “a corporation which acquires the assets of another corporation is not liable for the torts of its predecessors,”<sup>85</sup> in New York, a successor in interest can be liable even if an actual merger does not take place.<sup>86</sup> New York recognizes the de facto merger doctrine, where although the purchase and sale agreement concerns asset sales and not merged entities, the court will look behind the structure of the deal and hold the purchasing party liable for the agreements of its target.<sup>87</sup> In a case where an agreement between two parties contains an arbitration clause, a party that substantially purchases the assets of a prior entity and exhibits the following four factors:

[First,] [c]ontinuity of ownership; [second,] cessation of ordinary business and dissolution of the predecessor as soon as possible; [third,] assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; [fourth] a continuity of management, personnel, physical location assets, and general business operation,<sup>88</sup>

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<sup>82</sup> *Id.* at 603.

<sup>83</sup> J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate*, 21 *REV. LITIG.* 593, 599 (2002) (citing *Gvozdenovic v. United Airlines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991)).

<sup>84</sup> *Id.*

<sup>85</sup> *Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 244 (1983).

<sup>86</sup> *See AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 803 N.Y.S.2d 118, 120 (N.Y. App. Div. 2005).

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* (quoting *Fitzgerald v. Fahnestock & Co., Inc.*, 730 N.Y.S.2d 70,71 (N.Y. App. Div. 2001)).

will be held to have assumed the obligations under the first contract, including the arbitration clause.<sup>89</sup> It is important to note that not all of the aforementioned four factors need to be found in order for a court to hold that there has been a de facto merger;<sup>90</sup> yet the First Department, in dicta, has stated that factors three and four are insufficient to find a de facto merger.<sup>91</sup>

### C. Agency

Under ordinary rules of contract and agency law, a non-signatory principal may be forced to arbitrate by his agent, provided that the agent acted within his granted authority.<sup>92</sup>

Courts in New York have upheld the agency doctrine in cases involving investment management agreements where the investment manager has contracted with broker/dealers on behalf of his client, the principal, even though the principal never signed the contract.<sup>93</sup> The First Department found that it was not important that the agreement between the agent and third-party precede the agency relationship.<sup>94</sup> In addition, the court found that the investment manager was an agent for its principal whenever it executed a transaction on its behalf with third parties.<sup>95</sup> When the agent binds the principal to a third-party through a contract with an arbitration clause, the principal is bound to arbitrate.<sup>96</sup>

A related set of cases involve escrow agents<sup>97</sup> and sophisticated investors.<sup>98</sup> In a real estate transaction where money is put in escrow pending the purchase of an asset, any agreement that the escrow agent enters into on behalf of the principal will bind the principal in its entirety.<sup>99</sup> Thus, when an escrow agent opens up a brokerage account with a third party to manage the money, as was the case in *99 Commercial Street*,<sup>100</sup> the principal will be bound by

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<sup>89</sup> *Id.*

<sup>90</sup> *Fitzgerald*, 730 N.Y.S.2d at 71.

<sup>91</sup> *In re New York City Asbestos Litig.*, 789 N.Y.S.2d 484, 486 (N.Y. App. Div. 2005) (concerning tort creditors).

<sup>92</sup> *See Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995).

<sup>93</sup> *Jefferies & Co., Inc. v. Infinity Equities I, LLC*, 887 N.Y.S.2d 81, 81 (N.Y. App. Div. 2009).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See 99 Commercial Street, Inc. v. Goldberg*, 811 F.Supp. 900 (S.D.N.Y. 1993).

<sup>98</sup> *See Scone Invs., L.P., v. Am. Third Mkt. Corp.*, 992 F.Supp. 378 (S.D.N.Y. 1998).

<sup>99</sup> *See 99 Commercial Street*, 811 F.Supp at 900.

