IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KENZO KURODA, Plaintiff, v. SPJS HOLDINGS, L.L.C., LIBERTY SQUARE ASSET MANAGEMENT, L.L.C., WGL CAPITAL CORP., WARREN G. LICHTENSTEIN, THOMAS J. NIEDERMEYER, JR., and CLAIRE A. WALTON, Defendants.	)	Civil Action No. 4030-CC
SPJS HOLDINGS, L.L.C., LIBERTY SQUARE ASSET MANAGEMENT, L.L.C., and WGL CAPITAL CORP., Counterclaim/Third-Party Plaintiffs, v. KENZO KURODA, FUGEN CAPITAL MANAGEMENT, LLC, FUGEN CAPITAL PARTNERS LLC, and FUGEN CAPITAL JAPAN FUND, L.P., Counterclaim/Third-Party Defendants.	)	

OPINION

Date Submitted: September 7, 2010
Date Decided: November 30, 2010

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CHANDLER, Chancellor

This is my decision on plaintiff's motion to compel arbitration of defendants' counterclaims for misappropriation of trade secrets and use of infrastructure.

The background facts of this litigation are described in detail in my two earlier decisions in this matter, so I will not recite them all again here.[1] In short, this is a case involving sophisticated parties on both sides, who joined together to set up investment vehicles by which to utilize their experience and activist investor strategies to invest in Japanese companies. As I described in an earlier ruling, the parties formed their relationships through a "complex web of overlapping contracts, agreements, and duties that the Court [is now asked to] untangle and interpret in order to make sense of who among these sophisticated parties owes" what to whom.[2]

Essentially, plaintiff (Mr. Kuroda) seeks money he alleges defendants owe him pursuant to a limited liability company agreement ("LLC Agreement"). Defendants, on the other hand, ask the Court, *inter alia*, (1) to enjoin Kuroda and third-party counterclaim defendants Fugen Capital Management LLC, Fugen Capital Partners LLC, and Fugen Capital Japan

[1] *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 877-880 (Del. Ch. 2009) ("*Kuroda I*"); *Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853, at *1-7 (Del. Ch. Mar. 16, 2010) ("*Kuroda II*").
[2] *Kuroda II* at *1.

Fund, L.P. (collectively "Fugen"[3]) from using or disclosing any confidential information of the Steel Partners Entities, (2) to order Kuroda and Fugen to return any trade secret, confidential or proprietary information of the Steel Partners Entities, and (3) for an award of damages. In two earlier decisions in this case, I dismissed the bulk of plaintiff's claims against defendants under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief could be granted,[4] and I dismissed the bulk of defendants' counterclaims against plaintiff on the same grounds.[5]

There are few claims remaining on both sides. Plaintiff's breach of contract claims survived defendants' motion to dismiss. As for defendants' claims, plaintiff did not move to dismiss defendants' misappropriation of trade secrets counterclaim, so that is defendants' only remaining claim against plaintiff. Defendants may also have a valid common-law counterclaim relating to Kuroda's alleged misuse of non-party Steel Partners Japan Asset Management's ("SPJAM") infrastructure,[6] however they have yet to amend their counterclaims to this effect.

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[3] Fugen is an investment fund formed by Mr. Kuroda after he resigned as a consultant for the Steel Partners Entities.

[4] *Kuroda I*, 971 A.2d at 877, 893; *see also Kuroda II* at *1 n.2.

[5] *Kuroda II* at *1.

[6] *See Kuroda II* at *8 ("Defendants *may* have some kind of valid common law counterclaim relating to Kuroda's alleged use of SPJAM's infrastructure, but they do not have a valid counterclaim grounded in any kind of fiduciary duty. Defendants are free to amend their counterclaims accordingly.").

