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Tie That Doesn't Bind: Fifth Circuit Rules That Non-Signatory Agents Can't Compel Arbitration as Individuals - Westmoreland v. Sadoux, The

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The Tie that Doesn't Bind: Fifth Circuit Rules that Non-Signatory Agents Can't Compel Arbitration as Individuals

Westmoreland v. Sadoux[1]

I. INTRODUCTION

Two parties sit at a table reading over an agreement they intend to enter. One party is representing himself, and the other is representing his company. Nonetheless, two human beings sit at the table, sign human names and shake human hands. Though the individual representing himself shakes hands with another human, his intent is to shake hands with that human's corporation. When conflict arises, the individual must choose whether he should sue the other human he shook hands with, or the entity that human represented.

In *Westmoreland v. Sadoux*, the Fifth Circuit addresses the issue of whether a signatory party intended to enter an arbitration agreement with a non-signatory agent of the defendant corporation. The non-signatory agent sought to enforce the arbitration agreement between the signatory party and the signatory corporation in a suit brought against the non-signatory agent in his individual capacity. This case differs from most others that courts have addressed concerning non-signatory agents. In most cases, the complaining party seeks to enforce the arbitration agreement against the non-signatory agent. Yet, in *Westmoreland*, the non-signatory agent himself seeks to compel arbitration.

II. FACTS AND HOLDING

James Westmoreland filed a lawsuit against Roland Sadoux and Jan Hendrickx for fraud.[2] Westmoreland claimed that Sadoux and Hendrickx induced him to sell his interest in Aston Holdings, Inc. (Aston) to them based on falsehoods that the company was struggling. In response to Westmoreland's suit, Sadoux convinced the district court for the Southern District of Texas to stay the suit and compel arbitration.[3]

An arbitration clause for binding arbitration was included in the shareholders' agreement that Westmoreland, the minority shareholder, entered with majority shareholders Pentrade Limited (Pentrade), owned by Sadoux, and T.D.C. Trade Development, Co. (T.D.C), owned by Hendrickx.[4] However, the arbitration

1. 299 F.3d 462 (5th Cir. 2002).
2. *Id.* at 464.
3. *Id.*
4. *Id.* Westmoreland owned 7 percent of Aston stock. Pentrade and T.D.C. each owned 46.5 percent of the remaining 93 percent of shares in Aston. *Id.*

agreement was between Westmoreland and the two entities, not Westmoreland and the owners of the two entities.[5]

Westmoreland appealed the district court's decision to compel arbitration.[6] The appeal was based on the claim that Sadoux could not enforce the arbitration clause against Westmoreland because the suit Westmoreland filed against Sadoux and Hendrickx was against them as individuals, not as agents of their companies.[7] However, Sadoux argued that the arbitration agreement between Pentrade and Westmoreland could be invoked because Sadoux acted as an agent for Pentrade.[8] Sadoux based his argument on the Third Circuit decision in *Pritzker v. Merrill Lynch*, which concluded that arbitration can be ordered against a signatory's agent.[9]

The district court agreed with Sadoux, citing *Pritzker* in its order compelling arbitration.[10] The district court held that "agents of signatories to an arbitration clause can invoke the clause because 'under traditional agency theory, [the agent] is subject to contractual provisions to which [the principal] is bound.'"[11]

However, the Court of Appeals took the position that an agent who breaches a duty independent of his agency is personally liable.[12] In stating this position, the court acknowledged that an agent is not normally liable for contracts he signs on his principal's behalf.[13] In this action, the court found that Sadoux and Hendrickx, "for reasons advantageous to themselves," were not parties to the shareholder agreement.[14] The court also found that they did not negotiate an arbitration agreement for their personal interests in order to have access to the courts for claims they might have brought against Westmoreland.[15]

Accordingly, the court held that Sadoux does not have the right to compel arbitration because Westmoreland's suit neither sought to enforce the arbitration agreement between himself, Pentrade, and T.D.C., nor frustrate any rights under the shareholder agreement to compel arbitration.[16]

III. LEGAL BACKGROUND

Many corporations provide for arbitration of disputes in pre-incorporation agreements.[17] Professors F. Hodge O'Neal and Robert B. Thompson opine that

