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Enforcing Arbitration with a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil

*Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*¹

I. INTRODUCTION

Since Congress enacted the Federal Arbitration Act,² courts have liberally enforced a strong national policy favoring arbitration of commercial disputes.³ In furtherance of this goal, courts have refused to stay arbitration proceedings simply because they may involve parties who are nonsignatories to an arbitration agreement.⁴ Courts have accomplished this objective through the doctrine of equitable estoppel; *Sunkist* exemplifies that trend. However, *Sunkist* also represents a corporate scenario in which the emerging legal theory of "defensive piercing"⁵ could be established as another avenue from which to compel commercial arbitration.

II. FACTS AND HOLDING

In 1984, Del Monte Corporation ("Del Monte") acquired a wholly owned subsidiary known as Sunkist Soft Drinks ("SSD") from General Cinema Corporation ("GCC").⁶ Prior to this acquisition, Sunkist Growers Incorporated ("Sunkist") and SSD entered into a license agreement which included an

1. 10 F.3d 753 (11th Cir. 1993).

2. 9 U.S.C. §§ 1-14, 201-208 (1982).

3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985)(quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

4. *See, e.g., J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988); *Sam Reinfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

5. *See, e.g., Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979); *Reboy v. Cozzi Iron & Metal, Inc.*, 9 F.3d 1303, 1308 (7th Cir. 1993); *McQuade v. Draw Tite, Inc.*, 638 N.E.2d 818 (Ind. Ct. App. 1994).

6. *Sunkist*, 10 F.3d at 755. This dispute arose out of a complex set of events that would ultimately encompass two lawsuits and involve four separate organizations. *Id.* Sunkist owns the exclusive rights to the "Sunkist" trade-mark. *Id.* General Cinema Corporation (GCC) wished to obtain the right to market and sell an orange soda under the "Sunkist" brand name. *Id.* As a result, the two companies entered into a contractual agreement. *Id.* GCC created a subsidiary called Sunkist Soft Drinks Incorporated (SSD) to market and sell this new product. *Id.* Subsequently, Sunkist entered into a contract with SSD that provided a comprehensive plan for the marketing of "Sunkist" orange soda. *Id.*

arbitration clause.⁷ In October 1987, following a lengthy controversy and several complaints by Sunkist regarding SSD's performance under the license agreement,⁸ Del Monte filed a motion to compel Sunkist to arbitrate its claims.⁹

Del Monte contended that Sunkist had a contractual obligation to arbitrate all controversies arising out of the license agreement.¹⁰ Conversely, Sunkist did not dispute the existence of an arbitration commitment between SSD and itself, but maintained that Del Monte, as a nonsignatory to the agreement, had no standing to compel arbitration.¹¹ The district court granted Del Monte's motion to compel arbitration.¹²

Both parties chose an arbitrator and mutually agreed upon a neutral third arbitrator in accordance with the arbitration clause and the Rules of the American

7. *Id.* The arbitration clause provided that:

Except for any claim with respect to the ownership rights in Licensed Trademarks, any controversy or claim arising out of or relating to this Agreement or the breach thereof, including those regarding termination or failure to renew this Agreement, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator may be entered in any Court having jurisdiction thereof. The arbitration Tribunal shall be comprised of two party-designated arbitrators, one selected by Sunkist and one selected by SSD, and a third neutral arbitrator selected by the parties in accordance with the Rules of the American Arbitration Association.

Id. (emphasis added).

8. *Id.* On July 18, 1986, Del Monte and SSD filed for declaratory relief against Sunkist in the United States District Court of the Northern District of Georgia. *Id.* The complaint sought a declaration that an evolving controversy over SSD's performance under its license was subject to the arbitration clause of that agreement. *Id.* Shortly after the original complaint was filed, SSD was sold to a third party, Cadbury Schweppes, a fact that was reflected in Del Monte's amended complaint, which also added Nabisco Brands, Del Monte's sister company, as a party plaintiff. *Id.*

Prior to resolution of the complaint, Sunkist asserted several claims resounding in both tort and contract against SSD for alleged interference by Del Monte (SSD's parent company) with the Sunkist-SSD license agreement. *Id.* On March 12, 1987, Sunkist filed a counter-claim in the Georgia action alleging essentially the same claims as those in the California suit. *Id.* The counterclaims were for:

(1) Tortious interference with contract; (2) tortious interference with prospective advantage; (3) trademark infringement; (4) unfair competition in violation of 15 U.S.C. § 1125; (5) unfair competition in violation of the California Business Code; (6) conspiracy to breach contract; (7) conspiracy to breach the covenant of good faith and fair dealing; (8) civil conspiracy; (9) fraudulent misrepresentation; (10) declaratory relief; and (11) abuse of process.