SPJAM is an entity that was created to serve as investment manager of non-parties Steel Partners Japan Strategic Fund, L.P. ("Feeder Fund") and Steel Partners Japan Strategic Fund (Offshore), L.P. ("Master Fund") (together "the Funds").[7] The Funds were the principal investment vehicles set up by the parties for making Japanese investments—the Master Fund was the main vehicle by which to invest in Japanese companies, and the Feeder Fund was a vehicle by which United States investors could invest in the Master Fund.[8] In performing its management services, SPJAM engaged the consulting services of another non-party to this action, Steel Partners Japan, K.K. ("SPJ-KK"), a Japanese corporation of which plaintiff was a 50% shareholder. SPJAM and SPJ-KK entered into a Consulting Agreement in connection with this consulting work. The Consulting Agreement contained a confidentiality provision, an indemnification provision, and—most importantly to the present motion—a provision that any dispute arising out of or in connection with the Consulting Agreement shall be arbitrated in Japan.[9]

The pending motion before me turns on (1) whether defendants' counterclaims based upon (i) the alleged misappropriation of trade secrets

[7] *Kuroda II* at *2.
[8] *Id.* at *1.
[9] Consulting Agreement at ¶¶ 12, 14, 16; *see also Kuroda II* at *6.

and (ii) the alleged misuse of SPJAM's infrastructure (as yet unfiled) fall within the scope of the arbitration provision of the Consulting Agreement, and (2) whether the parties to this action—although nonsignatories to the Consulting Agreement—are bound by its provisions and should thus be compelled to arbitrate these claims in Japan. For the reasons that follow, I deny plaintiff's motion to compel arbitration in Japan.

THE PARTIES' CONTENTIONS

Plaintiff's main argument in support of its motion to compel arbitration is premised on the fact that these claims "arise" out of the Consulting Agreement, as the trade secrets at issue were acquired by Kuroda "in connection with his work under the Consulting Agreement."[10] The same, plaintiff argues, "is true for Defendants' expected counterclaim based upon Kuroda's alleged misuse of Defendants' infrastructure"[11]—that is, any access to the infrastructure that Kuroda may have misused arose in connection with his work under the Consulting Agreement and, therefore,

[10] Pl.'s Opening Br. 2 (citing Counterclaims ¶¶ 226-28 ("*As a consultant to SJPAM* for over four years, Kuroda obtained access to a wealth of confidential and proprietary information belonging to the Steel Partners Entities and their activities on behalf of the Funds, including information rising to the level of trade secrets . . . .") (emphasis added by plaintiff); Counterclaims ¶¶ 202-03 ("Kuroda's role and responsibilities exposed him to high-level proprietary and confidential information relating to the Steel Partners Entities . . . . This information was unknown to Kuroda prior to his relationship with the Steel Partners Entities, and was *acquired by him solely in his role as trusted consultant to the Funds' investment manager*.") (emphasis added by plaintiff)).

[11] Pl.'s Opening Br. 3. Defendants have advised plaintiff that they intend to commence an arbitration proceeding under the Consulting Agreement, although apparently they have yet to file a demand. *Id.* at 3-4.

should be arbitrated in Japan. Plaintiff also argues that its motion is timely and it has thus not waived its right to compel arbitration.

Defendants' main argument is that none of the parties to this action are a party to the Consulting Agreement and, therefore, they cannot be bound by its terms. Moreover, defendants argue that plaintiff has waived its right to compel arbitration by actively participating in the litigation process, citing the factors recited by this Court in *Anadarko Petroleum Corp. v. Panhandle E. Corp.*[12]

Plaintiff counters defendants' contentions by arguing that under common law agency and contract principles, the parties can be bound to the Consulting Agreement through common law exceptions to the general rule that only parties to a contract are bound by its terms.

Essentially, though, because neither plaintiff nor any of the defendants to this action are parties to the Consulting Agreement, and I am not convinced that any of the common law exceptions that would bind nonparties to a contract have been met, I conclude that the parties are not bound by the Consulting Agreement's provisions. Thus, the parties cannot be compelled to arbitrate claims allegedly arising out of that agreement in

[12] Defs.' Answering Br. 12 (citing *Anadarko*, 1987 WL 13520, at *8 (Del. Ch. July 7, 1987).

Japan, and I need not address whether the claims would fall within the scope of the arbitration provision. In addition, I need not reach the issue of waiver.

ANALYSIS

The Consulting Agreement's arbitration clause provides that "[a]ny disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules . . . [and a]ny such arbitration shall be conducted in English in Tokyo, Japan."[13] This standard language is very similar to the model clause recommended by the International Chamber of Commerce for ICC arbitration services,[14] and has been interpreted broadly by courts.[15]

[13] Consulting Agreement ¶ 16.

