COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2020AP199 **Cir. Ct. No. 2017CV373**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JOHN MAYER AND DIANNE MAYER,

PLAINTIFFS-RESPONDENTS,

V.

CONROY SOIK AND MARY SOIK,

DEFENDANTS,

STEVE ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: MARK ROHRER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Reilly, P.J., Gundrum and Davis, JJ.

¶1 DAVIS, J. Normally only parties to a contract have standing to enforce it. There are exceptions. This case requires us to address the applicability of one or more of these exceptions. Specifically, we are asked to determine if and when a nonsignatory to a franchise agreement—here, a corporate officer of the franchisor—has standing to enforce an arbitration provision.

¶2 This issue arises in the context of a dispute between franchise partners. John and Dianne Mayer and Conroy[1] and Mary Soik (collectively, the Partners) own three Culver's restaurant franchises. The Mayers initially sued the Soiks, alleging breach of the Partners' operating agreements and various business torts. The Mayers later joined Steve Anderson, General Counsel and Vice President of Legal Affairs for Culver's Franchise Systems (CFS), the franchisor. The Mayers alleged that Anderson injected himself into this internecine partnership dispute by taking the Soiks' side and, in the course of doing so, committed various torts. Anderson moved to compel arbitration of the claims against him pursuant to an arbitration provision in the franchise agreement[2] between CFS and the Partners' corporate franchisee. The trial court denied the motion. Anderson now appeals.[3]

[1] Conroy Soik passed away during this litigation, but because the operative complaint brings claims against him, we treat him as a defendant for the purpose of this decision.

[2] The franchise agreement for each of the co-owned Culver's locations contains an identical arbitration provision. For ease of reading, we refer to the "franchise agreement" and the "arbitration provision" in the singular.

[3] Although this case is ongoing, this appeal is considered one as of right pursuant to ***L.G. v. Aurora Residential Alternatives, Inc.***, 2019 WI 79, ¶¶26-27, 387 Wis. 2d 724, 929 N.W.2d 590, holding that an order denying a motion to stay proceedings and compel arbitration is a final appealable order.

¶3 Anderson invokes various legal theories recognizing a nonsignatory's right to compel arbitration. We agree with Anderson that there are circumstances in which a nonsignatory should be able to enforce an arbitration provision—but only with respect to issues that fall within its scope. The provision here applies to disputes "between the parties … arising under or in connection with" the franchise agreement. As discussed below, some of the Mayers' allegations fit this description; others do not. We therefore reverse and remand for the circuit court to grant Anderson's motion to compel arbitration of those allegations that fall within the scope of the arbitration provision, as further articulated in this opinion.

BACKGROUND

¶4 The Partners, through corporate franchisees, own three Culver's franchises. A corporation operates the franchise at each location, for each of which, Conroy Soik is the president and Mary Soik is the bookkeeper. The complaint alleges that, in 2016, the Soiks told the Mayers that they would like to split up the franchises. The Mayers, before considering the proposal, requested inspection of financial and business records. The Soiks refused. The Soiks acted in other ways harmful to the Mayers and their business interests, including unilaterally paying rent on the buildings at a lesser amount, ceasing monthly distributions to shareholders, treating employees unfairly, and "[c]reating an overtly sexually harassing environment" in the stores. The Soiks took these actions, in part, so as to pressure the Mayers to dissolve their partnership.

¶5 In 2017, the Mayers sued the Soiks. In 2019, the Mayers filed an amended complaint—the operative complaint for this appeal—joining Anderson. The complaint alleges that Anderson abused his authority throughout the

partnership dispute in an attempt to strong-arm the Mayers into agreeing to a split of the businesses. Specifically, Anderson tried to mediate between the Mayers and the Soiks while, unbeknownst to the Mayers, separately counseling the Soiks. Anderson also disparaged the Mayers to CFS, "silence[d]" CFS employees who spoke out on the Mayers' behalf, and "receiv[ed] information regarding this lawsuit from the Soiks and their attorney which he used to further exert pressure on the Mayers."

¶6 Anderson, the complaint alleges, did not merely leverage his position to the Soiks' benefit; he also attempted to "destroy[] the business that the Mayers … worked tirelessly … to build" as "payback to the Mayers for standing up to him." When the Mayers refused to allow Anderson to act as mediator, Anderson retaliated by suspending the Mayers' Culver's expansion rights in Colorado, Wisconsin, and Michigan. The Mayers "brought their concerns" about Anderson to CFS; this prompted Anderson to retaliate further. Anderson told the Mayers that they could not acquire the Soiks' interest in the three co-owned restaurants, which the Mayers had been attempting to do in an effort to resolve the partnership dispute. Anderson also told the Mayers that Dianne Mayer could not be an approved Culver's operator (each Culver's location requires an approved operator; Conroy Soik was the operator until his death, at which point Dianne Mayer sought to become one). Finally, Anderson had CFS send the Mayers notices of default of the franchise agreement, on the grounds that the stores lacked an approved operator.

¶7 Based on these allegations, the Mayers sought compensatory and punitive damages against: (1) the Soiks for breach of fiduciary duty, breach of

contract, tortious interference with contract, and civil conspiracy; (2) Mary Soik for civil theft under WIS. STAT. § 895.446 (2019-20)[4] and conversion; (3) Anderson for aiding and abetting the Soiks' breach of fiduciary duty and tortious interference with the Mayer/Soik contractual relationship; and (4) Anderson and Mary Soik for injury to business in violation of WIS. STAT. § 134.01 and civil conspiracy.

¶8 Anderson brought a motion to dismiss and compel arbitration. The motion is based on an identical arbitration provision in franchise agreements between CFS and three respective corporations, of which each partner owns an equal share (we refer to the franchise agreement, in the singular, as between CFS and "the Partners' corporation"). As relevant here, that provision requires that

> **all disputes, claims and controversies between the parties arising under or in connection with this Agreement** or the making, performance or interpretation of this Agreement (including claims of fraud in the inducement and other claims of fraud and the arbitrability of any matter) which have not been settled through negotiation or mediation **will be submitted to binding arbitration pursuant to the Federal Arbitration Act**.