5. *Id.*
6. *Id.*
7. *Id.* Sadoux argued that Westmoreland had waived the right to argue that Sadoux could not enforce the arbitration clause because Westmoreland did not bring that argument in the lower court. However, the appellate court determined that Westmoreland did not waive his right to this argument. *Id.* at 465.
8. *Id.* at 466.
9. *Id.* (citing Pritzker v. Merrill Lynch, 7 F.3d 1110, 1112 (3d Cir. 1993)).
10. *Westmoreland*, 299 F.3d at 466 (quoting *Pritzker*, 7 F.3d at 1111).
11. *Id.*
12. *Id.* at 466-67.
13. *Id.* at 466.
14. *Id.* at 467.
15. *Id.*
16. *Id.*
17. F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEALS CLOSE CORPORATIONS § 9.10 (3d ed. 2002) [hereinafter O'NEAL, O'NEALS CLOSE CORPORATIONS]. Pre-incorporation arbitration agree-

such pre-agreements are necessary if a party plans to use arbitration because disputants usually try to benefit from a deadlock before agreeing to arbitration.[18] Further, courts are more likely to compel arbitration instead of litigation when all shareholders agree to the pre-incorporation arbitration agreement.[19] The professors also recommend that shareholders not be the only parties to the arbitration agreements. They state, "[W]henever matters that are to be subject to arbitration may affect the rights of persons who are directors or officers but who are not shareholders, those persons should also be made parties to the agreement."[20] Some arbitration agreements between shareholders are signed without corporation directors or officers being parties to the agreement. Thus, courts have had to address the issue of whether non-signatory agents, such as directors and officers, may invoke the arbitration agreements against signatory parties.

The federal circuits are divided on the issue of whether non-signatory agents may invoke arbitration agreements in suits against signatory parties. The Third, Fourth, Sixth, and Ninth Circuits have held that a signatory's agent may invoke the arbitration clause.[21] Contrarily, the First and Ninth Circuits have held that a signatory's agent may invoke the arbitration clause only where the agent is acting in his representative capacity,[22] and where the wrongdoing at issue arose from the contract containing the arbitration agreement.[23] At least one circuit, the Ninth Circuit, has held both that a non-signatory may and may not invoke arbitration.[24] Each time, the decision has depended on the facts of the case.[25]

A. Arbitration Agreement Binds Non-signatory Agents

Many courts have held that arbitration agreements may bind non-signatory agents.[26] The ties that bind are "ordinary contract and agency principles."[27] This rule "is an outgrowth of the strong federal policy favoring arbitration."[28]

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ments are the most effective tools for compelling arbitration. *Id.* at § 9.14. However, a party can compel arbitration without such an agreement. O'Neal and Thompson state:

> [E]ven in the absence of a preexisting arrangement shareholders will occasionally submit a dispute to arbitration. Ordinarily, however, one or the other of the disputants believes that he or she can hold out longer or will in some way benefit from a deadlock, and consequently will refuse to agree to arbitration.

Id. Before corporations began including arbitration agreements in contracts, they used third party "appraisers" to fix the price for transferring shares between shareholders. *Id.* at § 9.10.

18. *Id.* at § 9.10.

19. *Id.* at § 9.16.

20. *Id.* They also state:

> Since the arbitrators usually are given power to make awards that will affect rights and obligations of the corporation, the corporation should also be made a party to the agreement. The rights and interests of the shareholders and the corporation are so intertwined that the latter is a real party in interest to most of the disputes arising under the typical shareholders' agreement.

Id.

21. *See* Long v. Silver, 248 F.3d 309 (4th Cir. 2001); Pritzker v. Merrill Lynch, 7 F.3d 1110 (3d Cir. 1993); Arnold v. Arnold Corp.--Printed Communications for Business, 920 F.2d 1269 (6th Cir. 1990); Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185 (9th Cir. 1986).

22. *See* McCarthy v. Azure, 22 F.3d 351, 356 (1st Cir. 1994).

23. *See* Britton v. Co-op Banking Group, 4 F.3d 742 (9th Cir. 1993).

24. *Compare Britton*, 4 F.3d 742 (9th Cir. 1993) *with Letizia*, 802 F.2d 1185 (9th Cir. 1986).

25. *Id.*

26. *Letizia*, 802 F.2d at 1187 (citations omitted).