<sup>100</sup> *See id.*

the agreement to arbitrate.<sup>101</sup> The court in *99 Commercial Street* reasoned that compelling arbitration was warranted because the escrow agent acted with express authority under the escrow agreement to bind the principal to a customer agreement with a third party, which contained the arbitration clause.<sup>102</sup> Moreover, the defendant in *99 Commercial Street* was an explicit third-party beneficiary, as stated in the customer agreement and thus, *a fortiori*, he was entitled to compel arbitration.<sup>103</sup>

Sophisticated investors are assumed to be familiar with various financial industry practices, including the requirement of arbitration clauses by the securities industry.<sup>104</sup> As a sophisticated investor, the court charged the plaintiff in *Scone Investments, L.P.* with constructive knowledge of an arbitration clause that his agent and broker executed with a third party on his behalf.<sup>105</sup> The court found that he explicitly consented to transactions completed by his broker through an explicit broker agreement with a non-discretionary approval provision and through the broker's power to bind him to the agreement in question with a third party. Plaintiff had implicitly consented to arbitrate his claims against the defendants.<sup>106</sup>

#### D. *Alter Ego/Veil Piercing*

A fourth theory for compelling arbitration is the alter ego/veil piercing doctrine, which courts invoke when a party seeks to hold the owners or shareholders liable for an obligation of the corpora-

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<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 907. In agency law, "express authority" is authority distinctly, plainly expressed orally or in writing while "implied authority" exists when verbal or other acts by a principal reasonably give the appearance of authority to the agent. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l. Inc.*, 241 F.Supp. 2d 246, 259 (S.D.N.Y. 2002) (applying New York law) (citations omitted).

<sup>103</sup> *Id.* at 902.

<sup>104</sup> *See Scone Invs., L.P., v. Am. Third Mkt. Corp.*, 992 F. Supp. 378, 381 (S.D.N.Y. 1998) (citing *Ilan v. Shearson/Am. Express, Inc.*, 632 F. Supp. 886, 890 (S.D.N.Y. 1985)). Note that a "sophisticated investor" is a legal conclusion based on a variety of factors including education level and investing experience. Plaintiff here was an attorney and general partner of *Scone Investments, L.P.*, and the court said that this clearly qualified him as a sophisticated investor. *See id.* Sophisticated investors also include investment funds, experienced and wealthy individuals, and publically-traded corporations. *See* 4B N.Y. PRACTICE, *Commercial Litigation in New York State Courts* § 81:12 (2010). The importance for the sophisticated investor characterization is that courts will hold these individuals and corporations to a higher standard, especially when determining reasonable reliance. *Id.* (citations omitted).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

tion.<sup>107</sup> The general rule in New York is: “Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, ‘pierce the corporate veil’, whenever necessary ‘to prevent fraud or to achieve equity.’”<sup>108</sup> However, in practice, courts in New York (and elsewhere)<sup>109</sup> have been reluctant to apply this doctrine and have thus found that “a corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement.”<sup>110</sup> Rather, a movant needs to show that the veil should be pierced “in two broad situations: to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.”<sup>111</sup> In the context of parental domination over a subsidiary, the control has to be so blatant that it is as if the parent and subsidiary corporations are actually one unit.<sup>112</sup>

While contract matters are issues of state law, the Second Circuit has invoked a list of factors to consider when determining if piercing the corporate veil is warranted.<sup>113</sup> The Second Circuit

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<sup>107</sup> The alter ego/veil piercing doctrine is one that courts may use, although sparingly, to hold liable individual stakeholders, who would otherwise be protected from the limited liability feature of corporations, for the liabilities of the corporation. When a court engages in piercing the corporate veil or finds that a corporation is simply the alter ego of a natural person or another entity, it places the interests of creditors, both tort and contractual, above those of stakeholders who used the corporate form because of the limited liability feature. See ALAN R. PALMITER, *EXAMPLES & EXPLANATIONS: CORPORATIONS* 619-32 (6th ed. 2009); *Morris v. New York State Dept. of Taxation and Finance*, 82 N.Y.2d 135, 140-41 (1993).

<sup>108</sup> *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966) (quoting *International Aircraft Trading Co. v. Mfrs. Trust Co.*, 297 N.Y. 285, 292 (1948)).

<sup>109</sup> See *Palmiter*, *supra* note 109, at 619-32. The reasons offered for why veil piercing is an unfavored doctrine include the potential for “chill[ing] capital formation and desirable risk taking.” *Id.* at 620. In addition, *Palmiter* points out that instead of piercing the veil, courts have recognized that contract creditors can protect themselves through contract and tort creditors can often rely on insurance or government regulation. *Id.*

<sup>110</sup> *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 777 (2d Cir. 1995).

<sup>111</sup> *Id.*

<sup>112</sup> *Hui*, *supra* note 23, at 724.

