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Consent is the Key to Compel: The Eighth Circuit Properly Denies a Motion to Compel a Non-Signatory to Arbitrate United States Court of Appeals, Eighth Circuit: Bank of America v. UMB Financial Services

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Bank of America v. UMB Financial Services

I. INTRODUCTION

This Note addresses a recent Eighth Circuit decision concerning the issue of whether or not to compel arbitration between a non-signatory plaintiff and a defendant who desires to arbitrate the plaintiff's claims.[1] After examining a recent Supreme Court decision in which the Court articulated certain principles of state contract law that allow a court to compel arbitration by or against nonparties to a contract, this Note will explore precedent in Missouri that demonstrates a stringent process in order to compel non-signatories to arbitration. The various federal circuit court treatments of this commonly litigated issue and its underlying split on the topic will also be addressed, as the issue is one typically decided based on the circumstances of the particular case. Based on the facts of the case, this Note will argue that the Eighth Circuit sensibly did not compel arbitration because the circumstances did not support any particular state contract law theory. Also, this Note will address the most practical way to compel arbitration against a non-signatory and the negative implications that could ensue if courts freely compel arbitration by or against non-signatories without proper procedure between contracting parties.

II. FACTS AND HOLDING

The parties involved in this case, decided in the Eight Circuit, include Bank of America (BOA), UMB Financial Services (UMB), and five former financial advisors of BOA (Advisors).[2] BOA employed Sheryl Bolsilevac, Elizabeth C. Brown, Aaron Isralite, Amy Pieper, and Molly Kerr as financial advisors for its "high-net-worth clients," but the Advisors decided to terminate their employment with BOA to pursue employment with UMB.[3] They were all paid a salary by BOA and also received securities-related sales commissions from Bank of America Investment Services (BOAIS).[4] BOAIS is a subsidiary of BOA which con-

1. Bank of America v. UMB Financial Servs., Inc., 618 F.3d 906, 910 (8th Cir. 2010).
2. *Id.* at 908.
3. *Id.* at 908-09.
4. *Id.* at 908.

ducts business in investment of securities.[5] As part of their employment agreement, the Advisors were bound by a non-solicitation clause which prohibited them from soliciting BOA customers for a period of time if they discontinued employment with BOA.[6] Bosilevac, Brown, and Pieper signed non-solicitation agreements for a one-year term that referred to both BOA and BOAIS; Israelite and Kerr's non-solicitation agreements referred only to BOA and contained a six-month term.[7]

The Advisors discontinued their work with BOA in the spring of 2009 and started working for UMB.[8] Despite the fact that the employees did not sell securities in the course of their employment with UMB, BOA believed that the former advisors were soliciting customers from BOA, violating the non-solicitation agreements.[9] Counsel for BOA sent a letter to UMB demanding the company stop any solicitation efforts by the employees.[10] BOA subsequently filed suit on July 27, 2009 to enforce all five agreements and to seek damages.[11] BOAIS was not included as a party in BOA's suit and did not bring any claims against the advisors.[12] In an effort to prevent any additional client loss during litigation, BOA filed a temporary restraining order against UMB, which the district court immediately granted.[13] In response, UMB attempted to dismiss the case on failure to join BOAIS as a necessary party and for failure to state a claim upon which relief could be granted.[14] In addition to both motions, UMB also filed a statement of claim with the Financial Services Regulatory Authority (FINRA).[15]

UMB filed a statement of claim with FINRA to commence arbitration proceedings against BOA and BOAIS.[16] As part of the Securities and Exchange Act (SEA), FINRA regulates the securities industry pursuant to an agreement between banks that agree to form a membership with FINRA, or member entities, and approval by the Securities and Exchange Commission.[17] As its source of regulation, FINRA has its own Code of Arbitration for disputes between the member banks and between the member banks and their employees.[18] UMB Financial Services is a member of FINRA but BOA is not.[19]

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5. *Id.*
6. *Id.*
7. *Bank of America*, 618 F.3d at 908-909.
8. *Id.* at 909.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Bank of America*, 618 F.3d at 909.
14. *Id.*
15. *Id.* ("FINRA is the organization that issued licenses to Bosilevac, Brown, Pieper, and Israelite to broker securities. FINRA was formed by consolidation of NYSE Regulation, Inc. . . . and the National Association of Securities Dealers, Inc. . . . FINRA is a private entity, part of the system of self-regulation set up under the [Securities and Exchange Act].").
16. *Id.*
17. *Id.*; FINRA, MANDATORY FINRA MEMBERSHIP FOR NYSE MEMBER ORGANIZATIONS, Notice to Members 07-52, WL 3311531, at *4 (Nov. 2, 2007) ("The term "member organization" also includes a registered broker or dealer that is a member of FINRA, which does not own a trading license and agrees to be regulated by the Exchange as a member organization and which the Exchange has agreed to regulate.").
18. *Bank of America*, 618 F.3d at 909 ("[E]ach member of FINRA agrees by membership, to submit to arbitration if a "dispute arises out of the business activities of a member or an associated person and

In an effort to dispel UMB Financial's arbitration demand and substitute a non-FINRA entity, BOA requested leave of the district court to substitute UMB Bank, a non-FINRA entity, as defendant.[20] Pursuant to the FINRA provisions, UMB asked the district court to compel BOA to participate in arbitration.[21] The district court denied the motion to compel "without prejudice" and expressed its intent to adequately consider the issues before it.[22] However, as a result of this limited and non-specific ruling, FINRA sent the district court a letter stating that it would conduct arbitration between UMB and the five former BOA employees, along with BOAIS, unless the district court gave an order enjoining the arbitration.[23] In response to this letter, the district court entered an order *sua sponte* enjoining the parties from arbitrating their dispute until the court ruled otherwise.[24] The next day, UMB appealed both the district court order denying the motion to compel arbitration and the order enjoining the arbitration[25] UMB also requested a stay of the district court proceedings pending resolution of the appeal.[26]