Id. at 758 n.3.

On March 12, 1987 the Georgia district court approved SSD's dismissal of its claims against Sunkist. *Id.* at 755. Sunkist also voluntarily dismissed SSD from the California action. *Id.* Finally, on November 20, 1987, after further procedural maneuvering the California suit was transferred to the Georgia district court becoming a companion case, thus consolidating this dispute into one lawsuit. *Id.*

9. *Id.* at 755-56.

10. *Id.* at 756-57.

11. *Id.* at 757.

12. *Id.* at 756. Sunkist filed an interlocutory appeal from that order with the United States Court of Appeals for the Eleventh Circuit. *Id.* The appellate court dismissed this appeal, sua sponte, for lack of jurisdiction in accordance with 9 U.S.C. § 16. *Id.*

Arbitration Association (AAA).¹³ The arbitration panel found in favor of Del Monte in a two to one decision with Sunkist's arbitrator dissenting.¹⁴ Upon this finding, Del Monte made a motion to confirm the award in the district court while Sunkist made a motion to vacate the award.¹⁵ Sunkist based its motion to vacate on the alleged misconduct of Del Monte's chosen arbitrator.¹⁶ The district court confirmed Del Monte's award and subsequently denied Sunkist's motion to vacate the award.¹⁷ Sunkist's appeal followed.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court, holding that a nonsignatory to a contract may invoke an arbitration provision contained therein and that a party will be equitably estopped from avoiding arbitration of a dispute based on another party's nonsignatory status where the claims are intimately founded in and intertwined with the underlying contractual obligations.¹⁸

III. LEGAL HISTORY

Historically, English courts were openly hostile to the concept of arbitration as an alternative means for dispute resolution.¹⁹ Accordingly, the United States adopted the English common-law of arbitration, including the traditional common-law view of revocability.²⁰ Consequently, arbitration remained relatively stagnant in the early period of American law.²¹

However, scholars began to recognize that arbitration is an efficient alternative to lawsuits and, therefore, well-suited to an increasingly commercial society.²² As a result, states began passing statutes which made agreements to arbitrate irrevocable in order to promote this beneficial practice.²³

13. *Id.* at 756.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 756-57. The court ruled on two issues, the nonsignatory status of Del Monte to the arbitration agreement and the alleged misconduct of Del Monte's chosen arbitrator. *Id.* This Note covers only the first issue of whether Sunkist may be equitably estopped from avoiding arbitration on grounds of a lack of a written agreement with Del Monte.

19. See *Kulukundis Shipping Co., S/A v. Amtorg Trading Co.*, 126 F.2d 978, 983-85 (2d Cir. 1942). This hostility developed out of the courts of England that traditionally received fees for hearing cases and did not wish to lose such fees to an arbitrator. *Id.* They also felt that arbitration improperly ousted the courts from their jurisdiction. *Id.*

20. DOMKE ON COMMERCIAL ARBITRATION § 3:01, at 22 (G. Wilner rev. ed. 1984). "The arbitrators are authorized by each party to act in his behalf and to determine the matter in dispute. However, in common law such agreement, like an agency relationship, is revocable at will by each party at any time before the award is rendered." *Id.*

21. *Id.* at 22.

22. See Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 610 (1928).

23. See, e.g., N.Y. CIV. PRACT. LAW §§ 7501-7514 (McKinney 1980).

In 1923, Congress enacted the Federal Arbitration Act ("FAA").²⁴ The FAA rendered contractual obligations to arbitrate disputes "valid, irrevocable, and enforceable."²⁵ The Supreme Court recently illustrated the purpose of the FAA when it stated, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which 'requires that we rigorously enforce agreements to arbitrate.'"²⁶

Congress' policy favoring enforcement of arbitration agreements was quickly reflected in court decisions such as *In re Utility Oil Corp.*²⁷ *Utility Oil* arose under admiralty law and involved a breach of performance where a contract included an arbitration clause requiring the arbitration of any dispute arising during contract performance.²⁸ The issue was whether one party's breach of performance entitled another party to have its respective claims determined by arbitration.²⁹ Basing its opinion on common law developed prior to the enactment of the FAA, the district court held that the scope of this arbitration clause did not encompass a breach of performance.³⁰ However, on appeal the Second circuit reversed, finding that the FAA intended to change this restrictive view.³¹ Consequently, the court held that the arbitration clause covered any dispute arising after performance began.³² The court reasoned that nothing in the clause required performance to continue during the dispute or arbitration and therefore, the "purpose of this arbitration clause [was to be] carried out and the appellee held bound by its agreement."³³

24. 9 U.S.C. §§ 1-14, 201-208 (1982).