(Emphasis added.) As part of motion practice, the parties also submitted evidence showing that many of Anderson's so-called retaliatory actions either were carried out in the scope of his employment, on CFS' behest and authorization, or were not done by Anderson at all. We will discuss below whether and how this evidence is relevant to analyzing Anderson's motion.

¶9 In his motion, Anderson acknowledged that he was not a signatory to the franchise agreement, but he invoked various doctrines—agency, equitable

[4] All references to the Wisconsin Statutes are to the 2019-20 version.

estoppel, and third-party beneficiary—permitting a nonsignatory to enforce an arbitration provision against a signatory (he further argued that the Mayers personally, and not just the Partners' corporation, were signatories; we will address that nuance below). The trial court ruled that, nonetheless, Anderson was not a "party" to the agreement and thus could not demand arbitration of his dispute with the Mayers. The court based its conclusion on the plain language of the franchise agreement, which, in its view, precluded nonsignatories from invoking arbitration. For that reason, the court did not determine whether any nonsignatory principles might permit Anderson to compel arbitration of the claims against him. Anderson appeals from that ruling.

DISCUSSION

Principles of Law and Standard of Review

¶10 This arbitration provision falls within the scope of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., which governs written arbitration agreements in contracts involving interstate commerce.[5] *See* 9 U.S.C. § 2; ***Allied-Bruce Terminix Cos. v. Dobson***, 513 U.S. 265, 273-81 (1995). The purpose of the FAA is "to ensure judicial enforcement of privately made agreements to

[5] Anderson claimed below, and the Mayers do not appear to dispute, that the FAA governs this agreement. On review of the franchise agreement and other evidence, we agree. The franchise agreement indisputably involves interstate commerce, and the arbitration provision itself states that arbitration is "pursuant to" the FAA. We construe a separate choice-of-law provision, designating the governing law as "of the state in which the Franchise Location is located," as identifying the substantive law to apply in interpreting the contract. In the face of the explicit language of the arbitration provision, we do not construe the choice-of-law provision as requiring the application of the Wisconsin Arbitration Act. In any case, the Wisconsin Arbitration Act is substantively identical to the FAA, and Wisconsin courts rely heavily on cases interpreting the FAA for persuasive authority. *See* ***Riley v. Extendicare Health Facilities, Inc.***, 2013 WI App 9, ¶18 n.4, 345 Wis. 2d 804, 826 N.W.2d 398 (Ct. App. 2012). Therefore, our citation to and reliance on federal substantive law is not outcome-determinative.

arbitrate," ***Dean Witter Reynolds, Inc. v. Byrd***, 470 U.S. 213, 219 (1985), by requiring arbitration of "those disputes—but only those disputes—that the parties have agreed to submit to arbitration," ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 943 (1995). To that end, Section 2 of the Act provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24 (1983). The effect of Section 2 "is to create a body of federal substantive law of arbitrability" applicable in both federal and state courts "to any arbitration agreement within the coverage of the Act." ***Moses H. Cone***, 460 U.S. at 24.

¶11 A party may move to stay litigation and compel arbitration pursuant to 9 U.S.C. § 3; the court "shall … stay the trial of the action" "upon being satisfied that the issue … is referable to arbitration." Where there is an arbitration agreement between the parties, then, the court's role is limited: it does not consider the merits of the claim but only whether the claim is properly before it. ***AT&T Techs., Inc. v. Communications Workers of Am.***, 475 U.S. 643, 648-50 (1986). The court's inquiry is often described as one into arbitrability: whether the parties agreed to submit that particular dispute to arbitration. *See, e.g.*, ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.***, 473 U.S. 614, 625-26 (1985). The wrinkle is that some broad arbitration provisions, such as the one at issue here, "clearly and unmistakably" delegate the arbitrability question itself to

the arbitrator.[6] *See* ***AT&T Techs.***, 475 U.S. at 649. In that case, the court's role is even more circumscribed and is limited to determining the existence of a valid arbitration agreement between the parties. ***Henry Schein, Inc. v Archer & White Sales, Inc.***, 139 S. Ct. 524, 530 (2019); ***Lipton-U. City, LLC v. Shurgard Storage Ctrs., Inc.***, 454 F.3d 934, 937 (8th Cir. 2006). In either case, the court has no discretion: if the parties contracted to submit the dispute (or the arbitrability question) to arbitration, the court must order arbitration, regardless of any resulting inconvenience to the litigation parties. ***Moses H. Cone***, 460 U.S. at 20 (the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement"); ***Dean Witter Reynolds***, 470 U.S. at 217 (the FAA "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [their] own views of economy and efficiency' for those of Congress" (citation omitted)).

¶12 Section 2 of the FAA "explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity')," and Section 3 "adds no substantive restriction to [this] enforceability mandate." ***Arthur Andersen LLP v. Carlisle***, 556 U.S. 624, 630 (2009) (quoting 9 U.S.C. § 2). Accordingly, courts determine threshold questions of contractual scope, validity,

[6] This arbitration provision requires that "all disputes, claims and controversies … including … the arbitrability of any matter … be submitted to binding arbitration." If we had any doubt as to whether this provision delegates arbitrability to the arbitrator, we note that the provision requires arbitration "in accordance with … the Commercial Arbitration Rules of the American Arbitration Association [AAA]." Most federal courts of appeals have construed this language as delegating arbitrability to the arbitrator, on the theory that AAA rules permit the arbitrator to determine his or her own jurisdiction. *See* ***Fallo v. High-Tech Inst.***, 559 F.3d 874, 877-78 (8th Cir. 2009). Therefore, we will attempt to avoid weighing in on arbitrability—whether these claims, if brought against CFS, would be arbitrable—even though, practically speaking, that inquiry overlaps with whether Anderson may compel arbitration. We note also that Anderson may in fact have consented to our determining arbitrability by specifically arguing this issue below.

and enforceability by applying generally applicable principles of state law. ***Id.*** at 630-61. These include, as relevant here, principles that "allow a contract to be enforced by or against nonparties to the contract," such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[7] ***Id.*** at 631 (citation omitted). Here, the parties agreed to apply the law of the state in which the franchises are located, which is Wisconsin.