[14] *See ICC Standard and Suggested Clauses for Dispute Resolution Services, available at* http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt ("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.").

[15] *See, e.g.*, *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) ("The International Chamber of Commerce's recommended clause . . . must be construed to encompass a broad scope of arbitrable issues.").

Moreover, Delaware's public policy favors arbitration,[16] and "contractual arbitration clauses are generally interpreted broadly"[17] such that "[a]ny doubt as to arbitrability is to be resolved in favor of arbitration."[18] The presumption in favor of arbitration, however, "will not trump basic principles of contract interpretation, for a litigant 'cannot be required to submit to arbitration any dispute which [it] has not agreed to so submit.'"[19] Thus, as a threshold matter, before even arriving at the question of whether the claims at issue fall within the scope of the arbitration clause, this Court must first determine whether the arbitration provision of the Consulting Agreement "can be interpreted, consistent with basic principles of contract

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[16] *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998). Although the Consulting Agreement contains a provision that it "shall be construed in accordance with, and governed by, the laws of the State of New York applicable to contracts," Consulting Agreement ¶ 15, plaintiff's counsel suggests that its research "has not identified any meaningful distinction between New York and Delaware law on the legal issues" presented in plaintiff's motion. Pl.'s Opening Br. 4 n.3. In addition, all of the other contracts between plaintiff and defendants are governed by Delaware law. Accordingly, both plaintiff and defendants rely on Delaware law in their briefs. Based on my own research, I agree with plaintiff's counsel that the legal standards applicable to the pending motion are virtually the same in Delaware and New York—indeed, the Delaware courts cite to New York case law to articulate the various theories for binding non-signatories to arbitration agreements. I therefore will apply Delaware law in reaching my conclusions.

[17] *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 430 (Del. Ch. 2007).

[18] *SBC Interactive*, 714 A.2d at 761. *Cf. NANA Holdings*, 922 A.2d at 431 n.30 ("The case law does instruct that doubts should be resolved in favor of arbitrability when a 'reasonable interpretation in that direction exists.' However, the court is not required to grasp at straws and interpret an arbitration provision in an unreasonable manner just to blindly vindicate the broad public policy that supports arbitrating disputes.") (internal citation omitted).

[19] *NAMA Holdings*, 922 A.2d at 430 (internal footnote omitted) (quoting *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006)).

and equity, in such a way as to reasonably conclude that [the parties to this litigation] voluntarily consented to submit the present disputes to arbitration."[20] Here, I cannot conclude that they did.

Plaintiff's arguments in its submissions mainly focus on the relationship between the claims at issue and the Consulting Agreement (i.e., the idea that the claims are within the scope of the arbitration provision because they "arise out of" the Consulting Agreement), and less so—or not at all in the case of its opening brief—on the fact that neither of the parties here (plaintiff *or* defendants) are actually parties to the Consulting Agreement. Defendants' argument, on the other hand, turns on precisely that point.

Generally, only parties to a contract and intended third-party beneficiaries may enforce or be bound by that agreement's provisions, whereas "a nonparty to a contract has no legal right to enforce it."[21] There are, under principles of contract and agency common law, certain exceptions that allow for a contract—in this case, the arbitration clause in the Consulting Agreement—to be enforced against nonparties to that agreement. Specifically, courts have recognized several theories under which a non-

[20] *Id.*
[21] *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004); *NAMA Holdings*, 922 A.2d at 434.

signatory to a contract may nonetheless be bound by an arbitration provision contained in the agreement, including: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; (5) third-party beneficiary; and (6) equitable estoppel.[22]

The Consulting Agreement at issue is a contract between SPJ-KK and SPJAM—neither Kuroda, nor Fugen, nor any of the SPJS Entities are parties to the contract. Plaintiff argues that two of these common law exceptions are met, however, permitting the enforcement of the arbitration clause in the Consulting Agreement against defendants. Namely, plaintiff argues that the arbitration provision of the Consulting Agreement should be enforced under principles of agency and equitable estoppel.[23] In addition, plaintiff argues

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[22] *NAMA Holdings*, 922 A.2d at 430-31 & n.26 (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)).