25. *See Id.* at § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. (emphasis added).

26. *See supra* note 3 and accompanying text. Today, it is a general rule that parties to an arbitration agreement cannot be compelled to arbitrate a dispute that does not fall within the scope of the arbitration clause. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The federal courts standard for determining the scope of an arbitration clause is one of "doubt" in which the presumption is that when in doubt err towards arbitration. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775, 778 (3d Cir. 1984); *PAS-EBS v. Group Health, Inc.*, 442 F. Supp. 937, 941 (S.D.N.Y. 1977). With such a broad standard, it is readily apparent that courts have taken the federal policy favoring arbitration seriously, and thus construe the parties intentions to arbitrate "generously." *Mitsubishi*, 473 U.S. at 626.

27. 69 F.2d 524 (2nd Cir. 1934).

28. *Id.* at 524.

29. *Id.* at 525.

30. *Id.*

31. *Id.* at 526.

32. *Id.*

33. *Id.*

The courts' policy to liberally construe the scope and effect of arbitration clauses was further strengthened in *Crofoot v. Blair Holdings Corp.*³⁴ In *Crofoot*, a California arbitration statute insightfully provided "for arbitration of any controversy which '[arose] out of' a contract or 'any other obligation'", including tort liability.³⁵ Although the claims sounded in tort,³⁶ the court held that these charges arose out of the contract and that "[t]here is no requirement that the cause of action arising out of a contractual dispute must be itself contractual."³⁷

*Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd.*³⁸ further empowered courts to compel the arbitration of claims whether they sounded in tort or contract.³⁹ The court held that a "plaintiff cannot avoid the broad language of the arbitration clause by casting its complaint in tort."⁴⁰ Because a second claim by the plaintiff for the tort of conspiracy was substantially based on claims which arose out of an alleged contract breach, the court held that the scope of the arbitration clause would also apply to the plaintiff's claims sounding in tort.⁴¹

Cases such as *Crofoot* and *Altshul* represent a significant step in judicial interpretation of the FAA. Specifically, the FAA calls for arbitration of "a controversy thereafter arising out of such contract or transaction."⁴² The federal courts have broadly construed this language to encompass "contract-generated or contract-related disputes between the parties; however labeled . . . it [became] immaterial whether claims [were] found in contract or in tort."⁴³

Finally, in *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*,⁴⁴ the Seventh Circuit expressed broad support for arbitrability of claims.⁴⁵ The court held that where charges were "intimately founded in and intertwined with the underlying contract obligations," they were within the scope of a general arbitration clause.⁴⁶ As a result, courts have broadly interpreted arbitration clauses, allowing their scope to encompass almost any claim, whether in tort or contract, if they are intimately founded in and intertwined with the underlying contract obligations.⁴⁷

34. 260 P.2d 156 (Cal. App. Ct. 1953).

35. *Id.* at 170.

36. *Id.* at 161.

37. *Id.* at 170.

38. 385 F.2d 158 (2nd Cir. 1967).

39. *Id.* at 159.

40. *Id.* See *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625, 628-29 (2d Cir. 1945).

41. *Altshul Stern*, 385 F.2d at 159.

42. 9 U.S.C. § 2 (1988).

43. *Acevedo Maldonado v. PPG Indus., Inc.*, 514 F.2d 614, 616 (1st Cir. 1975). See *Crofoot*, 260 P.2d at 170; *Altshul Stern*, 385 F.2d at 159 n.1.

44. 659 F.2d 836 (7th Cir. 1981).

45. *Id.* at 841.

46. *Id.* at 841 n.9.

47. Note that the Eleventh Circuit adopted this test in *McBro Planning & Dev. Co. v. Triangle Elec. Const. Co.*, 741 F.2d 342, 344 (11th Cir. 1984).

A. Nonsignatory Inclusion: Equitable Estoppel

In furtherance of a strong policy favoring arbitration, courts have refused to stay arbitration simply because it may involve parties who are nonsignatories to an arbitration agreement.⁴⁸ The court in *Hilti, Inc. v. Oldach*⁴⁹ postulated that "if arbitration defenses could be foreclosed simply by adding as a defendant a person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised."⁵⁰

Courts have found this postulate especially useful in the commercial setting where parent companies who are often nonsignatories to an arbitration agreement made by their subsidiaries are routinely brought into disputes involving their subsidiaries.⁵¹ In *Lawson Fabrics, Inc. v. Akzona, Inc.*,⁵² the court adopted *Hilti's* view and denied the plaintiff's attempt to avoid arbitration when the defendant named its owner (a nonsignatory) as a party to the action.⁵³

Several courts have affirmed the reasoning in *Lawson* and have focused on the operative facts underlying the parties' claims.⁵⁴ The court in *Sam Reisfeld & Son Import Co. v. S.A. Eteco*⁵⁵ held that it was within the discretion of the trial court to include defendant's parent company in its order to arbitrate even though it was a nonsignatory party.⁵⁶ The court justified its use of discretion by noting that the claims against both defendants (the parent and its subsidiary) were based on "the same operative facts" and therefore were "inherently inseparable."⁵⁷ The court concluded that if "the parent corporation [were] forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."⁵⁸ This policy favoring arbitration is currently followed by many courts.⁵⁹

48. See, e.g., *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

49. 392 F.2d 368 (1st Cir. 1968).