As an attempt to preserve its preliminary injunction, BOA moved to extend its previous temporary restraining order in regard to the Advisor's solicitation attempts.[27] After receiving an extension, BOA subsequently appealed to the Eighth Circuit to dismiss all of the UMB appeals.[28] The Eighth Circuit denied its motion to dismiss.[29] After denying UMB's dispositive motions, the district court decided to join BOAIS as a necessary party.[30] After this ruling, UMB moved to compel arbitration with BOAIS and renewed its motion to compel with BOA.[31] BOAIS disputed its inclusion as a necessary party, stating "it had no claims in the litigation" and it attempted to waive "any claims that could arise out of the subject matter of the litigation."[32] The district court denied UMB's new motions to compel arbitration with BOAIS and BOA.[33] Furthermore, the district court granted BOA's request for a preliminary injunction.[34] This restrained the employees with non-solicitation agreements from violating them any further and prevented UMB from doing business with any customers gained in violation of the agreements.[35]

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is between or among: Members; Members and Associated Persons; or Associated Persons." "Associated persons" are defined under the FINRA code as individuals who are registered with FINRA, whereas "members" refers to the organizations regulated by FINRA.").

19. *Id.*

20. *Id.* ("BOA claims none of the individual defendants, except for Pieper, work for UMB Financial and requested leave of the district court to substitute UMB Bank (a non-FINRA entity) as defendant. That motion is stayed along with the rest of the district court proceedings pending the outcome of these appeals.").

21. *Id.* at 909-10.

22. *Id.* at 910.

23. *Id.*

24. *Bank of America,* 618 F.3d at 910.

25. *Id.*

26. *Id.*

27. *Id.* ("The court granted the extension of the temporary restraining order and UMB subsequently appealed that order.").

28. *Id.*

29. *Id.*

30. *Bank of America,* 618 F.3d at 910.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

In its appeal to the Eighth Circuit, UMB only addressed the question of "whether the district court should have compelled BOA and BOAIS to arbitrate in the FINRA proceedings." [36] Additionally, UMB appealed the district court's decision to enjoin the parties from proceeding with the FINRA arbitration.[37] The Eighth Circuit held that BOA could not be compelled to arbitrate its dispute because BOA is not a FINRA member and a party can not be forced to arbitrate an agreement which it did not originally agree to arbitrate.[38] Furthermore, the circuit court refuted UMB's argument that BOA and BOAIS were inextricably intertwined under the FINRA arbitration agreement, and stated they were only inextricably intertwined under the employment contract.[39] Finally, the circuit court held that BOA is not a third party beneficiary to any of the FINRA membership contracts because it did not derive a benefit from them and thus could not be compelled to arbitrate based on its third party affiliation with BOAIS.[40]

III. LEGAL HISTORY & BACKGROUND

A. Arbitration Agreements Enforced Against Non-signatories by Incorporation

In *Arthur Andersen LLP v. Carlisle*[41], the Supreme Court reviewed a court of appeal determination that those who are not parties to a written arbitration agreement are "categorically ineligible for relief."[42] After briefly reviewing the substantive Section 2 mandate of the Federal Arbitration Act (FAA), the Court noted how Section 3 allows litigants, who are already in court, to invoke prior agreements made enforceable by Section 2 in an effort to stay the litigation and resolve whether a dispute should be submitted to arbitration.[43]

Because neither sections of the FAA purported to determine the scope of a non-party in litigation to compel arbitration, the Court articulated that state law is applicable to determine which contracts are binding under Section 2 and enforceable under Section 3.[44] After determining the state law's purpose, the Court concluded that "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[45] As a result of this articulation of state law contract principles

36. *Bank of America,* 618 F.3d at 910.

37. *Id.*

38. *Id.* at 911-912.

39. *Id.* at 912- 913 (citing Dunn Indus. Grp. v. Lafarge Corp., 112 S.W.3d 421, 436-37 (Mo. 2003) ("[T]he estoppel cases were based on actions inextricably intertwined with the contract containing the arbitration agreement, not the collateral contract sought to be enforced.").

40. *Bank of America*, 618 F.3d at 913-14.

41. 129 S.Ct. 1896 (2009).

42. *Id.* at 1901.

43. *Id.* at 1901-02.

44. *Id.* at 1902 (quoting Perry v. Thomas, 482 U.S. 483, 493 n. 9 (1987))("[S]tate law, therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 if that law arose to govern issues concerning the validty, revocability, and enforceability of contracts generally").

45. *Id.* (quoting 21 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 57:19 ¶ 2 (4th ed. 2001)).

permitting enforcement of contracts by or against nonparties, the Supreme Court ruled that the Sixth Circuit's holding relating to Section 3 was error. [46]

In response to the respondent's argument that claims to arbitration by nonparties are not referable to arbitration because they try to enforce an obligation not within the signatory's actual agreement, the Court looked to a canon interpretation.[47] The Court noted that stays of litigation are required if the claims are "referable to arbitration under an agreement in writing." [48] Based on its statutory interpretation, the Court concluded that enforcement of an arbitration provision by or against a third party is possible under state contract law.[49] Thus, the Court stated a third-party claim is referable to arbitration where state law permits.[50]

However, in 2002, the Court addressed the related issue of whether a signatory can compel arbitration against a non-signatory in *EEOC v. Waffle House, Inc.*[51] The Court held that, at least where the EEOC is the non-signatory and is suing on behalf of a signatory to an employment agreement containing an arbitration clause, the employer cannot compel the EEOC to arbitrate.[52] Although this case does not directly address the issue contemplated by this Note, the Court reaffirmed the FAA's pro-arbitration policy and the principle of contractual consent: "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'"[53] In other words, the FAA policy favoring arbitration applies to ambiguous agreements but not where there is a lack of agreement.