[23] Plaintiff first makes these arguments in its reply brief, as it failed to even mention in its opening brief that the parties to this action are nonparties to the Consulting Agreement, and only raised these arguments in response to defendants' answering brief. Defendants thus contend that plaintiff waived the ability to make these arguments.

Specifically, plaintiff's opening brief focused on arguments relating to (1) the scope of the arbitration provision and (2) whether plaintiff's motion was timely such that plaintiff did not waive its right to compel arbitration. Defendants, in their answering brief, challenged plaintiff's ability to compel arbitration on the grounds that (1) neither party to the litigation is party to the Consulting Agreement, so they are not bound by its terms, and (2) plaintiff has waived its right to compel arbitration. Only then, in its reply brief, did plaintiff address the agency and equitable estoppel principles. Accordingly, in defendants' sur-reply brief, they suggest that plaintiff's failure to raise these issues in its opening brief constituted a waiver of the arguments. Defs.' Sur-Reply Br. 4. While that proposition is generally true—i.e., failure to raise a legal issue or argument in an opening brief generally constitutes a waiver of the ability to raise that argument in connection with the matter under submission to the court—I will entertain plaintiff's arguments here, as plaintiff was responding to arguments raised in defendants' answering brief and, in any event, I am unconvinced by the agency and equitable estoppel arguments.

under an agency theory that Kuroda and Fugen can invoke the arbitration provision even though they are nonparties to the Consulting Agreement. I address each of these arguments in turn, starting with Kuroda and Fugen.

A. Kuroda and Fugen are not parties to the Consulting Agreement

Under an agency theory, plaintiff argues that the movants themselves (Kuroda and Fugen) are entitled to invoke the arbitration provision. There are circumstances where it may be appropriate for an agent of a party to a contract to compel arbitration under that agreement. This, however, is not such a case.

First, plaintiff has argued throughout this litigation that he is not a party to the Consulting Agreement. For example, in its motion to dismiss defendants' counterclaims, plaintiff wrote: "Mr. Kuroda is not a party to the Consulting Agreement, and therefore none of the duties imposed by that agreement . . . bind him."[24] (Indeed, plaintiff argues that defendants are not parties to that agreement either: "Nor are the SPJ Defendants. They therefore lack standing to enforce it."[25]). As a nonparty to the Consulting Agreement, plaintiff cannot invoke its arbitration clause.[26] Now plaintiff

[24] Pl.'s Motion to Dismiss Counterclaims 16.
[25] *Id.*
[26] *See* Restatement (Third) of Agency § 6.01 (comment d) ("When an agent enters into a contract on behalf of a disclosed principal, the agent is not a party to the contract unless the agent and the third party so agree. . . . If an agent does not become a party to a contract and is not subject to liability on the contract as an individual, the agent should

argues that "[a]s agent and 'Representative' of SPJ-KK, Mr. Kuroda is entitled to invoke the arbitration provision contained"[27] in the Consulting Agreement. Plaintiff cannot have it both ways.

Second, Kuroda is being sued here in his individual capacity. Actions alleging *ultra vires* conduct, torts, or fraudulent activity, such as the allegations against Kuroda for misappropriation of trade secrets, are actions against him in his personal capacity and not in his official capacity.[28] Kuroda, therefore, cannot invoke his principal's arbitration agreement.[29]

Third, the policy considerations do not help plaintiff either. The presumption in favor of arbitrability relates to the scope of arbitrable issues "once it is established that a valid agreement to arbitrate exists. It does not apply where the dispute focuses on whether an entity, not a party to an arbitration agreement, must submit its claim to mandatory arbitration."[30]

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not be able to assert rights as an individual derived from the contract in the absence of indicia that the parties to the contract so intended.").

[27] Pl.'s Reply Br. 1.

[28] *See, e.g.*, *McCarthy v. Azure*, 22 F.3d 351, 359-61 (1st Cir. 1994); *see also* 3A Fletcher Cyclopedia of the Law of Corporations § 1135 ("An individual is personally liable for all torts which that individual committed, notwithstanding the person may have acted as an agent or under directions of another. This rule applies to torts committed by those acting in their official capacities as officers or agents of a corporation.") (footnotes omitted).