50. *Id.* at 369 n.2.

51. See, e.g., *Lawson Fabrics, Inc. v. Akzona, Inc.* 355 F. Supp. 1146 (S.D.N.Y. 1973).

52. 355 F. Supp. 1146 (S.D.N.Y. 1973).

53. *Id.* at 1151.

54. See, e.g., *J.J. Ryan & Sons*, 863 F.2d at 320.

55. 530 F.2d 679 (5th Cir. 1976).

56. *Id.* at 681.

57. *Id.*

58. *Id.*

59. *J.J. Ryan & Sons*, 863 F.2d at 321.

Courts have developed equitable estoppel⁶⁰ as the legal vehicle by which to compel arbitration.⁶¹ The court in *Avila Group Inc. v. Norma J. of California*⁶² found that a party cannot assert the existence of a valid contract on which to base its claims and deny the same contract's existence to avoid arbitration.⁶³ *Avila* held that "to allow [plaintiff] to claim the benefit of [a] contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."⁶⁴

Hughes Masonry extended the principle of equitable estoppel to compel arbitration with a nonsignatory parent company.⁶⁵ *Hughes Masonry* illustrates the use of equitable estoppel to enforce the courts' liberal policy of including nonsignatories as parties to an arbitration agreement where the claims arise out of similar operative facts. In *Hughes Masonry*, the court held that a party could not avoid the effects of an arbitration clause by superficially characterizing its claims in tort.⁶⁶ The court further held that it would be unjust to allow a party to avoid arbitration of claims against a third-party nonsignatory defendant where those claims arose directly from the arbitration agreement to which the third-party defendant is a non-signatory.⁶⁷ The court noted that this argument is valid only

60. Equitable Estoppel is defined as follows:

Where a party is prevented by his own acts from asserting a right to the detriment of another party who is reasonably expected to rely on said conduct and has acted accordingly. It is a doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

BLACK'S LAW DICTIONARY 538 (6th ed. 1990).

61. See, e.g., *Avila Group Inc. v. Norma J. of California*, 426 F. Supp. 537 (S.D.N.Y. 1977); *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688 (S.D.N.Y. 1966).

62. 426 F. Supp. 537 (S.D.N.Y. 1977).

63. *Id.* at 542. Upon an alleged breach of contract, petitioner *Avila*, brought a motion to compel arbitration in federal court pursuant to an arbitration clause included within its contract with respondent *Norma J.* *Id.* Conversely, *Norma J.* brought an action for damages based wholly on petitioner's alleged breach of the same contract containing the arbitration provisions denying petitioners right to arbitrate this claim. *Id.*

64. *Id.*

65. *Hughes Masonry*, 569 F.2d at 838.

66. *Id.*

67. *Id.* The *Hughes* court stated:

[Plaintiff] has characterized its claims against [third party defendant] as sounding in tort, i.e., intentional and negligent interference with contract. In substance, however, [plaintiff] is attempting to hold [third party defendant] to the terms of the [plaintiff]-[defendant] agreement. [Plaintiff's] complaint is thus fundamentally grounded in [third-party defendant's] alleged breach of the obligations assigned to it in the [plaintiff-defendant] agreement. Therefore, we believe it would be manifestly inequitable to permit [plaintiff] to both claim that [third party defendant] is liable to [plaintiff] for its failure to perform the contractual duties described in the [plaintiff-defendant] agreement and at the same time deny that [third party defendant] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause. In short, (plaintiff) 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. To allow (defendant) to claim the

to the extent that plaintiff's claims against the nonsignatory are closely related to the contract.⁶⁸