B. The Necessity of Incorporation by Reference to Enforce Arbitration Agreements in Missouri

In an attempt to determine the scope of an agreement to arbitrate against a non-signatory party, the Supreme Court of Missouri addressed the issue relating to a construction contract in *Dunn Industrial Group, Inc. v. City of Sugar Creek*.[54] The court held that a third party guarantor could not be bound by an agreement to arbitrate in a construction contract it did not sign, because the contract in which it was a signatory did not incorporate the arbitration provision of the construction contract at issue.[55] Lafarge contracted with Dunn Industrial Group, Inc. (DIG) for the design and construction of a new cement plant and included an arbitration clause within the contract.[56] DIG's parent company, Dunn Industries, Inc. (Dunn) signed a contract guaranty promising DIG's performance of its obligations under

46. *Id.* ("[T]he Sixth's Circuit's holding that nonparties to a contract are categorically barred from Section 3 relief was error.").

47. *Arthur Anderson*, 129 S.Ct. at 1902.

48. *Id.* (quoting 9 U.S.C. § 3 (2006)).

49. *Id.* at 1902 ("[I]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled.").

50. *Id.* at 1902 n. 6.

51. 534 U.S. 279 (2002).

52. *Id.* at 281, 288-89, 291-96.

53. *Id.* at 293 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

54. 112 S.W.3d 421 (Mo. 2003) (en banc).

55. *Id.* at 436.

56. *Id.* at 426-27.

the construction contract with Lafarge.[57] After disputes and litigation arose against Lafarge for mechanic's lien claims, Lafarge successfully compelled arbitration against DIG, its original contract partner, but the Missouri Supreme Court declined to compel arbitration against Dunn, the non-signatory.[58] Despite limiting the scope of an arbitration agreement against a non-signatory guarantor, the Missouri Supreme Court compromised with the strong federal policy in favor of arbitration.[59]

The court expanded the scope somewhat by noting that a majority of state courts enforce arbitration against a non-signatory when parties incorporate an arbitration agreement by reference into a separate guaranty or performance bond.[60] Specifically, the court noted that where the agreement specifically incorporated by reference an arbitration provision, subcontractors, acting as non-signatories, were subject to the arbitration provision.[61] However, the courts compelled arbitration in certain cases because the incorporation by reference method was effectively demonstrated.[62] As an example of its stringent requirements for incorporation by reference, the Supreme Court of Missouri in *Dunn* noted that "mere reference to the construction contract in the guaranty is insufficient" to establish that a third party guarantor bound itself to an arbitration provision of a separate contract.[63]

C. Arbitration Agreements Enforced Against Non-signatories through Estoppel and Inextricable Intertwinement in Missouri

Just as the Missouri Supreme Court denied the scope of arbitration against a third party unless the contract in which it was a signatory specifically incorporated or referenced the applicable arbitration provision, it also denied the scope of arbitration against a third party under an estoppel theory.[64] Despite denying both the guaranty incorporation and estoppel theory against Dunn, the court did note that there were cases in which arbitration agreements were enforced on a theory of estoppel.[65] In the cases where a theory of estoppel arose, the highly related issues of the non-signatory's arbitration claim estopped the signatories, who were parties to contracts including an arbitration agreement, from avoiding arbitration.[66] The

57. *Id.* at 427.

58. *See Dunn*, 112 S.W.3d at 432-37.

59. *See Dunn*, 112 S.W.3d at 435.

60. *Id.* ("[I]n a majority of state courts, including Missouri, due to strong federal policy in favor of arbitration, arbitration agreements are enforced against guarantors or sureties where the arbitration agreement is incorporate into the guaranty or performance bond.").

61. *Id.* at 435 n. 5 (citing Jim Carlson Const., Inc. v. Bailey, 769 S.W.2d 480, 482 (Mo. App. W.D. 1989); *See also* Metro Demolition & Excavating Co. v. H.B.D. Contracting, Inc., 37 S.W.3d 843, 847 (Mo. Ct. App. 2001); Sheffield Assembly of God Church, Inc. v. American Ins. Co., 870 S.W.2d 926, 931 (Mo. Ct. App. 1994)).

62. *Dunn*, 112 S.W.3d at 436 (in those cases, documents containing the arbitration provisions were specifically incorporated by reference into the other contracts).

63. *Id.*

64. *Id.* at 436-37.

65. *Id.* at 436 (citing J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988)); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc., 741 F.2d 342 (11th Cir. 1984)).

66. *Dunn*, 112 S.W.3d at 436 ("[S]ignatories to contracts containing an arbitration agreement were estopped when the issues the non-signatories were seeking to resolve in arbitration were intertwined with the agreement signed by the signatory.").

court noted that the claims were "integrally related to the contract containing the arbitration provision."[67]

Although the court noted the possibility of an estoppel theory in *Dunn*, it distinguished auxiliary agreements that involve isolated conditions and responsibilities, such as third party guaranty agreements, as not "integrally related" to a construction contract with an arbitration clause.[68] Thus, the estoppel cases were based on actions inextricably intertwined with the contract containing the arbitration agreement, not the collateral contract sought to be enforced.[69] However, the court did not explore the extent to which the claims have to be intertwined in order to find an estoppel theory.[70]