¶13 Below, we will discuss some relevant principles that courts apply when faced with a motion to compel arbitration by or against a nonsignatory. We note here that although the case law frequently refers to a general presumption of arbitrability, we construe this presumption as attaching only *after* the court determines that an arbitration agreement between the parties actually exists. *See* ***Moses H. Cone***, 460 U.S. at 24 ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). *But see* ***Century Indem. Co. v. Certain Underwriters at Lloyd's***, 584 F.3d 513, 526 (3d Cir. 2009) (agreeing with "[s]everal other courts of appeals," which "view the presumption in favor of arbitration [as] appl[ying] to the question [of] whether a particular dispute falls within an existing agreement's scope, but not to the threshold question as to the existence of an agreement between the parties to arbitrate"). After all, where a

[7] The list expressed in ***Arthur Andersen LLP v. Carlisle***, 556 U.S. 624, 630 (2009), is nonexclusive and includes, as relevant here, principles drawn from the law of agency. *See* ***Grand Wireless, Inc. v. Verizon Wireless, Inc.***, 748 F.3d 1, 9-13 (1st Cir. 2014); *see also* MARTIN DOMKE, ET AL., 1 DOMKE ON COMMERCIAL ARBITRATION § 13.1 (June 2021 update) ("The Supreme Court did not expressly declare that these are the only state-law principles allowing enforcement of a contract by or against a nonparty, and further observed … that [references to] 'the federal policy favoring arbitration' … 'cannot possibly require the disregard of state law permitting arbitration by or against nonparties to the written arbitration agreement.'" (quoting ***Arthur Andersen***, 556 U.S. at 630 n.5).

nonsignatory seeks to compel arbitration with a signatory, or vice versa, the court's inquiry is, essentially, whether there is an implicit or de facto arbitration agreement between the two. It would erode a party's fundamental right to access the courts if the court presumed arbitrability at the outset. *See* ***Grundstad v. Ritt***, 106 F.3d 201, 205 n.5 (7th Cir. 1997) ("[T]he 'federal policy favoring arbitration' … does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place." (citation omitted)). All of this is to say that we do not apply any presumption of arbitrability in reviewing the motion to compel itself. Nonetheless, our analysis occasionally requires us to wade into the realm of arbitrability—whether *CFS* and the Mayers intended to submit a particular dispute to arbitration—and we do so with the purpose and policy of the FAA in mind.

¶14 Where a litigant moves to stay litigation and compel arbitration pursuant to 9 U.S.C. § 3 (or dismiss and compel arbitration, as here),[8] the court applies the same standard as on summary judgment. ***PCH Mut. Ins. Co. v. Casualty & Sur., Inc.***, 569 F. Supp. 2d 67, 73-74 (D.D.C. 2008). The party seeking to compel arbitration must demonstrate that there is no genuine issue of material fact and that arbitration is required. ***Id.*** at 74. The nonmoving party, in

[8] Anderson sought dismissal, as opposed to a stay, on the grounds that all of the claims against him were subject to arbitration. *See* ***Johnson v. Orkin, LLC***, 928 F. Supp. 2d 989, 1008 (N.D. Ill. 2013) ("There is a growing trend among courts favoring dismissal of a case when all of the claims contained therein are subject to arbitration—resulting in 'a judicially-created exception to the general rule which indicates district courts may, in their discretion, dismiss an action rather than stay it where it is clear the entire controversy between the parties will be resolved by arbitration.'" (citation omitted)). The trial court did not reach the issue of whether dismissal versus a stay was appropriate. The methodology for deciding a motion to dismiss in this context, however, is identical to that for deciding a motion to stay, so we need not decide this point. *See* ***Brown v. Dorsey & Whitney, LLP***, 267 F. Supp. 2d 61, 66-67 (D.D.C. 2003).

turn, must designate sufficient specific facts establishing a genuine issue for trial. ***Id.*** If a factual dispute exists, the court must resolve this threshold issue through a trial or other proceedings. *See* ***id.*** at 77-78. Our review is de novo. ***McMahan Sec. Co. v. Forum Cap. Mkts. L.P.***, 35 F.3d 82, 86 (2d Cir. 1994).

Analysis

The franchise agreement does not preclude application of principles governing contract enforceability by third parties

¶15 The trial court denied Anderson's motion to compel arbitration based on the plain language of the franchise agreement, which, in its view, precluded *any* nonsignatory from invoking arbitration. The court reached this result by determining that the words "party" and "parties" in the franchise agreement referred only to the signatories. It followed, the court reasoned, that had the parties intended to permit nonsignatories to invoke arbitration, the arbitration provision would have referenced CFS's officers, directors, etc. The Mayers largely abandon this argument on appeal, but the point nonetheless bears addressing so that we may properly frame the issue before us.

¶16 Much of the briefing below focused on whether the terms "party," "parties," and "between the parties" were ambiguous and/or encompassed Anderson. To be clear, the franchise agreement is unambiguous and is between only two parties: CFS and the Partners' corporation. We know this because the agreement states so at the outset ("THIS FRANCHISE AGREEMENT is … between [CFS] and [the Partners' corporation]"). Thus, the contractual term "party" refers to, and can only refer to, either CFS or the Partners' corporation; the term "parties" means both. But this unremarkable conclusion is the beginning, not the end, of our analysis. Anderson does not argue that he is a party to the contract.