<sup>113</sup> *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993) (citations omitted). These factors include:

- (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records and the like,
- (2) inadequate capitalization,
- (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes,
- (4) overlap in ownership, officers, directors, and personnel,
- (5) common office space, address and telephone numbers of corporate entities,
- (6) the amount of business discretion displayed by the allegedly dominated corporation,
- (7) whether the related corporations deal with the dominated corporation at arm’s length,
- (8) whether the corporations are treated as independent profit centers,
- (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and
- (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

notes that a party asking it to pierce the corporate veil has an uphill battle, because if the burden was easier,

[it] would defeat the ordinary and customary expectations of experienced business persons. The principal reasons corporations form wholly owned . . . subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary. . . . The practice of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of . . . trade.<sup>114</sup>

In the context of arbitration, given that veil piercing is an equitable remedy available to enforce a breach of contract claim, courts will use the doctrine to compel a non-signatory to arbitrate when that non-signatory exercises complete control over the subsidiary.<sup>115</sup> In New York, the Court of Appeals has taken a very conservative approach with respect to veil-piercing as a basis to compel a signatory to arbitrate against a non-signatory.<sup>116</sup> The court has held that without showing abuse of the corporate form, a non-signatory corporation cannot be forced to arbitrate.<sup>117</sup> The court has stated that: "those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences."<sup>118</sup>

### E. *Equitable Estoppel*

Equitable estoppel, as applied in compelling arbitration, has developed as two distinct theories. One theory, termed the direct benefits theory (Strand A), states that if a non-signatory party knowingly accepted the benefits of an agreement, it can be estopped from denying its obligation to arbitrate.<sup>119</sup> The other theory compels a signatory to arbitrate because of "the close relationship between the entities involved, as well as the relation-

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*Id.*

<sup>114</sup> Sarhank Group v. Oracle Corp., 404 F.3d 657, 662 (2d Cir. 2005).

<sup>115</sup> Hui, *supra* note 23, at 724.

<sup>116</sup> See TNS Holdings, Inc. v. MKI Securities Corp., 92 N.Y.2d 335, 337 (1998).

<sup>117</sup> See *id.*

<sup>118</sup> *Id.* (citations omitted). See also Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141-42 (1993) (evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance).

<sup>119</sup> Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993). See also Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 778-79 (2d Cir. 1995).

ship of the alleged wrongs to the non[-]signatory's obligation and duties in the contract . . . and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations [(Strand B)].'<sup>120</sup>

Strand B has been further split into two sub-theories: The first sub-theory applies when the signatory to a contract with an arbitration clause "must rely on the terms of the written agreement in asserting its claims" against the non-signatory.<sup>121</sup> The second sub-theory applies "when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract."<sup>122</sup> The rationale for invoking equitable estoppel based on these two sub-theories is that alternatively, "arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."<sup>123</sup>

A good illustration of Strand B is *MS Dealer Service Corp. v. Franklin* ("MS Dealer").<sup>124</sup> In this case, plaintiff Sharon Franklin and a car dealer executed a Buyers Order for the purchase of a vehicle.<sup>125</sup> The Buyers Order incorporated by reference a Retail Installment Contract which provided that Franklin would pay \$990.00 for a service contract through MS Dealer.<sup>126</sup> The Buyers Order contained an arbitration clause which elected the FAA as the applicable law.<sup>127</sup> MS Dealer was not a signatory to either the Buyers Order or Retail Installment Contract.<sup>128</sup> Franklin took possession of the car and found several defects, and then filed suit in Alabama state court against MS Dealer among others alleging breach of contract, breach of warranty, fraud, and conspiracy.<sup>129</sup>

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<sup>120</sup> *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994) (quoting *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co., Inc.* 741 F.2d 342, 344 (11th Cir. 1984)); *see also* *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988).

<sup>121</sup> *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999) (citing *Sunkist Soft Drinks*, 10 F.3d at 757).

<sup>122</sup> *Id.* (quoting *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1433 (M.D. Ala. 1997)).

<sup>123</sup> *Id.* (quoting *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)).

<sup>124</sup> *See MS Dealer Serv. Corp.*, 177 F.3d 942.

<sup>125</sup> *Id.* at 944.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *MS Dealer Serv. Corp.* at 944-45.