In relation to the benefits from the contract it sought to enforce, the Missouri Supreme Court has always adhered to long-standing contract principles, as alluded to in *Dubail v. Medical West Bldg. Corp.*[71] In *Dubail*, the court stated the rule governing situations where actions by one party in accepting benefits of one contract leads to the inability to avoid the obligations imposed by other terms.[72] As a general contract principle, a person may be estopped from questioning the existence, validity, and effect of a contract by accepting benefits.[73] Essentially, contract law does not allow a party to claim benefits afforded to it by contract and then proceed to bypass its duties and encumbrances.[74] Consistent with the contract principles outlined, the *Dunn* court held that Dunn did not accept the benefits of the construction contract because it only pointed to a provision within the alleged contract containing the arbitration provision to avoid guaranty liability.[75] Thus, since Dunn did not agree to arbitrate its liability as guarantor or accept any benefits of the contract between Lafarge and DIG, Dunn was not required to arbitrate any claims with Lafarge.[76]

D. Arbitration Agreements Enforced Against Non-signatories through Third Party Beneficiary Status in Missouri

The Supreme Court of Missouri addressed an appeal from a judgment overruling motions to compel arbitration and stay litigation and visited the issue of third party non-signatories and arbitration in *Nitro Distributing, Inc. v. Dunn*.[77] The parties appealing the judgment were the Amway Corporation (Amway) distributors and its related entities who sought to compel arbitration with Nitro and

67. *Id.*

68. *Id.* at 436-37 ("[W]hile the contract guaranty signed by Dunn guarantees DIG's prompt and satisfactory performance of the construction contract between Lafarge and DIG, it is a collateral agreement for another's undertaking and is an independent contract that imposes different responsibilities from those imposed in the construction contract between Lafarge and DIG.").

69. *Id.*

70. *See generally* Dunn Indust. Grp., Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. 2003).

71. 372 S.W.2d 128, 132 (Mo. 1963).

72. *Id.*

73. *Id.* (quoting 31 C.J.S. Estoppel & Waiver § 110 (2011)).

74. *Dubail*, 372 S.W.2d at 132 ("[A] party will not be allowed to assume the inconsistent position of affirming a contract in party by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens."); *see also* 17A C.J.S. Contracts § 521 (2011).

75. *Dunn*, 112 S.W.3d at 436-37.

76. *Id.* at 437.

77. 194 S.W.3d 339, 343 (Mo. 2006) (en banc).

West Palm, companies owned by an Amway distributor.[78] However, neither Nitro nor West Palm was signatories to any agreement with Amway.[79] Amway attempted to bind Nitro and West Palm as third party beneficiaries to an Amway distributorship agreement with Ken Stewart, another party involved in the dispute.[80]

The court articulated the law with regard to third-party beneficiaries in *Nitro*.[81] If a party is bound as a third-party beneficiary, intent relating to the contract terms' manifest purpose to benefit that party is expressly shown.[82] In cases where the contract language does not embody that manifest purpose, "there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves."[83] Furthermore, as an example of its strict interpretation, the court articulated that "a mere incidental benefit to the third party is insufficient to bind that party."[84] In relation to Nitro, the court held that there was a lack of intent to benefit Nitro and West Palm and the only benefit to them was incidental.[85] Relying on this general stance, the court found that Nitro and West Palm were not third party beneficiaries.[86] The court did not allude to what extent the benefit exceeds incidental and becomes substantial enough to find third party beneficiary status.[87]

E. The Circumstances Required to Bind Non-Signatories to Arbitration in the Federal Courts

Although the Eighth Circuit found that BOA had not extracted any benefit from the FINRA form U-4 and thus could not be compelled to arbitrate according to Missouri law, a number of federal courts have explicitly mentioned the requirements to bind non-signatories.[88] In *Gersten v. Intrinsic Technologies, LLP*,[89] a non-signatory, who had relied upon provisions of an agreement as a basis for its recovery but denied that it was bound by the arbitration provision of the same contract, was required to arbitrate.[90] The defendants, Intrinsic Technologies, moved to stay proceedings pending the result of its requested arbitration against Plaintiff, Robert Gersten, pursuant to the Operating Agreement.[91] Intrinsic argued

78. *Id.* at 343-344.
79. *Id.* at 345.
80. *Id.*
81. *Id.*
82. *Id.* (citing Peters v. Employers Mut. Cas. Co., 853 S.W.2d 300, 301 (Mo. 1993) (en banc))("[T]o be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member.").
83. *Nitro*, 194 S.W.3d at 345 (citing State *ex rel.* William Ranni Assocs, Inc. v. Hartenbach, 742 S.W.2d 134, 141 (Mo. 1987) (en banc)).
84. *Id.* (citing *Hartenbach*, 742 S.W.2d at 140).
85. *Nitro*, 194 S.W.3d at 345.
86. *Id.*
87. *See generally* Nitro Distributing, Inc. v. Dunn 194 S.W.3d 339 (Mo. 2006) (en banc).
88. Camp v. TNT Logistics Corp., (No. 04-1358), 2006 WL 91318 (C.D. Ill. Jan. 12, 2006); Gersten v. Intrinsic Technologies, LLP, 442 F. Supp. 2d 573, 579 (N.D. Ill. 2006); Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 839 (7th Cir. 1981).
89. 442 F. Supp. 2d 573 (N.D. Ill. 2006).
90. *Id.* at 581.
91. *Id.* at 576.

that because Plaintiff's suit attempts to declare rights arising under and predicated upon that agreement, the lawsuit must be submitted to arbitration.[92]

Gersten argued that the arbitration clause did not apply to him because he was not a signatory to the Operating Agreement.[93] The court held in compliance with the estoppel doctrine that a party's attempt to avoid an arbitration clause within a certain document while concurrently reaping the benefits of that contract which contains the arbitration clause is improper.[94] However, in limiting this estoppel application, the court noted that the foundation of this estoppel theory is "whether the non-signatory has brought suit against the signatory premised upon the agreement that contains the arbitration clause at issue, thus seeking the agreement's direct benefits."[95]