B. Nonsignatory Inclusion: Alter Ego Doctrine and the Instrumentality Rule

Courts have also relied on the alter ego doctrine and instrumentality rule to pierce the corporate veil⁶⁹ and compel third-party nonsignatories to arbitrate.⁷⁰ The alter ego doctrine allows courts to disregard a corporate entity and hold individuals responsible for intentional acts done in the name of the corporation.⁷¹ Where the corporation is simply an alter ego, or business conduit of persons or organizations, the protective veil of the corporation may be ignored.⁷² The alter ego theory is most commonly used by plaintiffs who wish to reach beyond a corporation to its shareholders who have used the corporation as a protective veil to facilitate fraud while remaining immune from lawsuits.⁷³ The reasoning behind this theory is that if shareholders themselves ignore the distinct legal separation and formalities in their different corporate enterprises then the court will also disregard these formalities to protect those individuals from certain liabilities.⁷⁴ This theory also has been used by courts where observance of the corporate entity as a protective subterfuge would work an injustice.⁷⁵ It is important to note that a corporation may be the alter ego of another corporation, enabling courts to treat the two corporations as one.⁷⁶

benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.

Id.

68. *Id.*

69. Piercing the corporate veil is defined as follows:

Judicial process whereby court will disregard usual immunity of corporate officers from liability for wrongful corporate activities; e.g. when incorporation exists for sole purpose of perpetrating fraud. The doctrine which holds that the corporate structure with its attendant limited liability of stockholders may be disregarded and personal liability imposed on stockholders, officers and directors in the case of fraud or other wrongful acts done in name of corporation.

BLACK'S LAW DICTIONARY 1147-48 (6th ed. 1990).

70. *See, e.g.,* Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890 (Fla. Dist. Ct. App. 1989); Laborers' Local Union 472 & 172 v. Interstate Curb & Sidewalk, 448 A.2d 980 (N.J. 1982); In re Sbarro Holding, Inc., 91 A.2d 613 (N.Y. App. Div. 1982).

71. *Ivy v. Plyler*, 246 Cal. App.2d 678 (Ct. App. 1966).

72. *See, e.g.,* Gibraltar Savgs. v. LDE Brinkman Corp., 860 F.2d 1275 (5th Cir. 1988); Firstmark Capital Corp. v. Hempel Fin. Corp., 859 F.2d 92 (9th Cir. 1988).

73. *See supra* note 70 and accompanying text.

74. *Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106 (5th Cir. 1988).

75. *See, e.g.,* Gibraltar, 860 F.2d 1275, 1286; Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co., 855 F.2d 406, 414 (7th Cir. 1988).

76. *McKinney v. Gannett Co.*, 817 F.2d 659 (10th Cir. 1987).

Where a corporation is an alter ego of another corporation, such as in a parent/subsidiary scenario, the courts often rely on the instrumentality rule.⁷⁷ Theoretically, the instrumentality rule and alter ego doctrine operate on comparable rationales. "Where one corporation is so organized and controlled and its affairs are conducted so that it is, in fact, a mere instrumentality or adjunct of the other, the fiction of the corporate entity of the 'instrumentality' may be disregarded."⁷⁸ The level of parental control necessary to invoke the instrumentality rule does not require complete stock control, but rather such domination as to effectively leave the subsidiary corporation with no mind of its own, thereby merely acting as a conduit for its parent company.⁷⁹ This total control must be shown to have existed at the time the cause of action arose⁸⁰ and must be the proximate cause of the complainant's injury.⁸¹ It should be noted that some courts have not required proof of fraud or injustice;⁸² instead, they have held that dominative control alone is sufficient to hold a parent company liable for the acts of its subsidiary.⁸³

Recently, under an alter ego theory, courts have found that a nonsignatory corporation may be liable for the actions of a signatory.⁸⁴ Courts have held that where a party seeks to enforce an agreement to arbitrate against a nonsignatory corporation, the party must establish that the degree of control exhibited over the subsidiary by the parent amounted to the subsidiary having no separate mind, will or existence of its own.⁸⁵ More specifically, courts have held that where a

77. See, e.g., *Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973).

78. 1 FLETCHER CYCLOPEDIA CORPORATIONS §43.10 (1990) (citing *Krivo*, 483 F.2d at 1098).

79. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3rd Cir. 1988).

80. See, e.g., *Verreries De L'Hermitage, S.A. v. Hickory Furniture Co.*, 704 F.2d 140 (4th Cir. 1983).

81. *Johnson v. Warnaco, Inc.*, 426 F. Supp. 44 (S.D. Miss. 1976) (quoting 1 FLETCHER CYCLOPEDIA CORPORATIONS §43 (1990)). The test may be stated as follows:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id.

82. See *James E. McFadden, Inc. v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102 (E.D. Pa. 1985).

83. See *Dania Jai-Alai Palace, Inc. v. Sykes*, 425 So. 2d 594 (Fla. Dist. Ct. App. 1982) (citing *Levenstein v. Sapiro*, 279 So. 2d 858 (Fla. Dist. Ct. App. 1973)). *But see* *Scott v. AZL Resources Inc.*, 753 P.2d 897 (N.M. 1988).