Franklin's claims against MS Dealer, the non-signatory, arose out of the Retail Installment Contract and the \$990.00 charge.<sup>130</sup> MS Dealer filed a petition in federal district court to compel Franklin to arbitrate her claims.<sup>131</sup> While the district court, upon rehearing, found MS Dealer was not entitled to compel arbitration because it was a non-signatory to the Buyer's Order, the Eleventh Circuit reversed, invoking both sub-theories of Strand B.<sup>132</sup>

With respect to the first sub-theory, the court found that Franklin had to rely on the terms of the Buyer's Order and Retail Installment Contract because her claims, even though cloaked as tort claims against MS Dealer, "depend entirely upon her contractual obligation to pay \$990.00 for the service contract."<sup>133</sup>

With respect to the second sub-theory, Franklin claimed that MS Dealer, a non-signatory, worked collusively with Jim Burke, a signatory to the Buyers Order, and others, and given the fact that her claims focused on the Buyer's Order (her \$990.00 obligation),<sup>134</sup> Franklin's "allegations of such pre-arranged, collusive behavior establish[ ] that [her] claims against [MS Dealer are] intimately founded and intertwined with the obligations imposed by the [Buyer's Order]."<sup>135</sup> Therefore, under both sub-theories, Franklin, the signatory, was forced to arbitrate against MS Dealer, a non-signatory.

It is important to note also that even though Franklin attempted to argue non-contractual grievances against MS Dealer, the court found that "it is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than in contract."<sup>136</sup>

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<sup>130</sup> *Id.* at 945.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 947-48.

<sup>133</sup> *Id.* at 948.

<sup>134</sup> *Id.*

<sup>135</sup> *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d at 948 (11th Cir. 1999) (quoting elements of *Boyd v. Homes of Legend, Inc.*, 981 F.Supp.1423, 1433 (M.D. Ala. 1997)).

<sup>136</sup> *MS Dealer Serv. Corp.*, 177 F.3d at 948, n.4 (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d at 758 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994)).

## IV. STRAND A: SIGNATORY COMPELS A NON-SIGNATORY TO ARBITRATE

The New York Court of Appeals has implicitly adopted Strand A by focusing on a non-signatory's intent to be bound.<sup>137</sup> The court stated that "an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by contract."<sup>138</sup>

In *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP*,<sup>139</sup> the New York Court of Appeals focused on the evidence of the parties' intent to be bound by an agreement and found it immaterial that neither the church, the plaintiff, nor the defendant, signed the agreement.<sup>140</sup> Moreover, intent to be bound can be found by the benefit the party received under the contract, which in this case was the very essence of the breach of contract claim.<sup>141</sup> The court said that the Church "may not pick and choose which provisions suit its purposes, disclaiming part of a contract while alleging breach of the rest."<sup>142</sup>

While the New York Court of Appeals has only implicitly adopted Strand A, some lower courts have explicitly adopted Strand A. The First Department adopted Strand A by referring to *MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC*,<sup>143</sup> a Second Circuit decision, cited in *HRH Construction LLC v. MTA*.<sup>144</sup> In *HRH Construction LLC*, the court found that the acquirer of a parent company's assets, HRH LLC, received a direct benefit of over \$7,000,000 from a contract between a subsidiary of its acquiree and the MTA that contained an arbitration clause.<sup>145</sup> Therefore, the court reasoned, HRH LLC, the non-signatory to the contract, was estopped from avoiding arbitration because of the direct benefit it received.<sup>146</sup>

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<sup>137</sup> See *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP*, 6 N.Y.3d 371, 373 (2006).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 374.

<sup>140</sup> *Id.*

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> *MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001).

<sup>144</sup> *HRH Constr. LLC v. MTA*, 823 N.Y.S.2d 140, 141 (N.Y. App. Div. 2006).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (citing *MAG Portfolio*, 268 F.3d at 61).

But the court in *MAG Portfolio*, warned that the benefit must be “direct, that is flowing from the agreement.”<sup>147</sup> Thus, to be successful, a signatory must prove that a non-signatory “knowingly exploit[ed] the [contract with an arbitration clause] and thereby received a direct benefit from the contract.”<sup>148</sup> In contrast, “the benefit from an agreement is indirect where the non-signatory exploits the contractual relation of parties to an agreement, but does not exploit (or thereby assume) the agreement itself.”<sup>149</sup>