The benefit, however, must be direct; attenuated and indirect benefits are insufficient to force arbitration under an estoppel theory.[96] In *Zurich*, Zurich, the insurer, argued that Jones, a non-signatory, was bound to arbitrate issues respecting certain deductible agreements.[97] As a basis for its arbitration claim, Zurich declared that Jones' relationship to its parent company, Watts, as its wholly owned subsidiary restrained Jones to the agreements.[98] Furthermore, Zurich claimed that Jones was subject to arbitration because Jones utilized benefits associated with the deductible agreements.[99] In its analysis of the facts related to the law of the estoppel theory, the Seventh Circuit concluded that Jones did not seek or call upon any rights under the deductible agreements or derive any direct benefit.[100] In an effort to define a benefit too indirect based on the estoppel theory, the court mentioned that Jones' assumed lower insurance premiums based on the deductible agreements would not compel Jones to arbitrate.[101] Thus, there were no grounds for compelling the non-signatory to arbitrate.[102]

The Seventh Circuit explicitly stated that "arbitration is contractual by nature, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[103] Despite the basic consensual agreement required to arbitrate, the court did state five contract doctrines which courts have used to bind a non-signatory to an arbitration agreement to arbitrate: "(1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference"[104] Zurich attempted to establish that since Jones was a wholly owned subsidiary of

92. *Id.*
93. *Id.*
94. *Id.* at 579 (citing *Hughes Masonry Co.*, 659 F.2d at 838).
95. *Gersten*, 442 F.Supp. 2d at 579.
96. Zurich Am. Ins. Co. v. Watts Indus., 417 F.3d 682, 688 (7th Cir. 2005).
97. *Id.* at 687.
98. *Id.*
99. *Id.*
100. *Id.* at 688.
101. *Id.* ("[E]ven assuming that Jones has benefitted from the deductible agreements by paying lower insurance premiums based on the deductibles, this benefit is too attenuated and indirect to force arbitration under an estoppel theory.").
102. *Zurich*, 417 F.3d at 688.
103. *Id.* at 687.
104. *Id.* (citing Fyrnetics (H.K.) Ltd. v. Quantum Group, Inc., 293 F.3d 1023, 1029 (7th Cir. 2002) ("[T]here are five doctrines through which a non-signatory can be bound by arbitration agreements entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference."); *accord* Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 352 (2d. Cir. 1999)).

Watts, Jones should be required to arbitrate based on its status.[105] The court did not agree with Zurich's claim and interpretation and ruled that any form of agency or alter ego theory was not met because "a mere parent-subsidiary relationship does not create the relation of principal and agent or alter ego between the two."[106] Thus, the court concluded that a party cannot compel a subsidiary to arbitrate based only on the parent's signature to an arbitration agreement.[107]

The Seventh Circuit's treatment of this estoppel theory is consistent with substantial federal appellate authority from other circuits.[108] In *Washington Mutual Fin. Group, LLC v. Bailey*, the Fifth Circuit endorsed the reasoning of the Fourth Circuit in *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*.[109] Applying the estoppel theory principle, the Fifth Circuit held that application of the estoppel doctrine was appropriate to prevent the non-signatory plaintiff from taking "inconsistent positions" in "suing based upon one part of transaction that she says grants her rights while simultaneously attempting to avoid other parts of the same transaction that she views as a burden, namely the arbitration agreement."[110]

The United States District Court in the Northern District of Illinois in *Gersten* also relied on this analysis and used it as a way to harmonize its facts with *Washington Mutual* in order to compel a non-signatory to arbitrate.[111] Specifically, the court noted that the Gersten did seek to invoke significant rights under the Operating Agreement involved in the parties' dispute, which contained a broad arbitration provision.[112] As an owner of interest in the company, Gersten sought annual financial distributions and the right to inspect the core books and records of the Company seeking to compel arbitration.[113] Thus, if Gersten, the Plaintiff, wished to invoke the benefits of rights conferred by the Operating Agreement, the Plaintiff must also abide by the arbitration provision, which is explicitly within the same Operating Agreement that confers benefits to the Plaintiff.[114]

F. The Effect of a Lack of Incorporation by Reference when Considering Two Separate Agreements

The court in *Zurich* noted estoppel and incorporation by reference as distinct bases by which a non-signatory can be compelled to arbitrate claims.[115] Two Seventh Circuit cases offer thorough analysis of how the lack of incorporation by reference will force a court to not compel arbitration against a non-signatory,

105. *Zurich*, 417 F.3d at 687.
106. *Id.* (quoting Caligiuri v. First Colony Life Ins. Co., 742 N.E.2d 750, 756 (Ill. App. Ct. 2000)).
107. *Id.* ("[A] corporate relationship is generally not enough to bind a non-signatory to an arbitration agreement.").
108. *See* American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999); Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000); Washington Mutual Fin Group, LLC v. Bailey, 364 F.3d 260 (5th Cir. 2004).
109. *See Washington Mutual*, 364 F.3d at 267-68 (quoting Int'l Paper Co., 206 F.3d at 418)).
110. *Id.* at 268.
111. *Gersten*, 442 F. Supp. 2d at 582 n.4.
112. *Id.* at 583.
113. *Id.* at 582.
114. *Id.*
115. *See Zurich*, 417 F.3d at 687.

which is precisely the outcome of *Bank of America*.[116] In *Rosenblum v. Travelbyus.com Ltd.*, the Seventh Circuit addressed whether an employment agreement's arbitration clause governs and applies to the action of the acquisition agreement.[117] The court noted there were two potential origins of Rosenblum's obligation to arbitrate the dispute.[118] First, if the arbitration clause within the employment agreement arbitration clause was broad enough to cover disputes arising from the subsequent acquisition agreement, then Travelbyus could have required Rosenblum to arbitrate.[119] Second, an obligation to arbitrate is necessary if the subsequent acquisition agreement incorporates the employment agreement by reference.[120]