27. *Id.*

According to two circuits, for a non-signatory agent to compel arbitration against a signatory party the allegations against the signatory corporation and its non-signatory agent must be "inherently inseparable."[29] In *Long v. Silver*, the Fourth Circuit held that non-signatory shareholders and officers may compel arbitration in a suit another shareholder brought against them.[30] The court stated, "[T]he facts and claims against the Corporation and its shareholders are so closely intertwined that Long's claims against the non-signatory shareholders of the Corporation are properly referable to arbitration even though the shareholders are not formal parties" to the agreement.[31] The court also stated that forcing the non-signatory shareholders to litigate would render the arbitration proceedings against the Corporation "meaningless and the federal policy in favor of arbitration effectively thwarted."[32]

In *Hill v. GE Power Systems*, the Fifth Circuit employed the "inherently inseparable" requirement to determine that the non-signatory agent could compel arbitration.[33] It stated, "A suit against a non-signatory that is based upon the same operative facts and is inherently inseparable from the claims against a signatory will always contain 'issue[s] referable to arbitration under an agreement in writing.'"[34]

The *Hill* decision was based largely on the Fifth Circuit's decision in *Grigson v. Creative Artists Agency*.[35] There the court gave two situations in which a non-signatory agent may compel arbitration. These two situations seem to be the determining factors for inherent inseparability. The court stated:

> *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory.* When each of a signatory's claims against a non-signatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Second, application of equitable estoppel is warranted when the signatory to the contract containing an 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. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.*[36]

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28. *Id.* at 1188.

29. *See* Hill v. GE Power Sys., Inc., 282 F.3d 343 (5th Cir. 2002); Long v. Silver, 248 F.3d 309, 319 (4th Cir. 2001) (quoting J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 315 (4th Cir. 1988)).

30. *Long*, 248 F.3d at 309.

31. *Id.* at 320.

32. *Id.* (quoting Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976)).

33. *Hill*, 282 F.3d at 347.

34. *Id.* (quoting 9 U.S.C. § 3 (2000)). The Fifth Circuit decided *Hill* only five months before *Westmoreland*.

35. 210 F.3d 524 (5th Cir. 2000).

36. *Id.* at 527 (emphasis in original).

Where both of the above bases arise equitable estoppel should be employed to compel arbitration and "prevent a situation that would fly in the face of fairness."[37]

Similarly, the Third Circuit has held that non-signatory agents may invoke arbitration.[38] The Third Circuit did not mention inherent separability, but it relied only on agency principles.[39] It also cited the "federal policy favoring arbitration" as a reason for its decision. In *Pritzker*, the court addressed whether Section 2 of the Federal Arbitration Act (FAA) subjects claims of statutory violations of the Employee Retirement Income Security Act (ERISA) of 1974 to arbitration.[40] There the plaintiffs, pension plan trustees, brought suit against their broker, its sister corporation and its financial consultant to recover for ERISA violations.[41] Prior to the dispute, the plaintiffs entered a contract with the broker that included an arbitration clause.[42] Neither the broker's sister corporation nor its financial consultant signed the contract.[43] Thus, the pension plan trustees claimed that arbitration could not be compelled against them because the non-signatories, the sister corporation, and financial consultant, could not enforce the arbitration agreement.[44]

The Third Circuit found that under traditional agency theory, the financial consultant is subject to the contractual provisions the pension plan trustees entered with the broker.[45] The court stated, "Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."[46] The court also applied agency analysis to conclude that the broker's sister corporation was entitled to compel arbitration under the agreement although it was a non-signatory.[47] The court came to this conclusion because the sister corporation was obligated to perform certain duties in connection with the pension plan trustees' accounts.[48] It further stated that as a subsidiary of the same parent company as the broker, the sister corporation may compel arbitration as an "alter-ego" of the broker.[49]

In concluding that the non-signatory agents in *Pritzker* could invoke the arbitration agreement entered against the plaintiffs, the Third Circuit stated that it was "keeping with the federal policy favoring arbitration."[50]

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37. *Id.* at 528.
38. *See* Pritzker v. Merrill Lynch, 7 F.3d 1110 (3d Cir. 1993).
39. *Id.* at 1121.
40. *Id.* at 1111. According to Professors O'Neal and Thompson:
> [T]he Federal Arbitration Act makes enforceable a written provision to settle any existing or future dispute by arbitration if the provision appears in a contract involving interstate or foreign commerce in a maritime transaction. As most close corporations are engaged to some extent in interstate commerce, and many are engaged in foreign commerce, the Federal Arbitration Act may be applicable to most arbitration arrangements in close corporations.