In cases such as *MAG Portfolio*, the fact that a competitor (a non-signatory) purchases a business, which is a signatory to an agreement, to exploit its agreement with another competitor (the other signatory) will be insufficient to invoke the doctrine of equitable estoppel to compel the non-signatory to arbitrate.<sup>150</sup> In *MAG Portfolio*, the court concluded that in order for MAG, the signatory of a purchase agreement with an arbitration clause, to compel arbitration against the “New Merlins,”<sup>151</sup> a non-signatory to the purchase agreement, it must show that the New Merlins passes the *Thomson-CSF* test: “‘know[ing] exploitat[ion] [of] the purchase contract and thereby received a direct benefit from the contract.”<sup>152</sup> The Second Circuit applied this stringent test and found that the *Thomson-CSF* test was not satisfied given that,

there is no relationship between the signatories and the non[-]signatory except that they are competitors for the same business. Even assuming a less than arms length relationship between the old and new Merlins, the most one could say is that the specific terms of the contractual relation between MAG and the old Merlins had been exploited by Weisbrod [principal shareholder of both the old and new Merlins, former partner to the owner of MAG] of to the disadvantage of MAG. The benefit to Weisbrod would not flow, *in such a case, from the agreement itself, but from his ability to evade the intent of the agreement through the creation of alter egos.*<sup>153</sup>

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<sup>147</sup> *MAG Portfolio*, 268 F.3d at 61.

<sup>148</sup> *Id.* at 62 (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d at 778 (2d Cir. 1995)).

<sup>149</sup> *Id.* at 61 (citing *Thomson-CSF*, 64 F.3d at 778-79).

<sup>150</sup> *See id.* at 62-63.

<sup>151</sup> *Id.* at 62.

<sup>152</sup> *Thomson-CSF*, 64 F.3d at 778.

<sup>153</sup> *MAG Portfolio*, 268 F.3d at 63 (emphasis added). As discussed in the Veil Piercing/Alter Ego section above, a finding by the court that such an instance existed would be rare. Regardless, even if the new Merlins were an alter ego of Weisbrod, this would not satisfy the *Thomson-CSF* test cited above.

Moreover, the Second Circuit notes that a signatory cannot invoke Strand A against a non-signatory when there is no agreement or intent to contract for such a clause.<sup>154</sup> The notion is that “[a]rbitration is a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so.”<sup>155</sup> The implication here is that Strand A, like its counterpart Strand B, will present significant obstacles for those who intend to assert it and the court will not apply the doctrine unless one of the *Thomson-CSF* tests can be satisfied.

#### V. STRAND B: NON-SIGNATORY COMPELS A SIGNATORY TO ARBITRATE

A second theory of equitable estoppel has been implemented by various federal circuit courts to compel signatories to arbitrate their claims against non-signatories.<sup>156</sup> In these cases, a signatory was forced to arbitrate with a non-signatory because of “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 contractual obligations.’”<sup>157</sup>

The New York Court of Appeals has not ruled explicitly on this matter, although it has set forth some precedent on a related issue, consent to arbitrate. In an older case, *Crawford v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*,<sup>158</sup> the court held that a signatory to an employment agreement with an arbitration clause, Crawford, was estopped from forcing the matter to be arbitrated in a different venue, even though Merrill Lynch did not actually sign the agreement.<sup>159</sup> Here the court focused on whether the “non-

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<sup>154</sup> *Thomson-CSF*, 64 F.3d at 779.

<sup>155</sup> *Id.* (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

<sup>156</sup> See *Thomson-CSF*, 64 F.3d at 779; see also *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994); see also *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984).

<sup>157</sup> *Sunkist Soft Drinks*, 10 F.3d at 757 (quoting *McBro Planning*, 741 F.2d at 344) (emphasis added).

<sup>158</sup> 35 N.Y.2d 291 (1974).

<sup>159</sup> *Id.* at 299-300. This case is interesting given that both sides eventually agreed to some form of arbitration but fought over whether through the NYSE or through the American Arbitration Association. The Court held that even though Merrill Lynch did not sign Crawford’s

signatory” would have been a signatory but for its not actually signing the contract.