Rather, he argues that various principles permit him, as a *third-party nonsignatory*, to invoke arbitration.

¶17 The Mayers argued below (and the trial court agreed) that the contract itself precluded Anderson's reliance on these principles. But parties are presumed to contract with knowledge of the law: here, that Wisconsin law extends contractual rights and obligations to third parties under a variety of circumstances, and that a body of persuasive authority has developed to apply these third-party principles to motions to compel arbitration. *See* ***Menard v. Sass***, 127 Wis. 2d 397, 399, 379 N.W.2d 344 (Ct. App. 1985) ("It must be assumed that parties to a contract have knowledge of the law in effect at the time of the agreement."). Had the parties sought to preclude the application of common-law doctrines of agency, equitable estoppel, and the like, they could have done so (setting aside any public-policy concerns this might have created, language along the lines of, "Only the signatories and their personal guarantors may submit a matter to arbitration" should have sufficed). The parties' *failure* to include such language, however, cannot possibly mean that they intended that result; it does not even mean that the agreement is ambiguous. Rather, the contract speaks for itself: it creates rights and obligations only for the parties, but within a legal framework that permits the extension of those rights and obligations to third parties, under certain circumstances. The inquiry, then, is not whether the franchise agreement

precludes nonsignatories from invoking arbitration as a matter of law, but whether this nonsignatory may invoke arbitration of this dispute.[9]

¶18 On a side note, the franchise agreement is between CFS and the Partners' corporation; the Mayers are not signatories. For purposes of this appeal, however, the parties agree that each partner can be considered a signatory by virtue of a "personal guarantee" addendum. Therefore, we treat the Mayers as personally entering into and bound by the terms of the contract.

Enforcement of arbitration agreements by nonsignatories

¶19 Wisconsin case law generally recognizes that contractual rights and obligations extend to nonsignatories under various common-law principles. *See*, *e.g.*, ***Winnebago Homes, Inc. v. Sheldon***, 29 Wis. 2d 692, 699-700, 139 N.W.2d

[9] Below, the Mayers argued that other contract provisions, when read in conjunction with the arbitration provision, demonstrate that the arbitration provision prohibits nonsignatories from invoking arbitration. We disagree. The franchise agreement lays out the rights and obligations of the contracting parties; where it apparently made sense to do so, the agreement also refers to the rights and obligations of individuals acting on those corporations' behalf. Thus, for example, a "class action" provision in the same section as the arbitration provision states that only the Mayers, the Soiks, and CFS's "officers, directors, owners or partners" have the right to join in arbitration. As the Mayers would have it, the explicit reference to CFS "officers" in the class action provision, but not in the arbitration provision, means that Anderson can join in but cannot invoke arbitration. We are dubious of this logic, but the more fundamental flaw is that any argument along these lines presupposes some ambiguity in the arbitration provision. The arbitration provision is *silent* as to whether a nonsignatory can invoke arbitration under contract-law principles, but that does not mean that it is *ambiguous*. *See* ***Kuehn v. Safeco Ins. Co. of Am.***, 140 Wis. 2d 620, 626, 412 N.W.2d 126 (Ct. App. 1987) ("We find no authority that mere silence [in the contract] is the equivalent of ambiguity."). Without speculating too much on this point, it seems unlikely that any arbitration provision could preclude application of these principles—or any other pertinent body of law—without explicitly stating so. We note too that even if the arbitration provision were ambiguous, we would be hesitant to interpret it so as to reach a result that is both absurd and likely unintended. That is, if we interpreted the arbitration provision as precluding nonsignatories from invoking arbitration in all circumstances, then either party could evade arbitration of tort claims merely by suing the other party's employees, with mandatory indemnification and directors and officers liability insurance available to make the end run complete.

606 (1966) (third-party beneficiary); ***Dunn v. Pertzsch Constr. Co.***, 38 Wis. 2d 433, 436-38, 157 N.W.2d 652 (1968) (equitable estoppel). Relatedly, Wisconsin law recognizes the legal distinction between agent and principal while also, in some circumstances, extending the principal's rights and obligations to the agent. *See, e.g.*, ***Benjamin Plumbing, Inc. v. Barnes***, 162 Wis. 2d 837, 848-52, 470 N.W.2d 888 (1991) (agent personally liable where contracting party unaware of principal's corporate status); ***Krawczyk v. Bank of Sun Prairie***, 203 Wis. 2d 556, 563-67, 553 N.W.2d 299 (Ct. App. 1996) (negligent bank officer not liable for economic losses caused to those other than the bank).

¶20 In addition, "Wisconsin has a 'policy of encouraging arbitration as an alternative to litigation,'" and "[t]he Wisconsin Arbitration Act embodies this … clearly established public policy to enforce agreements to arbitrate." ***First Weber Grp., Inc. v. Synergy Real Est. Grp., LLC***, 2015 WI 34, ¶24, 361 Wis. 2d 496, 860 N.W.2d 498 (citations omitted). Wisconsin courts have had little opportunity, however, to apply contract and agency principles to the enforcement of arbitration agreements by or against nonsignatories. To our knowledge, there is no binding or persuasive Wisconsin authority on point. Without foreclosing the application of other principles under other circumstances, we have identified at least two that theoretically apply to Anderson's motion: agency and equitable

estoppel. We will discuss these as they relate to a nonsignatory's motion to compel arbitration with a signatory.[10]

¶21 Courts often turn to agency principles where a nonsignatory corporate-officer defendant seeks arbitration. The premise is that corporations can only act through individuals. Thus, where the plaintiff alleges misconduct relating to the defendant's behavior as officer, or capacity as agent, "courts have consistently afforded agents the benefit of arbitration agreements." MARTIN DOMKE, ET AL., 1 DOMKE ON COMMERCIAL ARBITRATION § 13.4 (June 2021 update); ***Meridian Imaging Sols., Inc. v. OMNI Bus. Sols. LLC***, 250 F. Supp. 3d 13, 23 (E.D. Va. 2017) ("This sensible rule—that a corporation's agents or employees may in some instances invoke the company's arbitration clause—is widely recognized."). Doing so is necessary both to carry out the intent of the signatory parties and to prevent the plaintiff from circumventing the arbitration agreement by suing the employee directly. ***Hirschfeld Prods. v. Mirvish***, 673 N.E.2d 1232, 1233 (N.Y. 1996).