84. See *supra* note 70 and accompanying text.

85. See *Fisser v. Int'l Bank*, 282 F.2d 231, 238 (2nd Cir. 1960); *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977); *Farkar Co. v. R.A. Hanson Disc., Ltd.*, 441 F. Supp. 841 (S.D.N.Y. 1977).

subsidiary is found to be a mere "instrumentality" of its parent nonsignatory, the corporate veil will be pierced and the parent will be bound by its subsidiary's arbitration agreement.⁸⁶ In sum, all of the aforementioned doctrines illustrate the courts' liberal enforcement of a federal policy favoring commercial arbitration agreements.

IV. INSTANT DECISION

In *Sunkist*, the court began its analysis by noting the district court's use of equitable estoppel to compel arbitration.⁸⁷ The court noted the Eleventh Circuit's adoption of a policy where parties are equitably estopped from asserting that lack of a written agreement is a defense precluding the courts from compelling arbitration.⁸⁸ The court highlighted the close relationships existing between the parties as well as the interdependence of the claims to the nonsignatory's obligations and duties in the contracts.⁸⁹ Therefore, the court, having noted the relationship between Del Monte and Sunkist, analyzed the relationship of the claims asserted by Del Monte and Sunkist under the guidance of *McBro*.⁹⁰

Accordingly, the court first found that the agreement at issue in the instant case was silent on whether Del Monte owed Sunkist any obligations or duties.⁹¹ The court noted that the nonsignatory parties in both *Hughes* and *Masonry* were expressly mentioned in those agreements, but that this fact had no material effect on the outcome of either case.⁹² Instead, the court found that these decisions were ultimately based on the theory that these parties necessarily had to rely on the existing contract to assert their claims.⁹³ The *Sunkist* court found that the references to the nonsignatory third parties only added cursory support for those court's conclusions that the claims against the third parties were "intimately founded in and intertwined with the underlying contract obligations."⁹⁴ Therefore, the court adopted the reasoning of *Ryan*⁹⁵ and focused its inquiry on the nature of Sunkist's underlying claims against Del Monte to determine whether they fell within the scope of the arbitration clause contained in Sunkist's contract with SSD.⁹⁶

86. *Federated Title Insurers, Inc.*, 890 So.2d at 891.

87. *Sunkist*, 10 F.3d at 757. This section of the Note does not discuss the entire decision of the court but only those issues relevant for analysis of nonsignatory party obligations.

88. *Id.* (adopting *McBro*, 741 F.2d at 344).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. 863 F.2d at 320-21.

96. *Sunkist*, 10 F.3d at 757-58.

The court found that the eleven claims brought by Sunkist against Del Monte arguably sounded in tort.⁹⁷ However, the court noted that a party may not avoid an agreement to arbitrate simply because it casts its complaint in tort rather than contract.⁹⁸ Although Sunkist did not solely rely on its license agreement with SSD, the court found that each claim referred to the agreement and "presume[d] the existence of such an agreement."⁹⁹ Therefore, the court concluded that each claim asserted by Sunkist necessarily arose out of and directly related to Sunkist's license agreement with SSD, which included the arbitration clause.¹⁰⁰

Additionally, the court found that SSD, upon acquisition, became an integral part of Del Monte and lost all independent status.¹⁰¹ The court pointed to the nexus between Sunkist's asserted claims and the SSD agreement and to the integral relationship between SSD and Del Monte as the basis for its conclusion that the claims were intimately founded in and intertwined with the license agreement.¹⁰² Therefore, the court held that Sunkist was equitably estopped from avoiding arbitration of its claims based on Del Monte's nonsignatory status because the claims asserted were intimately founded in and intertwined with the underlying contract obligation.¹⁰³

V. COMMENT

On its face, *Sunkist* provides a current and accurate illustration of the courts' continued policy in favor of compelling arbitration whenever possible by extending the policy to nonsignatory parties.¹⁰⁴ The court relies on the doctrine of equitable estoppel as the avenue to which it extends this strong national policy favoring arbitration.¹⁰⁵ Arguably, the court has invoked this doctrine in an appropriate manner and followed accepted precedent.¹⁰⁶ However, the court did not address whether another solution to this issue existed based on the law of corporations.

It cannot be disputed that arbitration has played an increasingly important role in the resolution of disputes arising in corporate America. Since so many motions to compel or stay arbitration involve corporations as a party, one might be tempted to look to the law of corporations for possible theories that would have allowed *Sunkist* to be decided differently. Upon a cursory view of this area of the law, it can be argued that courts faced with the issue found in *Sunkist* may not

97. *Id.* at 758.