A lower court expanded upon *Crawford* to cover cases where a signatory has consistently treated an agreement as the governing document but then tries to avoid arbitration because the other party did not sign as “baseless.”<sup>160</sup> The First Department further stated that “[a signatory’s] effort to avoid the arbitration clause is particularly disingenuous, in light of the fact that [signatory] is the one whose conduct most clearly shows intent to be bound by the contract containing this clause.”<sup>161</sup>

In a later case, a signatory to two cellular services orders containing arbitration clauses in the attached cellular service agreements, which were not signed by the defendant, Bell Atlantic Mobile, was estopped from preventing arbitration because his claim not to arbitrate is “inconsistent with his claim that they are liable to him under those [a]greements for breaches of contract.”<sup>162</sup>

## VI. NEW YORK COURT OF APPEALS SHOULD EXPLICITLY ADOPT STRAND B

Given that the Second Circuit is the highest federal court in New York, and given the Court of Appeals’ explicit desire to have consistency among its decisions concerning cases that arise under either the FAA or NY CPLR §7501, the Second Circuit’s decisions concerning equitable estoppel should be officially adopted by the Court of Appeals.<sup>163</sup>

The New York Court of Appeals believes that for the most part, there should be consistency between federal and state law with respect to arbitration.<sup>164</sup> Thus, the Court of Appeals would agree that doctrines espoused to compel arbitration under either the FAA or N.Y. C.P.L.R. § 7501<sup>165</sup> should be consistent whenever

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stock exchange application, it had agreed to arbitrate any matters arising under the application, including the commissions earned by *Crawford*. *See id.*

<sup>160</sup> *Rudolph & Beer LLP v. Roberts*, 88 N.Y.S.2d 553, 553 (N.Y. App. Div. 1999).

<sup>161</sup> *Id.*

<sup>162</sup> *Ranieri v. Bell Atlantic Mobile*, 759 N.Y.S.2d 448, 448 (N.Y. App. Div. 2003).

<sup>163</sup> *See In re Weinrott (Carp)*, 32 N.Y.2d 190, 199-200 (1973).

<sup>164</sup> *See id.*

<sup>165</sup> N.Y. C.P.L.R. §7501 (McKinney 2010) (The statutes states that “[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter

possible.<sup>166</sup> The Court argues that these statutes “[are] almost identical,”<sup>167</sup> and that it is “bothersome to have different rules applied in interstate commerce cases from those applied in intrastate commerce cases . . . [I]t is a rather technical distinction to apply one law or another depending on whether interstate commerce is involved.”<sup>168</sup> More recently, the Court expanded its policy of consistency by stating that it has particular applicability to “commercial matters where reliance, definiteness, and predictability are such important goals of the law itself.”<sup>169</sup>

As such, with respect to Strand B, the Court of Appeals should formally adopt the doctrine as mentioned in *Thomson-CSF*.<sup>170</sup> To reiterate, this doctrine will bind a *signatory* to arbitrate because of “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.’”<sup>171</sup>

#### A. *Attack of Strand B as Not Grounded in Ordinary Principles of Contract Law*

Various commentators have taken issue with Strand B.<sup>172</sup> One commentator has stated that the doctrine of equitable estoppel is not available to a non-signatory to compel arbitration against a signatory because “there is no mutual agreement to arbitrate [which is] the fundamental requisite for arbitration.”<sup>173</sup> Two critics in particular believe that Strand B is not based on ordinary principles of contract law and thus should not be invoked by the courts.<sup>174</sup>

One commentator reasons that when courts use the equitable estoppel doctrine, they should examine the relationship between

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arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.”).

<sup>166</sup> See *In re Weinrott*, 32 N.Y.2d at 199-200.

<sup>167</sup> *Id.* at 198-99.

<sup>168</sup> *Id.* at 200, n.2.

<sup>169</sup> *In re Southeast Banking Corp.*, 93 N.Y.2d 178, 184 (1999).

<sup>170</sup> *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995).

<sup>171</sup> *Id.* at 779 (citations omitted). Note that this test comes from the Eleventh Circuit’s rulings in decisions discussed earlier in this note, but I refer to it as the *Thomson-NSF* test for simplicity purposes.

<sup>172</sup> See, Hui, *supra* note 23, at 737; Uloth et al., *supra* note 83 at 623.

<sup>173</sup> Hui, *supra* note 23, at 737.