¶22 This is a fact-specific inquiry into the contract's terms, the contracting parties' intentions, and the officer's alleged actions. Courts[11] consider such overlapping factors as: (1) whether the parties anticipated an ongoing

[10] Anderson's is a motion *by* a nonsignatory to compel arbitration. Courts, at times, have applied contract and agency principles to enforce an arbitration agreement *against* a nonsignatory. Courts, however, are generally more hesitant to bind an unwilling nonsignatory to arbitration. *See* ***Merrill Lynch Inv. Managers v. Optibase, Ltd.***, 337 F.3d 125, 131 (2d Cir 2003) ("[I]t matters whether the party resisting arbitration is a signatory or not…. '[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party." (second alteration in original; citation omitted)). Therefore, case law analyzing a signatory's motion to compel against a nonsignatory has less relevance to Anderson's motion.

[11] ***McCarthy v. Azure***, 22 F.3d 351, 357-58 (1st Cir. 1994), provides a helpful summary of considerations that typically guide the agency inquiry.

relationship, such that they expected that agents would be carrying out the terms of the contract;[12] (2) whether the contract contains a broad arbitration agreement, indicating an intent to rely on arbitration as the main forum for dispute resolution;[13] (3) whether the arbitration agreement, and the contract as a whole, indicate an intent to protect employees alleged to have committed misconduct within its scope;[14] (4) whether the allegations relate to actions the officer took in an official capacity (i.e., as an agent or within the scope of employment), as opposed to his or her personal capacity;[15] and (5) whether the claims themselves are arbitrable.[16] The basic idea can be summed up as, "Don't shoot the (corporate officer) messenger." *See* ***Trott v. Paciolla***, 748 F. Supp. 305, 309 (E.D. Pa. 1990) ("[The defendant] was an employee of Merrill Lynch. An entity such as Merrill Lynch can only act through its employees and an arbitration agreement would be of little practical value if it did not extend to employees.").

[12] *See* ***id.*** at 357-58 (not applying agency theory partly because the asset transfer agreement containing the arbitration provision was "a one-shot transaction").

[13] *See* ***id.*** at 358-59 (not applying agency theory partly because the arbitration clause was narrow).

[14] *See* ***Roby v. Corporation of Lloyd's***, 996 F.2d 1353, 1360 (2d Cir. 1993) (applying agency theory on the grounds that the parties intended to protect nonsignatories; "otherwise, it would be too easy to circumvent the agreements"); ***Glassell Producing Co. v. Jared Res., Ltd.***, 422 S.W.3d 68, 81 (Tex. App. 2014) ("[I]t is impractical to require every corporate agent to sign or be listed in every contract"; thus, arbitration cannot be avoided by suing the owner, officer, etc.).

[15] *See* ***McCarthy***, 22 F.3d at 359-61 (not applying agency theory partly because defendant was not acting in a representative capacity); ***Letizia v. Prudential Bache Sec., Inc.***, 802 F.2d 1185, 1187-88 (9th Cir. 1986) (requiring plaintiff to arbitrate fraud and securities law violation claims with nonsignatory broker who handled the account).

[16] *See* ***McCarthy***, 22 F.3d at 361.

¶23 Generally speaking, the concept of equitable estoppel prevents a party from repudiating a contract where his or her action or nonaction in regards to that contract induced another party to reasonably rely thereon, to the other party's detriment. ***Dunn***, 38 Wis. 2d at 436-38. Courts have formulated several variations of this principle in the context of motions to compel arbitration with nonsignatories; we will discuss those most applicable to the facts before us. For our purposes, the basic premise is that

> a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are *intimately founded in and intertwined with the underlying contract* obligations.… This requirement comports with, and indeed derives from, the very purposes of the doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of the same agreement.
>
> [E]quitable estoppel applies only if the plaintiffs' claims against the nonsignatory are *dependent upon, or inextricably bound up with, the obligations imposed by the contract* plaintiff has signed with the signatory …. [M]erely mak[ing] reference to an agreement with an arbitration clause is not enough…. [Plaintiff] must rely on the terms of the written agreement in asserting [its] claims against the nonsignatory.

Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1129 (9th Cir. 2013) (first, second, third, and fifth alteration in original; citations omitted).

¶24 Some courts more directly incorporate the "reliance" element of equitable estoppel, by clarifying that there must be a relationship between the

nonsignatory defendant and the other party to the contract.[17] The Second Circuit helpfully explained this concept by denoting the signatory plaintiff as "*x*," the other party to the contract as "*y*" and the nonsignatory as "y^1." *See* ***Sokol Holdings, Inc. v. BMB Munai, Inc.***, 542 F.3d 354, 359 (2d Cir. 2008). Arbitration may be appropriate where *x* brings claims against y^1 and where the y/y^1 relationship is, for example, one of corporate parent/subsidiary, affiliate/affiliate, guarantor/debtor, or assignor/assignee. ***Id.*** at 359-62.

> In each case, the promise to arbitrate by *x*, the entity opposing arbitration, was reasonably seen on the basis of the relationships among the parties as extending not only to *y*, its contractual counterparty, but also to y^1, an entity that was, or would predictably become, with *x*'s knowledge and consent, affiliated or associated with *y* in such a manner as to make it unfair to allow *x* to avoid its commitment to arbitrate on the ground that y^1 was not the very entity with which *x* had a contract. The estoppel did not flow merely from *x*'s agreement to arbitrate with *someone* (*y*) in disputes relating to the agreement. It flowed rather from the conclusion that the relationships among the parties developed in a manner that made it unfair for *x* to claim that its agreement to arbitrate ran only to *y* and not to y^1.