98. *Id.*

99. *Id.* "Essentially, Sunkist contends that Del Monte, through its management and operation of SSD, caused SSD to violate various terms and provisions of the license agreement." *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See supra* note 46 and accompanying text.

105. *Sunkist*, 10 F.3d at 757.

106. *McBro*, 741 F.2d at 344.

have to rely on the nebulous and sometimes esoteric theory of estoppel. Courts like *Sunkist* may do well to consider the alter ego doctrine or the instrumentality rule as a more precise means of compelling arbitration with third-party nonsignatory corporations such as Del Monte.

Traditionally, the alter ego doctrine and the instrumentality rule were used offensively by a plaintiff to pierce the corporate veil and compel arbitration with a third-party defendant.¹⁰⁷ However, it is arguable that a court could rely on this same reasoning in a defensive posture to afford equitable relief to a nonsignatory corporation, such as Del Monte, who wishes to compel arbitration. The court's rationale would be that where a parent corporation is deemed the alter ego of its subsidiary, it not only bears the burden of liability arising from that relationship but may also benefit from certain aspects of that relationship, such as the existence of an arbitration clause. Specifically, since Del Monte is burdened by claims arising from its subsidiary's contract with Sunkist, it should also be permitted to benefit from the existing arbitration agreement between its subsidiary and the appellant. In essence the court would be applying a mirror image of the instrumentality rule/alter ego theory to deny a plaintiff the ability to avoid arbitration with a nonsignatory where allowing such an avoidance would otherwise work an intolerable injustice.

Parent companies assert this so called "defensive piercing" as a defense to third-party tort liability in worker's compensation actions.¹⁰⁸ In those cases, the parent asks the court to pierce its own corporate veil and essentially hold that its subsidiary functions as a mere instrumentality.¹⁰⁹ By holding that the parent is the alter ego of its subsidiary, the court could conceivably bar an aggrieved party from maintaining a separate claim against the parent for tort liability limiting plaintiff's remedy to only workmen's compensation benefits.

Generally, the courts have declined to embrace this defensive use of piercing.¹¹⁰ In *Reboy v. Cozzi Iron & Metal, Inc.*,¹¹¹ parent company Cozzi asked the Seventh Circuit to pierce its corporate veil and hold that its subsidiary ASP was merely an instrumentality.¹¹² Cozzi argued that it was so inter-related with its subsidiary that both should be treated as one corporation for the purpose of applying the exclusivity provision of the Indiana Worker's Compensation Act, thereby barring plaintiff's claims of negligence against Cozzi.¹¹³ However, the court rejected this argument and held that "the record [was] replete with evidence that ASP and Cozzi [were] distinct and separately operated corporations and that Cozzi made significant and continuing efforts to maintain separate corporate

107. See *supra* note 70 and accompanying text.

108. See, e.g., *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 662 (6th Cir. 1979); *Reboy v. Cozzi Iron & Metal, Inc.*, 9 F.3d 1303, 1308 (7th Cir. 1993); *McQuade v. Draw Tite, Inc.*, 638 N.E.2d 818 (Ind. Ct. App. 1994).

109. See *supra* note 108 and accompanying text.

110. See, e.g., *Latham v. Technar, Inc.*, 390 F. Supp. 1031 (E.D. Tenn. 1974).

111. 9 F.3d 1303 (7th Cir. 1993).

112. *Id.*

113. *Id.*

entities."¹¹⁴ While Cozzi's defensive use of piercing was rejected by that court, the court in *McQuade v. Draw Tite, Inc.*,¹¹⁵ surmised that "[Reboy] does not preclude the possibility that where the evidence shows sufficient interconnectedness, this 'reverse piercing' may be successful."¹¹⁶ *McQuade* focused on the issue of actual control and adopted a standard of whether "the parent and subsidiary companies are distinct and separately operated corporations which have made significant and continuing efforts to maintain separate corporate entities."¹¹⁷ Arguably, a parent found to be in actual control and not distinct or separate from its subsidiary could successfully assert a defensive piercing of its corporate veil. *McQuade* represents those courts who leave the door open to defensive piercing where instrumentality exists.

In contrast, note that Del Monte is not attempting to avoid liability to an injured employee; instead, Del Monte wishes to compel arbitration with an allegedly aggrieved party. Furthermore, in the cases above, the parent and its subsidiary were found to be separate and distinct, while it is arguable that SSD is an instrumentality of Del Monte because they are neither separate nor distinct.¹¹⁸ In comparing the facts of *Sunkist* with those of the aforementioned worker's compensation cases, it appears that *Sunkist* contains attributes ripe for a successful assertion of defensive piercing.