The court found that the two contracts were not part of the same agreement, and were "separate, free-standing contracts."[121] Through its logic, the court stated that "one contract may be fully performed while the other is breached."[122] In essence, the court reasoned that Rosenblum could fully perform one contract but be subject to a breach of the other, so the court was unable to find that the parties intended that the terms of the employment agreement to apply to disputes arising under the acquisition agreement.[123]

In regard to the law on incorporation by reference, the court construed Illinois law since it is a matter of contract interpretation.[124] As the general rule, "the contract must show an intent to incorporate the other document and make it part of the contract itself."[125] The court limited its interpretation to the four corners of the contract.[126] The defendant, Travelbyus.com, argued that the merger clause located within the acquisition agreement incorporated the employment agreement.[127] The court distinguished identification within a contract from the intent to incorporate another contract's provisions when it denied the defendant's incorporation by reference argument.[128] Following similar logic as the Eighth Circuit did in *Bank of America*, the court noted that "mere reference to another contract or document is not sufficient to incorporate its terms into a contract."[129] The court required an express intent to incorporate and, since there was no such expression within these two agreements, denied the incorporation by reference argument as a matter of law.[130]

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116. *See* Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657 (7th Cir. 2002); Grundstad v. Ritt, 106 F.3d 201 (7th Cir. 1997).
117. *Rosenblum*, 299 F.3d at 662.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 663.
122. *Id.*
123. *Rosenblum*, 299 F.3d at 663
124. *Id.* at 662.
125. *Id.* at 663.
126. *Id.* at 664.
127. *Id.*
128. *Id.* at 664-66.
129. *Rosenblum*, 299 F.3d at 666.
130. *Id.*

IV. INSTANT DECISION

On appeal, the Eighth Circuit articulated that the question of whether a dispute should be arbitrated under a contract is one of contract interpretation.[131] The court did not analyze a separate issue concerning whether the arbitrator decides if a dispute should be arbitrated because UMB argued the issue for the first time in their reply brief.[132] Since the dispute was a diversity action, the court applied the substantive law of Missouri, the forum state.[133]

In regard to the employment contracts the Advisors signed, the Eighth Circuit determined that the non-solicitation agreements at issue did not contain arbitration clauses.[134] The court's only finding of any applicable arbitration provision was within the FINRA form U-4.[135] All members of FINRA execute a form U-4, which includes an arbitration agreement "between members, members and associated persons, and associated persons."[136] However, the court poignantly noted that since BOA is not a FINRA member, it did not consent to be held accountable to the terms of FINRA's arbitration agreement between members.[137] Additionally, BOA could not hire FINRA members in their FINRA capacities because it was not a member of FINRA.[138] As a dispositive fact for affirming the district court ruling, the Eighth Circuit stressed the fact that the parties failed to assert any type of argument regarding incorporation of the FINRA arbitration agreement terms.[139] In order for UMB to compel arbitration with BOA, the court noted that the employment agreement needed to "incorporate the arbitration clause of the FINRA contracts by reference or otherwise."[140]

After reviewing the substantive law of Missouri regarding the possibility to enforce a contract against a non-signatory based on inextricable intertwinement, the Eighth Circuit found *Dunn* to be similar and a pertinent analogous case.[141] As a matter of law, the Eighth Circuit applied similar reasoning to the Missouri court's rejection that inextricability of facts permitted the court to bind a non-signing party to arbitration where that party had not agreed to arbitration in any manner.[142] Specifically, the court mentioned how BOA's claims were "inextricably intertwined with BOAIS's under the employment contract and not intertwined with the FINRA arbitration agreements."[143] Thus, due to the lack of any evidentiary force that the FINRA membership agreements benefitted BOA in any way or

131. *Bank of America*, 618 F.3d at 911.
132. *Id.* at 911 n. 3 ("[W]e would not consider the question in any case, as it was argued for the first time in a reply brief.").
133. *Id.* at 911.
134. *Id.* at 911-12.
135. *Id.* at 912.
136. *Id.* (The members agreed to arbitrate if a "dispute arises out of the business activities of a member or an associated person and is between or among: Members, Members and Associated Persons, or Associated Persons.").
137. *Bank of America*, 618 F.3d at 912 ("[B]OA is not a FINRA member and did not directly agree to subject itself to arbitration under FINRA's terms.").
138. *Id.* at 913-14.
139. *Id.* at 912.
140. *Id.* at 913.
141. *Id.*
142. *Id.*
143. *Bank of America*, 618 F.3d at 913.

that BOA expressed an intention to benefit from the FINRA agreements, the Eighth Circuit concluded that the district court did not err when it denied the motion to compel BOA to arbitrate.[144] Essentially, the Eighth Circuit adhered to the consensual agreement requirement between two parties as a condition to enforce an arbitration provision and found BOA had not agreed in writing or otherwise so it could not be compelled to do so.[145]

Finally, in order to clear any necessary involvement of BOAIS in the current dispute amongst BOA, UMB Financial, and the Advisors, the Eighth Circuit mentioned how BOAIS waived all claims related to the litigation or resulting from the employment agreements and non-solicitation clauses.[146] Furthermore, the court stated that UMB and the Advisors did not assert any claims against BOAIS.[147] For these reasons, the Eighth Circuit concluded that BOAIS could not be compelled to arbitrate either because there were no claims pending between BOAIS, UMB, and the Advisors.[148]