Id. at 361. Finally, some courts require an explicit initial determination of arbitrability—whether the scope of the arbitration clause even covers the dispute. *See* ***Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.***, 845 F.3d 1351, 1354-55 (11th Cir. 2017). This consideration underlies other analyses but is not always articulated.

[17] We view the explicit requirement that there be some relationship between nonsignatory and the other party to the contract (which also relates back to agency principles) as embodying the concept of reliance. That is, a nonsignatory might reasonably rely on the existence of, and expect to be protected by, an arbitration agreement where it has a functional or legal relationship with the signatory (i.e., employer/employee, parent corporation/subsidiary, etc.).

¶25 To summarize, the application of agency and equitable estoppel principles in this context is pragmatic and fact-specific. The goal is to carry out the contracting parties' intentions and prevent any absurdity that might result from limiting arbitration only to the signatories. Generally speaking, in applying these principles, courts consider who the nonsignatory is, what the nonsignatory did, and how that conduct relates to the contract and the arbitration provision.

¶26 As should be evident from this discussion, the assessment of whether a nonsignatory may compel arbitration overlaps significantly with the inquiry into arbitrability: whether the arbitration agreement's scope covers that dispute, regardless of who the defendant is. We recognize that the arbitration provision at issue here delegates that determination to the arbitrator, *see* note 6, but we cannot wholly ignore arbitrability if we wish to resolve the issue before us. Thus, to the extent we must determine whether the franchise agreement compels arbitration of these claims, some principles of arbitrability are relevant. First, as stated above, once the court determines that an agreement exists to arbitrate, the presumption is that a dispute is arbitrable. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." ***Moses H. Cone***, 460 U.S. at 24-25.

¶27 Second, arbitration provisions are either narrow or broad, the conceptual difference being whether "the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement" (broad) or whether, "on the other hand, arbitration was designed to play a more limited role in any future dispute" (narrow). ***Alstom v. General Elec. Co.***, 228 F. Supp. 3d 244, 250 (S.D.N.Y. 2017) (citation omitted). Courts uniformly classify clauses like the one at issue here

(requiring arbitration of disputes both "arising under" and "in connection with" the contract) as broad.[18]

¶28 Where the language in the agreement is broad, it can be said that courts apply the presumption of arbitrability with even greater force, in that they assume that the provision applies to collateral and indirect claims. *See* ***AT&T Techs.***, 475 U.S. at 650. Courts have expressed this point in various ways, the basic idea being that a broad arbitration agreement encompasses "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract." *See* ***Simula, Inc. v. Autoliv, Inc.***, 175 F.3d 716, 721 (9th Cir. 1999).[19] Conversely, where the claim is "'independently and separately assertable' even if the arbitration clause contract did not exist," then the claim is *not* arbitrable. ***Europlasma, S.A. v. Solena Grp., Inc.***, 604 F. Supp. 2d 66, 70 (D.C.C. 2009) (citation omitted). At the same time, there are outer limits to the scope of any clause; for example, where the only link between claim and contract is the "but for" of that contract's enabling those parties to interact, then the claim is not arbitrable. *See, e.g.*, ***Hill v. Hilliard***, 945 S.W.2d 948, 952 (Ky. Ct. App. 1996) (claims based on employer's alleged rape of

[18] *See* ***Hafer v. Vanderbilt Mortg. & Fin., Inc.***, 793 F. Supp. 2d 987, 1009 (S.D. Tex. 2011) ("[C]ourts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract." (alteration in original; citation omitted)); ***Simula, Inc. v. Autoliv, Inc.***, 175 F.3d 716, 720-21 (9th Cir. 1999) (language "[a]ll disputes arising in connection with" denotes broad arbitration agreement).

[19] *See also* ***AT&T Techs., Inc. v. Communications Workers of Am.***, 475 U.S. 643, 650 (1986) ("[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute…. Such a presumption is particularly applicable where the clause is … broad." (Second alteration in original; citations omitted)).

employee not arbitrable under the FAA; "[t]he mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative").

¶29 From these basic principles follow two additional points of law. "In determining whether a claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint, not the legal causes of action asserted." ***Genesco, Inc. v. T. Kakiuchi & Co., Ltd.***, 815 F.2d 840, 846 (2d Cir. 1987), *abrogated on other grounds as recognized by* ***Rodriguez-Depena v. Parts Auth., Inc.***, 877 F.3d 122, 124 n.1 (2d Cir. 2017). Thus, "[i]f the allegations underlying the claims 'touch matters' covered by the parties' [contracts], then those claims must be arbitrated, whatever the legal labels attached to them." ***Genesco***, 815 F.2d at 846 (quoting ***Mitsubishi***, 473 U.S. at 624 n.13). Relatedly, "[b]roadly worded arbitration clauses … are generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement." ***CD Partners, LLC v. Grizzle***, 424 F.3d 795, 800 (8th Cir. 2005). This makes sense given that broad clauses cover both "contract-generated" and "contract-related disputes between the parties however labeled"; thus, it is "immaterial whether claims are in contract or in tort." ***Id.*** at 801 (citation omitted).

Application of nonsignatory principles to the facts of this case

¶30 Before turning to our analysis, we must clear up some points regarding which facts we may consider and what those facts mean. The Mayers would confine our analysis to the pleadings, on the theory that this is a motion to dismiss. As we discuss above, however, motions to compel arbitration are treated under the summary judgment standard, meaning we consider the evidence filed in

connection therein. *See* ***PCH Mut. Ins. Co.***, 569 F. Supp. 2d at 73-74. Our doing so hardly seems unfair, in any case, given that both parties submitted materials extraneous to the pleadings. In reviewing this evidence, we construe the facts and reasonable inferences in favor of the Mayers. *See* ***Acuity v. Society Ins.***, 2012 WI App 13, ¶12, 339 Wis. 2d 217, 810 N.W.2d 812. Where Anderson has introduced evidence on some point, however, we will not treat the mere allegations or denials in the complaint as raising a genuine issue of material fact. *See* WIS. STAT. § 802.08(3).