O'NEAL, O'NEAL'S CLOSE CORPORATIONS, *supra* note 17, at § 9.11.
41. *Pritzker*, 7 F.3d at 1110.
42. *Id.* at 1111.
43. *Id.* at 1121.
44. *Id.* at 1112.
45. *Id.* at 1121.
46. *Id.*
47. *Id.* at 1122.
48. *Id.*
49. *Id.*
50. *Id.*

In *Arnold v. Arnold Corp.*,[51] the Sixth Circuit allowed non-signatory agents to compel arbitration based on an arbitration agreement between the signatory corporation and a former stockholder, who was also a signatory.[52] The appellate court did not want signatory parties to avoid arbitration by naming non-signatory agents as defendants and then asserting that the agents were not bound to the agreement.[53] The court stated, "[I]f appellant 'can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified.'"[54] The court went so far as to say that the corporation's non-signatory officers were "entitled" to arbitration.[55]

B. Non-Signatory Agents May Not Invoke Arbitration

While most courts uphold agreements in non-signatory agents' favor, a few do not allow non-signatories to compel arbitration. For these courts, the contracting parties *intent* to include or not include a third party in the arbitration is key. To determine intent, the courts look to the contract. They are particularly interested in whether the non-signatory party signed the agreement in his or her personal or official capacity. Like the Third Circuit in *Pritzker*, the First Circuit applied agency principals to address the issue of whether non-signatory agents can invoke arbitration agreements.[56] However, the two courts came to different conclusions.

In *McCarthy v. Azure*, the plaintiff entered a contract to sell his company to the defendant's company.[57] The defendant signed the contract, which contained an arbitration clause, on his company's behalf but not in a personal capacity.[58] The court made a distinction between the defendant as an official of his company and as an individual.[59] The court stated:

> An official capacity suit is, in essence, 'another way of pleading an action against an entity of which an officer is an agent.' Consequently, such a suit 'is in all respects other than name, to be treated as a suit against the entity.' By contrast, personal capacity suits proceed against the individual, not against the entity with which the individual is affiliated.[60]

The court stated that if a corporation wants to include its agents in the arbitration clause, then it would write the contract in such a way to convey this message.[61]

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51. 920 F.2d 1269 (6th Cir. 1990).
52. *Id.*
53. *Id.* at 1281.
54. *Id.* (quoting Arnold v. Arnold Corp., 668 F. Supp. 625, 629 (N.D. Ohio 1987)).
55. *Id.* at 1269.
56. McCarthy v. Azure, 22 F.3d 351, 360 (1st Cir 1994).
57. *Id.* at 351.
58. *Id.*
59. *Id.* at 358.
60. *Id.* at 359 (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)).
61. *Id.* at 360.

The *McCarthy* court further stated that agents are not entitled to arbitration simply because they signed the contract.[62] The First Circuit stated, "It is common ground that 'signing an arbitration agreement as an agent for a disclosed principal is not sufficient to bind the agent to arbitrate claims against him personally.'"[63] The court wanted to avoid the agent being able to benefit from the principal's contract without incurring any of the contract's burdens.[64]

The signatory parties' intent to arbitrate with one another is also key.[65] Where there is no "overt indication" that a party intends to commit claims to arbitration against an agent in his individual capacity to arbitration, it is settled that a non-signatory agent does not become a party to the agreement.[66] Thus, the First Circuit concluded that the non-signatory agent could not compel arbitration.[67]

Similarly, in *Britton*, the Ninth Circuit held, "[T]he right to compel arbitration stems from a contractual right."[68] Non-parties to the agreement may not invoke this right, the court stated.[69] Like the First Circuit, the Ninth Circuit found that the parties' intent is critical. The *Britton* court recognized that contract and agency principles may bind non-signatories of arbitration agreements.[70] However, it stated, "If the parties to the contract had no intention to benefit a third party, that third party has no rights under the contract . . . . [T]he law requires a showing that the *parties to the contract* intended to benefit a third party."[71] The defendant appellant in *Britton* was not allowed to invoke the arbitration agreement because he did not prove that the parties intended him to benefit from the contract.[72]