V. COMMENT

According to Professor Charles Knapp, one of the most litigated contract issues is whether or not to enforce a written arbitration agreement in a contract agreement.[149] In *Bank of America*, the Eighth Circuit decided this common issue among contracting parties and eventually denied UMB's request to compel arbitration.[150] A pivotal issue the courts try to answer when faced with a contract dispute is whether a consensual agreement occurred between the parties involved in the dispute.[151] Consent is also an important prerequisite to the Supreme Court in terms of their consideration to compel arbitration.[152] As the Court has decided, "[a]rbitration under the Act is a matter of consent, not coercion."[153] Courts use the canons of state law contract creation to determine whether the parties involved in a dispute acknowledged consent to arbitrate an issue.[154] Despite the FAA's policy to promote arbitration process, the lack of one party's consent to arbitrate will cause another party's potential motion to compel to fail pursuant to state contract interpretation.[155]

144. *Id.* at 914.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763 (2002).
150. *Bank of America*, 618 F.3d at 914.
151. Frank Z. LaForge, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225, 229 (2005).
152. Jaime Dodge Byrnes, Elizabeth Pollman, *Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House*, 8 HARV. NEGOT. L. REV. 289, 289 (2003) ("[T]he Supreme Court has consistently required consent as a precondition for compelling arbitration.").
153. Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
154. LaForge, *supra* note 146 at 229.
155. *Id.* at 230 ("[H]ence, if state contract formation law determines that the parties at hand have not manifested an agreement to arbitrate, the inquiry is ended regardless of the FAA's pro-arbitration policy.").

Rather than focusing on the extent and interpretations of BOA's claims against UMB, the Eighth Circuit prudently adhered to contractual foundations and decided to mainly focus on BOA's lack of consent to arbitration. BOA's lack of consent or even awareness of the arbitration clause within the FINRA membership agreement precluded the possibility that BOA should be compelled to arbitrate its unrelated claim against UMB and the Advisors.[156] Although the Eighth Circuit denied UMB's request to compel arbitration, the court did articulate various ways contracting parties can compel a non-signatory party to arbitrate.[157] Based on this authority, incorporation of the arbitration clause by reference in a contract in which the non-signatory is a signatory can offer the most predictable, persuasive, and efficient method to force a non-signatory to arbitrate future claims.

A. Incorporation by Reference: The Most Efficient and Fair Method to Compel a Non-signatory to Arbitrate Claims

Incorporation by reference can be the most discernible contract provision to successfully bind a non-signatory to an arbitration clause within another contract document.[158] However, according to J. Douglas Uloth & J. Hamilton Rial, III, some courts determine that incorporation by reference is not a valid method to bind a non-signatory "unless the incorporated arbitration clause itself contains language broad enough to allow non-signatories' disputes to be brought within its terms."[159] Broadly worded arbitration clauses can incorporate a non-signatory when the language within the clause is not limited to the named parties specifically identified in the agreement.[160] For instance, the use of arbitration clauses that refer to "contracting parties" instead of referring to the parties by name are considered broad and "may bind non-signatories to arbitration when the agreement or contract is referenced by an incorporation clause."[161] Additionally, as a strong prerequisite basis to the equitable estoppel theory, most courts that have compelled

156. *See Bank of America*, 618 F.3d at 912-913.

157. *Id.*

158. *See* 1 DOMKE ON COM. ARB. § 13:4 (3d ed. 2003).

159. J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel As A Basis for Compelling Nonsignatories to Arbitrate-A Bridge Too Far?*, 21 REV. LITIG. 593, 600 (2002); *See*, e.g., Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 47-48 (2d Cir. 1993) (holding that a broadly worded arbitration clause can bind a non-signatory if it is not restrictively worded); Import Export Steel Corp. v. Mississippi Valley Burge Line Co., 351 F.2d 503, 505-06 (2nd Cir. 1965) (holding that a motion to compel is denied when the non-party does not fit into the category of parties involved); Thyssen, Inc. v. M/V Markos N, 1999 WL 619634, at *4-*5 (S.D.N.Y. 1999) (stating that a narrow arbitration clause applies only to the particular parties identified in the clause.); Continental U.K., Ltd. v. Anagel Confidence Compania Navieras, S.A., 658 F. Supp. 809, 814 (S.D.N.Y. 1987).

160. Uloth & Rial, *supra* note 160 at 48; See, e.g., Progressive Case. Ins., 991 F.2d at 47-48 ("[A] broadly worded arbitration clause which is not restricted to the immediate parties may be effectively incorporated by reference into another agreement."); Thyseen, 1999 WL at *5 (stating that arbitration clause at issue was sufficiently broad to compel arbitration.); Limonium Maritime S.A. v. Mizushima Marinera, S.A., 1999 WL 46271, *6 (holding that the arbitration clause at issue was not limited to signatories and could cover disputes of non-signatories).

161. Uloth & Rial, *supra* note 160 at 48; See, e.g., Progressive Case. Ins., 991 F.2d at 48; Upstate Shredding, LLC v. Carlos Well Supply Co., 84 F. Supp. 357, 366 (S.D.N.Y. 2000).

arbitration against non-signatories based on an intertwinement theory also found references in the contracts to the non-signatories.[162]

From this diverse array of legal precedent, it is clear that courts prefer parties to utilize a broad arbitration clause that specifies its application to both signatories and non-signatories claims. In addition, parties that wish to maintain the possibility of compelling a non-signatory to arbitrate its claims in the future should also reference the non-signatory in the contract that incorporates the arbitration clause to further solidify their basis for a motion to compel. This procedure will force a non-signatory to recognize an arbitration clause and consent to its application according the arbitration clauses' terms.[163] When parties follow this clear procedure, it is apparent that the arbitral process' integrity and predictability are sustained and its main goals of efficiency and fairness are advanced.