¶31 The parties' evidence presents a straightforward account of the capacity in which Anderson was acting in his dealings with the Mayers. Simply put, he was acting as the agent of CFS. Joe Koss, President and Chief Executive Officer of CFS, attested without rebuttal that:

> At all relevant times in dealing with the Mayers and Soiks, Steve Anderson has acted within the course and scope of his employment as Vice President and General Counsel of CFS and all of his communications were on behalf of CFS. I know this because Steve Anderson reports directly to me.

Koss further attested that, although Anderson did send a letter to the Mayers suspending their expansion rights, that letter "was authorized by CFS and articulated the company's position."[20] Recall, too, that the complaint discusses other allegedly tortious actions/communications by Anderson, relating to CFS's

[20] Shortly after Anderson was joined in this case, CFS filed a demand for arbitration against the Mayers, the Soiks, and the corporate franchisees. The Mayers attached the demand for arbitration to its response to Anderson's motion to compel. We do not treat the demand itself as evidence; it is the equivalent of a complaint. We have referred to the demand, however, so as to verify, by reference to date, the general subject matter of some of the letters that Koss attests about. We do not feel it improper to do so: portions of these letters are reproduced verbatim, the Mayers introduced the arbitration demand and do not allege that it is inaccurate, and we do not otherwise rely on the content of the demand.

not approving Dianne Mayer as a Culver's operator, not allowing the Mayers to acquire the Soiks' interest, and sending notices of default to the Mayers. According to the Koss affidavit, Anderson did not send these letters: either Koss or CFS's outside counsel did. These letters too were "authorized by CFS and articulated the company's position."

¶32 The Mayers do not address how these facts relate to our analysis, other than to argue we should not consider them at all. But we cannot rely on broad allegations in the complaint where they are specifically contradicted by the evidence. In any case, as we will see, whether Anderson was acting within the scope of his employment is less relevant than whether Anderson's actions were connected to the franchise agreement. We keep in mind, however, that any actions or communications Anderson took in connection with the franchise agreement were at the direction of CFS. Moreover, the Koss affidavit would seem to establish that Anderson had no role in CFS's nonapproval of Dianne Mayer as a Culver's operator, its nonapproval of the Mayers' franchise interest acquisition, or its defaulting the Mayers under the franchise agreement. But because Anderson's exact role in these transactions is ultimately unimportant, we will leave open the possibility that Anderson was involved in a behind-the-scenes capacity.

¶33 This brings us to the essence of this appeal. The Mayers bring claims against Anderson; the labels attached to these claims, and whether they sound in tort or contract, are irrelevant to determining whether agency and equitable estoppel doctrines might apply. *See* ***Genesco***, 815 F.2d at 846; ***CD Partners***, 424 F.3d at 800. When we look at the underlying factual allegations, we can divide them into two groups. First are allegations that only tangentially relate either to Anderson's role as an officer or to any subject covered by the franchise agreement. These are that Anderson: (1) improperly attempted to mediate the

partnership dispute, (2) disparaged the Mayers to CFS, (3) "silence[d]" employees who spoke out on the Mayers' behalf, and (4) used information he received "regarding this lawsuit … to further exert pressure on the Mayers."

¶34 To the extent the Koss affidavit is meant to refer to these actions, we know that Anderson was acting "within the course and scope of his employment." But this fact alone is not enough to require arbitration. To apply either agency or equitable estoppel theories, we must undertake some inquiry into arbitrability; contractual protections for employees can only go so far as the contract's scope. And even applying a presumption of arbitrability, the above-described tortious conduct is not "arising under" or "in connection with" the franchise agreement. To be sure, "but for" the franchise agreement, there would be no CFS/Partners relationship, and thus Anderson would not have had the opportunity or ability to harm the Mayer/Soik partnership. But this is not enough to compel arbitration of issues that are, in fact, "independently and separately assertable." *See* ***Europlasma***, 604 F. Supp. 2d at 70 (citation omitted).

¶35 In contrast, the second group of allegations directly relates both to Anderson's duties as vice president and general counsel and to the Mayers' rights and obligations under the franchise agreement. These are that Anderson: (1) on CFS's directive, suspended the Mayers' Culver's expansion rights; (2) was involved in the decision to disapprove Dianne Mayer as a Culver's operator, (3) was involved in the decision to disapprove the Mayers' acquisition of the Soiks' interest in the three co-owned restaurants, (4) was involved in the decision to require the Mayers to inform any prospective purchaser of the Soiks' interest that the Mayers were not approved operators, and (5) was involved in the decision to send the Mayers notices of default of the franchise agreement.

¶36 Were these the only allegations before us, both agency and equitable estoppel doctrines would seem eminently applicable. We begin with the franchise agreement itself. That contract covers, among other topics: (1) whether the Mayers have the right to expand to new locations, (2) the conditions under which CFS will approve a partner as a store operator, (3) the conditions under which CFS will approve a partner's transfer of interest in the franchises, and (4) the circumstances in which CFS has the right to default the Partners and terminate the franchise agreement. If the Mayers had alleged only facts in the second group, then, the resulting claims clearly would have a significant relationship to and origin in the contract, and could not be asserted if the contract did not exist. The claims also could not be resolved without interpreting and applying the contract, since Anderson cannot, by these actions, have committed a business tort with respect to the Mayer/Soik partnership if the same actions were permissible under the franchise agreement. Such claims would be arbitrable, and the fact that the Mayers had also alleged claims against the Soiks, or against Mary Soik and Anderson, would be immaterial. *See* ***Dean Witter Reynolds***, 470 U.S. at 217 ("[T]he Arbitration Act divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so.").