IV. INSTANT DECISION

In *Westmoreland v. Sadoux*, the Fifth Circuit had to decide whether a non-signatory to an arbitration agreement could compel arbitration in a suit brought against the non-signatory as an individual.[73] The court held that Sadoux, the non-signatory owner of majority shareholder and signatory Pentrade Limited, could not compel the shareholders' arbitration agreement entered between Westmoreland, Pentrade, and T.D.C.[74] The court reasoned that Westmoreland's fraud suit against Sadoux and co-defendant Hendrickx did not give rise to the shareholders' agreement and did not frustrate arbitration under the shareholders' agreement.[75]

In determining whether Sadoux could compel arbitration, the court addressed which parties are entitled to the protections of arbitration agreements.[76] The court

62. *Id.* at 361.
63. *Id.* (citing Flink v. Carlson, 856 F.2d 44, 46 (8th Cir. 1988); *see also* Restatement (Second) of Agency § 320).
64. *Id.*
65. *Id.* at 355.
66. *Id.* at 356.
67. *Id.* at 351.
68. Britton v. Co-op Banking Group, 4 F.3d 742, 744 (9th Cir.1993).
69. *Id.*
70. *Id.*
71. *Id.* at 745 (emphasis in original).
72. *Id.* at 748.
73. Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002).
74. *Id.* at 464.
75. *Id.*
76. *Id.* at 465.

stated that an arbitration agreement "must be in writing and signed by the party invoking it" in order to be enforceable.[77] It added that it is "wary" of dispute resolution systems chosen and imposed after the dispute has arisen.[78] Therefore, it stated that non-signatories to an arbitration agreement are only allowed to invoke arbitration in "rare circumstances."[79] It added that a non-signatory has been allowed to invoke arbitration in situations where the party being ordered to arbitrate agreed to "arbitrate disputes arising out of a contract and is suing in reliance upon that contract."[80]

In the instant case, Sadoux argued that as Pentrade's agent he could invoke the arbitration agreement between Westmoreland and Pentrade.[81] The court rejected the agency argument and the Third Circuit reasons in *Pritzker*, which allow for agents of signatories to invoke arbitration under the traditional agency theory.[82] Instead, the court chose to follow the First Circuit's decision in *McCarthy*, which distinguishes suits between agents in their representative capacity and agents in their individual capacity.[83] It also referenced the Ninth Circuit's view that the "key question" is "whether the wrongdoing arose from a provision of interpretation of the contract containing the arbitration clause."[84] The court stated that agents seeking to compel arbitration are "subject to the same equitable estoppel framework left to other non-signatories."[85]

Here, the Fifth Circuit agreed with the First and Ninth Circuits that "a non-signatory cannot compel arbitration merely because he is an agent of one of the signatories."[86] The court found that an agent is not liable for contracts he executes on her principal's behalf.[87] Yet, it added that an agent is "personally liable if his acts breach an independent duty."[88]

The Fifth Circuit followed *Hill* in stating that a non-signatory can compel arbitration under two circumstances.[89] The two circumstances are:

> First, when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory. Second, when the signatory to the contract containing an 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.[90]

77. *Id.* (citations omitted).
78. *Id.*
79. *Id.*
80. *Id.* (citations omitted).
81. *Id.* at 466.
82. *Id.* (citing Pritzker v. Merrill Lynch, 7 F.3d 1110, 1111 (3d Cir. 1993)).
83. *Id.* at 466 (citing McCarthy v. Azure, 22 F.3d 351, 360 (1st Cir. 1994)).
84. *Id.* (citing Britton v. Co-op Banking Group, 4 F.3d 742, 747 (9th Cir.1993)).
85. *Id.* at 467.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (citing Hill v. GE Power Sys., Inc., 282 F.3d 343, 348 (5th Cir. 2002)).
90. *Id.*

In the instant case, the court found that Westmoreland's suit did not fall under either of the circumstances allowing for a non-signatory to compel arbitration.[91] It stated, "Westmoreland's suit does not rely upon the terms of the shareholder agreement or seek to enforce any duty created by the agreement, and there is no allegation that Sadoux acted in concert with anyone."[92] The court found that Sadoux and co-defendant Hendrickx purposely excluded themselves from the shareholder agreement "for reasons advantageous to themselves."[93] It also found that Sadoux and Hendrickx failed to negotiate an arbitration agreement with regards to their personal claims and liabilities.[94] Thus, the court cautioned that "courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives."[95] To compel arbitration in such a situation would frustrate "the ability of persons to settle their affairs against a predictable backdrop of legal rules--the cardinal prerequisite to all dispute resolution."[96]