From an efficiency standpoint, this method promotes efficiency by providing parties with clear expectations concerning which potential claims will be arbitrated, where the provision to which reference is made has a reasonably clear and ascertainable meaning.[164] Businesses and parties can avoid the long procedural process of determining whether a claim must be arbitrated and can instead move forward towards finality in their claims. Instead of resolving an arbitration conflict through a prolonged procedural litigation battle, clear contracting through the use of incorporation by reference clauses will allow parties to focus on other profit-maximizing or socially optimal ventures. As more parties' counsel incorporate arbitration clauses by reference between two different contracts, more and more predictability develops among arbitration clauses and contracting parties can allocate risk amongst each other more efficiently. Additionally, courts will examine similar and numerous incorporation by reference clauses and can begin to rule precedent that provides parties and counsel with clear guidance in future contract drafting. In sum, the incorporation by reference method is the traditional state contract law method that best serves and promotes the arbitration process. Its application should become the norm by parties wishing to bind a non-signatory to an arbitral forum concerning potential claims that may arise in the future.

B. The Inefficiency of the Inapplicable Inextricable Intertwinement Theory and Third-Party Beneficiary Status to the Case at Hand

The main problem with UMB's inextricable intertwinement theory is the lack of any relationship between the FINRA membership agreements and any of BOA's claims at issue. According to the "intertwining doctrine", courts may permit a motion to compel when the "non-signatory's claims are intertwined with and related to a contract containing a mandatory arbitration provision."[165] BOA's claims for violation of the non-solicitation agreement against the Advisors were unrelated to the underlying FINRA arbitration agreement, evidenced by the fact

162. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc, 10 F.3d 753, 757 (11th Cir. 1993) (quoting McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co, 741 F.2d 342, 344 (11th Cir. 1984)).

163. *See* 1 DOMKE ON COM. ARB. § 13:4 ¶ 2 (3d ed. 2003).

164. *Id.*

165. 6 C.J.S. Arbitration § 16 (2011) ("[U]nder the "intertwining doctrine," arbitration may be ordered if a nonsignatory's claims are intertwined with and related to a contract containing a mandatory arbitration provision.").

that BOA was not even a FINRA member nor was there any reference to the FINRA agreement in BOA's employment contract.[166] As in *Zurich*, any benefits that BOA received as a result of BOAIS's FINRA membership were too attenuated and indirect to force arbitration under an estoppel theory.[167] Additionally, the estoppel doctrine does not apply because BOA was not taking inconsistent positions as the plaintiff in Washington Mutual was attempting to do.[168] As efficient and just as arbitration can be for contracting parties, utilizing a common law doctrine of inextricable intertwinement or third party beneficiary status to compel arbitration in this case would promote inefficiency and an inequitable result. The current line in jurisprudence has increasingly allowed contractual theories to overshadow consent and these interpretations of third party relation based on state law contract doctrine comprise the consensual nature of arbitration.[169] The Eighth Circuit stayed true to a logical interpretation when it decided to not compel arbitration against BOA.[170]

Based on both ex-ante and ex-post perspectives, the circumstances in this case demonstrate the impracticability of compelling arbitration against an unassuming non-signatory. From an ex-ante perspective, if arbitration could be enforced against a non-signatory based on two unrelated contracts such as the BOAIS' employment contract and the FINRA membership contract, businesses and parties lose certainty in contracting their mitigation of liability for potential ventures or activities. Businesses and parties strategize in their contracting to avoid liability and desire certainty of in which forum a potential claim may arise. A loosely based estoppel theory that could compel an unsuspecting party like BOA to arbitrate, rather than the stringent test applied by Missouri and the Eighth Circuit, forecloses this strategy.

From an ex-post perspective, if a court permits UMB and the Advisors to compel arbitration against BOA, then many other parties would attempt to use arbitration as a procedural tactic to avoid litigation. For example, BOA sued UMB and the Advisors for a non-solicitation agreement violation. After BOA filed its suit, UMB and the Advisor's counsel seemed to use every procedural tactic to avoid the origination of this litigation.[171] As further proof that the UMB and the Advisor's counsel favored using arbitration as a means to avoid potential liability in a trial forum, they made passing reference to several potential theories to compel arbitration but never selected or developed one.[172] The fact that the counsel did not select one potential theory shows that there was never a true plan in place for the FINRA form to incorporate or require arbitration with non-signatories. If courts permit parties to compel arbitration based on an unrelated unilateral contract containing an arbitration provision from which the non-signatory derives no benefit, then the arbitration process compromises its high standard of efficiency and fairness.

166. *Bank of America*, 618 F.3d at 912.
167. *Zurich*, 417 F.3d at 688.
168. *Washington Mutual*, 364 F.3d at 268.
169. Byrnes & Pollman, *supra* note 152 at 311.
170. *Bank of Am.*, 618 F.3d at 914.
171. *Id.* at 909-12.
172. *See* Brief of Pl.['s]-Appellee at 54, Bank of Am. V. UMB Fin. Serv., Inc., No. 1436278 (8th Cir. Aug. 26, 2010).

VI. CONCLUSION

Arbitration is a matter of consent between contracting parties and not a tool used to coerce parties to an arbitral forum. If a signatory party to a contract with an arbitration clause desires to compel a non-signatory party to arbitrate its claims pursuant to another contract rather than pursue them in litigation, then signatory party should utilize the incorporation by reference method. This contract method promotes fairness and advances the fundamental goal of arbitration: efficiency. Some federal circuit courts have recently expanded the contractual theories to overshadow consent and expand the power to compel arbitration. These variations in interpreting party-status based on state law theories undermine the legitimacy of arbitration and compromise its attractiveness. Courts and parties should return to the fundamental principles of consensual arbitration to preserve its legitimacy and utility.

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