¶37 Next we consider nonsignatory principles. As to agency, CFS and the Partners' corporation created a fifteen-year fixed-term contract containing a broad arbitration clause. The parties plainly anticipated an ongoing relationship, necessarily performed by corporate personnel, with any resulting disputes connected to the franchise agreement resolved through arbitration. Anderson took various actions under that agreement in his official capacity as vice president and

general counsel. The Mayers object to these actions, which impact the Mayers' contractual rights to expand, acquire the Soiks' interest, and continue operating their business. On these facts, it seems entirely fair to carry out the parties' intention to arbitrate this dispute. It would be unfair to allow the Mayers to circumvent that agreement by suing Anderson directly and carefully framing their claims as affecting only the Mayer/Soik relationship. *See* ***Glassell Producing Co. v. Jared Res., Ltd.***, 422 S.W.3d 68, 77 (Tex. App. 2014) ("When determining whether claims fall within the scope of the arbitration agreement, we look to the factual allegations, not the legal claims. The determination is made based on the substance of the claim, not artful pleading." (citations omitted)).

¶38 Along similar lines, Anderson may invoke equitable estoppel to arbitrate this second group of allegations. For the reasons discussed above, these issues are intimately founded in and intertwined with the parties' contractual obligations. Moreover, there is a close connection between CFS and Anderson—the *y* and y^1—such that the Mayers could have reasonably predicted the franchise agreement's extending to Anderson. This is not a case in which Anderson is simply latching on to the existence of a random arbitration agreement between the Mayers and some unaffiliated third party.

¶39 The problem is that each of the Mayers' claims against Anderson relies to some degree on factual allegations from each group.[21] The overriding gist of the suit is that Anderson injected himself into a dispute that had nothing to do

[21] The possible exception is Mayers' injury to business claim, which alleges only that "Anderson acted willfully and maliciously by unjustifiably asserting himself in the partnership dispute and abusing his position of power and authority to exert pressure on the Mayers to dissolve their partnership with the Soiks." It is unclear which factual allegations support this claim.

with CFS, and many of the factual allegations similarly have nothing to do with CFS or the franchise agreement. Yet portions of each of the pleaded claims involve conduct that is, without question, arbitrable. Thus, for example, Anderson allegedly aided and abetted the Soiks' breach of fiduciary duty by seeking "to mediate the partnership dispute without disclosing to the Mayers that he was counseling the Soiks throughout the legal proceedings" and by "unjustifiably assert[ing] himself in the dispute" (first group—not arbitrable). Anderson, however, also allegedly committed this tort by: (1) "exert[ing] pressure on the Mayers to dissolve the partnership by suspending their expansion rights when he ha[d] no legal or factual basis to do so," (2) "increas[ing] the pressure by getting [CFS] to withdraw its approval of Dianne Mayer as an operator," and (3) "ha[ving CFS] issue notices of default for the co-owned stores in order to prevent the Mayers from acquiring the Soiks' interest in the restaurant which the Mayers had the contractual right to do under their partnership agreement with the Soiks" (second group—arbitrable).

¶40 The mixed nature of the claims suggests a bifurcated approach to resolving this suit: arbitrable issues should be referred to arbitration while nonarbitrable issues remain before the circuit court. As it happens, bifurcation as a general approach enjoys universal case law support, anchored by United States Supreme Court precedent, as a means of advancing the policy favoring arbitration. *See* ***Moses H. Cone***, 460 U.S. at 20 (the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement"); *see also* ***KPMG LLP v. Cocchi***, 565 U.S. 18, 22 (2011) (per curiam) ("[W]hen a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of

separate proceedings in different forums.'" (quoting ***Dean Witter Reynolds***, 470 U.S. at 217)). Importantly, severance in the name of advancing this policy has not been limited to claims but, where appropriate, has extended to issues within claims. *See* ***Collins & Aikman Prods. Co. v. Building Sys., Inc.***, 58 F.3d 16 (2d Cir. 1995) ("[T]here is no reason why, in a proper case, we cannot sever even a part of a claim, where that claim raises both arbitrable and nonarbitrable issues."); ***Aviation Fin. Co. v. Chaput***, Nos. 14 Civ. 8313 (CM), 14 Civ. 8315 (CM), 2015 U.S. Dist. LEXIS 32043, at *13-16 (S.D.N.Y. Mar. 12, 2015) (referring only certain claims and portions of claims to arbitration).

¶41 We recognize that the consequence of bifurcation to these parties may be a further delay in this litigation, as the arbitration may need to conclude before this suit can be fully resolved (or perhaps even before it can proceed any further at all, since the results of the arbitration will presumably need to be applied in this litigation as preclusion principles may dictate).[22] That consequence, however, stems from the Mayers' having pled claims based partly on factual allegations that fall squarely within the scope of the arbitration provision. So it is clear, the arbitrable portion of this case involves those allegations in the "second group" of allegations listed in paragraph 35, relating to CFS's and the Mayers' rights and obligations under the franchise agreement. If the Mayers wish to avoid arbitration of those matters as they concern Anderson—if, in other words, the Mayers wish to limit their claims to Anderson's conduct that has no relation to the

[22] Although we view a bifurcated procedure as compelled by the law and the language of the franchise agreement, we note that such an approach appears to fit comfortably within the existing procedural framework of this case, given that the arbitration demand filed by CFS raises the same issues that we have determined are arbitrable as between the Mayers and Anderson. *See* note 20.

franchise agreement—then they presumably can withdraw the arbitrable allegations. We express no opinion as to what effect, if any, such withdrawal would have on the viability of the Mayers' claims. We decide only that, under agency and equitable estoppel theories, Anderson has the same right as CFS to compel arbitration of those portions of the claims that require the court to construe the parties' rights and obligations under the franchise agreement, as such issues clearly "aris[e] under or in connection with" that agreement.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

Recommended for publication in the official reports.