<sup>174</sup> See generally, Hui, *supra* note 23, at 737; Uloth et al., *supra* note 83, at 623.

the parties and not the relationship that the parties have to the contract and their respective duties under the contract.<sup>175</sup> She calls the courts' statements that the relationship must be "intimately founded in and intertwined with the underlying contractual obligations"<sup>176</sup> as nothing more than courts "paying lip service" to the relationship among the parties.<sup>177</sup> She argues that in most of the cases involving Strand B, the relationship between the non-signatory and the contract is strictly circumstantial and does not arise out of the contract itself.<sup>178</sup>

Her argument basically focuses on the fact that only parties that have agreed to arbitrate should be forced to do so.<sup>179</sup> She quotes a fellow alumnus who stated that:

Assent to arbitrate a broad range of disputes . . . does not necessarily signify assent to arbitrate those disputes with non-signatories. Even if a party agreed to arbitrate a long range of disputes arising under a contract, that party might reasonably argue that it specifically agreed to arbitrate those disputes only with other contracting parties.<sup>180</sup>

The commentator then looks to the policy justifications for equitable estoppel and finds that "[e]quitable estoppel is intended to prevent a party from taking unconscionable advantage of its own wrong by asserting its strict legal rights."<sup>181</sup> But, she argues, "is it really unconscionable to send a party to court rather than to arbitration? In court, parties gain the protections of formal rules of evidence and civil procedure, stare decisis, and public opinions."<sup>182</sup>

### B. *Defense of Strand B*

The above commentators fail to consider two main aspects of Strand B. First, they assume that a party does not have intent to arbitrate because it claims it did not. While it is true that no party

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<sup>175</sup> Hui, *supra* note 23, at 737.

<sup>176</sup> Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp., 659 F.2d 836, 841, n.9 (7th Cir. 1981).

<sup>177</sup> Hui, *supra* note 23, at 737.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> David F. Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721, 736 (1998).

<sup>181</sup> Hui, *supra* note 23, at 738 (citing 28 AM. JUR. 2D, *Estoppel and Waiver* § 30 (2006)).

<sup>182</sup> *Id.* (internal citation omitted).

can be compelled to arbitrate, finding an initial intention to arbitrate is not a simple inquiry but rather one that requires an in-depth analysis by the reviewing court.<sup>183</sup> These intentions are to be construed liberally because of a federal policy favoring arbitration.<sup>184</sup>

One example of a court applying such a liberal construction is where a signatory tries to avoid a valid arbitration clause by recasting what appears to be a breach of contract claim as a tort claim against a non-signatory.<sup>185</sup> The Seventh Circuit in *Hughes Masonry*<sup>186</sup> found that the defendant-non-signatory, J.A., could not simply recast his basic breach of contract claims as intentional and negligent interference with contract just to avoid the arbitration clause in the underlying contract, to which it was a third party.<sup>187</sup> Although J.A. was not a signatory to the contract, J.A. was mentioned in various sections of the agreement in question, as “Construction Manager” and it the agreement forms the basis for the plaintiff-signatory’s, Hughes’, claims against it.<sup>188</sup> Given that equitable estoppel is an equitable doctrine, the court reasoned that it would be wholly unfair for the J.A., the non-signatory, to be sued for claims derived from the contract – though grounded in tort – and not be able to invoke the arbitration clause under the agreement.<sup>189</sup>

Moreover, the court adopts the *Tepper*<sup>190</sup> rationale: “In short, [a plaintiff-signatory] cannot have it both ways. [It] cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage,”<sup>191</sup> which seems to comport with common notions of fairness.

Second, these commentators fail to consider the narrow scope of this doctrine. One usage is “[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent

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<sup>183</sup> See, e.g., *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (agreement specifically disclaimed any third-party beneficiaries, yet the court found there was intention to be bound given the that the contractor’s claims were “intimately intertwined with the underlying contract obligations”).

<sup>184</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

<sup>185</sup> See, e.g., *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981).

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* at 838-39.

<sup>188</sup> See *id.* at 839.

<sup>189</sup> *Id.*

<sup>190</sup> *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966).