Although the decision is vague on the exact relationship between Del Monte and SSD, the court referred to SSD as a "wholly owned subsidiary" where "Del Monte effectively stripped SSD of its employees and management and any other separate operating status."¹¹⁹ Without knowing more, it is arguable that Del Monte has exhibited the kind of domination and control required by the alter ego doctrine and instrumentality rule. As stated earlier, piercing the corporate veil through application of the instrumentality rule essentially requires that a parent corporation use control of its subsidiary to proximately cause fraud or wrong on a complaining party.¹²⁰

With respect to control, courts have held that where a party seeks to enforce an agreement to arbitrate against a nonsignatory corporation, that party must establish that the degree of control exhibited over the subsidiary by the parent amounted to the subsidiary having "no separate mind, will or existence of its own."¹²¹ In *Farkar Co. v. R.A. Hanson Disc., Ltd.*,¹²² the court adopted this standard and held that the parent corporation was compelled to arbitrate a contract dispute where its subsidiary's officers and directors were identical to the parent,

114. *Id.*

115. 638 N.E.2d 818 (Ind. Ct. App. 1994).

116. *Id.* at 820.

117. *Id.* at 821.

118. See *infra* note 122 and accompanying text.

119. *Sunkist*, 10 F.3d at 755.

120. See *supra* note 81 and accompanying text.

121. See *supra* note 85 and accompanying text.

122. 441 F. Supp. 841 (S.D.N.Y. 1977).

the parent and subsidiary both used the same trade name, the subsidiary had no employees and the subsidiary maintained no inventory or office separate from parent.¹²³

Generally, Del Monte would have had to use such control to commit a fraud or wrong.¹²⁴ In *Sunkist*, arbitration resulted in an award in favor of Del Monte,¹²⁵ which was upheld by the district court and affirmed by the appellate court.¹²⁶ Consequently, one can infer that Del Monte was not found to have worked a fraud which was specifically noted as one of Sunkist's claims.¹²⁷ However, some courts have not required fraud or injustice to be proved;¹²⁸ instead, they have found that dominative control alone is sufficient to hold a parent company liable for the acts of its subsidiary.¹²⁹ If the court in *Sunkist* chose to adopt this reasoning, then it would not necessarily have to determine the issue of fraud in holding that SSD was the instrumentality of Del Monte.

Finally, it must be shown that Del Monte's aforesaid control was the proximate cause of the injury complained of by Sunkist.¹³⁰ Arguably, Sunkist firmly believed Del Monte was the proximate cause of its injury, but this would be a determination for the court. On the limited information presented by the court, it would be mere speculation to determine whether proximate cause did in fact exist.

Assuming that Del Monte did exhibit dominative control so as to make SSD an instrumentality, the court may do well to compel arbitration based on the rule grounded in the theory that Del Monte is the alter ego of SSD. Had Sunkist wished to compel arbitration with Del Monte, the court arguably would have pierced Del Monte's corporate veil and compelled the arbitration. Likewise where Sunkist attempts to use Del Monte's alleged corporate veil based on its nonsignatory status to avoid arbitration, the court should not allow the corporate veil to work an injustice. It should follow its policy favoring arbitration and give Del Monte the benefit of its bargain.

VI. CONCLUSION

The *Sunkist* decision represents an accurate culmination of the courts' use of equitable estoppel to compel arbitration with nonsignatory corporations in furtherance of a strong national policy favoring commercial arbitration of disputes arising in corporate America. The use of estoppel by the court is appropriate in

123. *Id.*

124. *See supra* note 81 and accompanying text.

125. *Sunkist*, 10 F.3d at 756.

126. *Id.* at 760.

127. *Id.* at 758 n.3.

128. *See, e.g.*, James E. McFadden, Inc. v. Baltimore Contractors, Inc., 609 F. Supp. 1102 (E.D. Pa. 1985).

129. *See supra* note 86 and accompanying text.

130. *See supra* note 81 and accompanying text.

that a corporation will not be allowed to avoid the effects of an arbitration clause based on the nonsignatory status of defendant while simultaneously asserting claims against the nonsignatory party arising from the same contract. Equity demands such an outcome. However, the court in *Sunkist* may have missed an excellent opportunity to step beyond the esoteric language of estoppel and base its equitable decision on the established rule of corporate instrumentality and alter ego doctrine. Where a parent and its subsidiary demonstrate an intense interconnectedness, the court could "defensively" pierce the parent corporation's protective veil and compel plaintiff to arbitrate its claims with a nonsignatory parent, such as Del Monte. By relying on an established rule of law, the court provides parties with standards of proof based on solid precedent rather than the often uncertain and arbitrary nature of a courts invocation of equitable estoppel. This approach would also allow courts to continue their strong national policy favoring arbitration.

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