Thus, the court decided that "as a non-signatory to agreement, owner of majority shareholder could not compel arbitration under shareholders' agreement in suit that did not seek to enforce any duty created by agreement or rely on its terms."[97]

V. COMMENT

The Fifth Circuit's ruling in *Westmoreland* was correct, yet difficult and different from other circuits. In ruling that Sadoux, the non-signatory agent, could not compel arbitration against Westmoreland, the court departed from the view several courts, including itself, have enforced that non-signatory agents may compel arbitration. Very few cases since the mid-1990s have been decided against the non-signatory compelling arbitration. Thus, the Fifth Circuit's departure is somewhat unexpected.

In departing from the norm, the *Westmoreland* court mainly relied on the fact that both parties did not intend for the arbitration agreement to apply to Sadoux.[98] The court stated that the only time it has compelled arbitration on a non-signatory's behalf is "when the party ordered to arbitrate has agreed to arbitrate disputes arising out of a contract and is suing in reliance upon that contract."[99] In this sense, the court was consistent with its finding in *Hill* that the non-signatory agent could compel arbitration because the allegations against it and the corporation were "inherently inseparable."[100] In the instant case, the court found that Westmoreland's suit against Sadoux was independent from any suit Westmoreland

91. *Id.*
92. *Id.*
93. *Id.* The court found that by not including themselves in the shareholder agreement Sadoux and Hendrickx retained access to the courts for their claims against Westmoreland. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 462.
98. *Westmoreland*, 299 F.3d at 464.
99. *Id.* at 465 (citations omitted).
100. *Hill*, 282 F.3d at 347.

may have brought against Sadoux's corporation.[101] Thus, Sadoux could not invoke the arbitration agreement.[102] This distinction was pivotal.

The Fifth Circuit effectively applied the two-part test it set out in *Grigson* and reiterated in *Hill* for determining when a non-signatory agent can compel arbitration.[103] The first circumstance requires the signatory who is bringing suit against the non-signatory to rely on the contract terms.[104] Here, Westmoreland did not rely on the contract terms.[105] The second circumstance requires that the signatory who is bringing suit must have raised "allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract."[106] Here, Westmoreland's claims were only against non-signatories.[107] The Fifth Circuit correctly applied its own test.

Because Westmoreland's suit was able to overcome the Fifth Circuit test for non-signatories compelling arbitration, it seems that the contract and agency principles that allowed other non-signatories to compel arbitration were absent here. The court correctly decided not to use these principles against Westmoreland because Westmoreland's suit did not deal with a contract he had with Sadoux's corporation. Instead, it dealt with his relationship to Sadoux as an individual.

Indeed, the court was wise to make this distinction. In *Westmoreland*, it was not the plaintiff who used strategy to avoid arbitration; rather, it was the defendant.[108] The court found that Sadoux purposely avoided being a party to the shareholders' agreement containing the arbitration clause so that he could litigate claims against Westmoreland.[109] This subtle distinction is crucial to prevent majority shareholders, or other powerful parties, from misapplying agreement terms.

VI. CONCLUSION

The issue of whether non-signatory agents may compel arbitration has been presented in federal district and appellate courts repeatedly from the 1980s forward. The appellate courts have been indecisive on whether non-signatories should benefit from arbitration agreements. Sometimes they hold in the non-signatories' favor, sometimes they do not. However, for most of the latter half of the 1990s and into the twenty-first century, most federal circuits allowed non-signatories to invoke arbitration. In *Westmoreland*, the Fifth Circuit departs from the majority. It uses earlier case law to support its conclusion that the non-signatory may not invoke arbitration. Thus, the split between the circuits has been renewed, and the issue may soon be ripe for the Supreme Court.

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101. *Westmoreland*, 299 F.3d at 466.
102. *Id.*
103. *See Grigson*, 210 F.3d at 527; *Hill*, 282 F.3d at 248;.
104. *Westmoreland*, 299 F.3d at 467.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 466.
109. *Id.* at 467. Courts seeking to apply the Sixth Circuit's reasoning in *Arnold* for allowing non-signatories to compel arbitration should be careful of agents like Sadoux. Although the *Arnold* court expressed a valid concern, each case must be reviewed individually.