<sup>191</sup> *Hughes Masonry*, 659 F.2d at 839 (citing *Tepper*, 259 F.Supp at 692).

to arbitration even though the parent is not formally a party to the arbitration agreement.<sup>192</sup> This context of the parent being responsible for its subsidiary's agreements is not unique to equitable estoppel but also, as mentioned before, is used in the alter ego/veil piercing doctrine.<sup>193</sup> The test is not automatic, as the commentator above may imply but rather requires a multi-step analysis to determine whether (1) the relationship between the entities<sup>194</sup> (close for a parent-subsidiary relationship), (2) "relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract"<sup>195</sup> and (3) that the claims from (2) are "intimately founded in and intertwined with the underlying contract obligations."<sup>196</sup> If charges against the parent were tried separately in court and not arbitrated along with those against the subsidiary, the arbitration process would be effectively meaningless, presumably because no judicial economy would exist.<sup>197</sup>

The Fifth Circuit offers an illustration of Strand B in the parent-subsidiary context. The court found that a plaintiff who charges a parent and its subsidiaries with the same grievances is estopped from denying the parent arbitration while assenting to arbitration with the subsidiaries.<sup>198</sup> Here, plaintiff Ryan had entered into distribution contracts with affiliates of the defendant, Rhone.<sup>199</sup> Rhone however was not a party to the agreements and thus Ryan, a signatory, argued that Rhone, a non-signatory should not be able to arbitrate the claims against it.<sup>200</sup> Yet Ryan claimed eight identical tortious actions against Rhone and its affiliates.<sup>201</sup> This case passes the test set forth in *Sunkist Soft Drinks* (and adopted by the Second Circuit in *Thomson-CSF*) because the defendant had a close relationship to its affiliate, the charges were directly related to the duties and obligations of the defendant, the non-signatory in the contract as they relate to distribution, and the

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<sup>192</sup> *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988).

<sup>193</sup> *Palmier*, *supra* note 109, at 619-32.

<sup>194</sup> *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (quoting *McBro Planning and Dev. Co. v. Triangle Elect. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984)).

<sup>197</sup> See *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

<sup>198</sup> See *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988).

<sup>199</sup> *Id.* at 316.

<sup>200</sup> *Id.* at 320.

<sup>201</sup> *Id.* at 317. Note that the court dismissed counts II-VIII given that, although cloaked as tortious, actions were found to be covered under the contract that the parties agreed to arbitrate.

charges were “intimately founded in and intertwined with the underlying contract obligations”<sup>202</sup> in that the tort claims directly arose out of the contract between plaintiff and the affiliates of the defendant.

## VII. CONCLUSION

Arbitration is clearly a favored alternative to the court system. Parties will typically contract for the use of arbitration to streamline the resolution of any issue that arises under their contracts. Issues may arise, however, when disputes occur among parties who are not explicit signatories to a particular contract.

In the commercial context, there are often various non-signatory parties that are either explicitly mentioned in the contract or who were on the minds of the signatory parties when they agreed to the contract. As potential third-party beneficiaries, these parties may try and assert their rights as if they were a signatory. The construction industry, for example, often has multiple agreements amongst various contractors and subcontractors for a particular job.

Problems arise, for example, when a subcontractor suffers a loss and seeks to hold various parties liable, including the ultimate payor, who may not be a signatory to its particular subcontract. If the subcontractor wants to sue a non-signatory payor based on its contract with another contractor, which happens to contain an arbitration clause, should not the subcontractor be compelled to arbitrate?

Strand B, the theory of equitable estoppel which compels a signatory to arbitrate its claims against a non-signatory, encompasses the example above and various others listed in this note. The theory is sound because courts will apply it only if they first find an intention by both parties to arbitrate. As stated above, even when intention is construed liberally, courts will only apply Strand B in the limited circumstances such as in parent-subsidiary context, where a parent corporation tries to recast its grievance in tort, rather than contract, to avoid being under the purview of the arbitration clause. One should note that finding intention to arbi-

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<sup>202</sup> *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984).

trate is not cut and dry, but rather involves the court looking to the four corners of the contract and the grievances derived therein.

The various state and federal courts who have adopted Strand B are correct in doing so because, as the underlying doctrine implies, it is equitable. The New York Court of Appeals has not officially adopted Strand B, but it likely will if presented with a case where a signatory asserts claims derived from a contract with an arbitration clause against a non-signatory, as long as the circumstances of the case pass the *Thomson-NSF* test. This result is probable given the New York Court of Appeals' desire to comport New York state law with federal law concerning arbitration generally. In addition, some of the New York state courts have already adopted the related doctrines of incorporation by reference, assumption, agency, and alter-ego/veil piercing, all of which the court can invoke to compel arbitration.

Based on the detailed analysis above, Strand B should be officially adopted by the New York Court of Appeals in matters that require a signatory to be equitably estopped from asserting its rights or derivations of its rights under the contract without also incurring the responsibility to arbitrate its claims against a non-signatory.