[29] *See, e.g.*, *McCarthy*, 22 F.3d at 363 (holding that a corporate officer who signed a contract containing an arbitration agreement in his official capacity could not compel arbitration of claims brought against him in his individual capacity).

[30] *Cantor Fitzgerald, L.P. v. Prebon Securities (USA) Inc.*, 731 A.2d 823, 831 (Del. Ch. 1999) (discussing analogous federal policy favoring arbitration); *see also McCarthy*, 22 F.3d at 360-61 (discussing, among other policy considerations, why an agency theory similar to that relied on by plaintiff here is "troubling"—namely, because it would allow

Finally, plaintiff argues that the same policy that would allow Kuroda to compel arbitration similarly enables Fugen to do the same, essentially because defendants' claims against Kuroda and Fugen are "inherently inseparable" since they are based on the same set of facts. Trying to bind Fugen to the Consulting Agreement, though, is an even further stretch than trying to bind Kuroda—Fugen was formed by Kuroda after he left the Steel Partners Entities and there is no basis to believe that any of the parties reasonably expected Fugen to be bound by the Consulting Agreement. Fugen itself had no agency relationship or "representative" relationship with either SPJ-KK or SPJAM—the parties to the Consulting Agreement.

Accordingly, Kuroda is not a party to the Consulting Agreement and therefore cannot invoke the arbitration clause. Neither is Fugen, and so it, too, can not invoke the arbitration clause.

B. Defendants are not bound by the Consulting Agreement

As noted above, plaintiff argues that defendants are bound by the arbitration clause in the Consulting Agreement under common law theories of agency and equitable estoppel.

"an agent for a disclosed principal [to] enjoy the benefits of the principal's arbitral agreement, but [] shoulder none of the corresponding burdens").

1. Agency

First, plaintiff argues that SPJAM was the agent of defendants (SPJS Holdings, Liberty Square, and WGL Capital).[31] Plaintiff arrives at this argument by attempting to untangle the complicated interrelationship between the parties in order to show that the web of agreements they had in place actually created a series of agency relationships: in March 2002, Liberty Square and WGL Capital created SPJS Holdings, LLC ("SPJS"). SPJS was to serve as the General Partner of the two investment funds in Japan and the United States—the Master Fund and the Feeder Fund. Liberty Square and WGL Capital, as General Partners of SJPS, "were authorized to manage SPJS and, indirectly, the Master Fund and Feeder Fund."[32]

SPJAM was formed to serve as the investment manager of the Master Fund, and "to provide investment management and related services necessary for the operation of the [Master Fund]."[33] SPJAM then entered into the Consulting Agreement with SPJ-KK.

The formation documents of the Master Fund and Feeder Fund gave SPJS the ability to exercise some level of control over SPJAM's work on behalf of the Funds. The Master Fund Agreement provided that SPJAM

[31] Pl.'s Reply Br. 10.
[32] *Id.* at 9.
[33] *Id.* (quoting Limited Partnership Agreement of SPJAM ¶ 3(a)).

would devote as much "time to the affairs of [Master Fund] as in the judgment of [SPJS] the conduct of its business shall reasonably require,"[34] and the Feeder Fund Agreement similarly provided that SPJAM would devote as much "time to the affairs of [the Feeder Fund] and the Master Fund as in the judgment of [SPJS] the conduct of its business shall reasonably require."[35]

Thus, according to plaintiff, these relationships made SPJAM the agent of SPJS, Liberty Square, and WGL Capital under basic principles of agency law. A principal-agent relationship exists when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act."[36] Here, "[b]ecause the nature and amount of work done by SPJAM in connection with the Master Fund and Feeder Fund were left to 'the judgment of [SPJS],'" plaintiff argues, defendants controlled and directed the work of SPJAM—thus, SPJAM was defendants' agent.[37] What is more, according to plaintiff, because SPJAM was defendants' agent with respect to

[34] Master Fund Limited Partnership Agreement § 2.04; *see also* Pl.'s Reply Br. 10.
[35] Feeder Fund Limited Partnership Agreement § 2.4; *see also* Pl.'s Reply Br. 10.
[36] Restatement (Third) of Agency § 1.01.
[37] Pl.'s Reply Br. 11 (citations omitted).

administration of the Funds, SPJAM was *also* defendants' agent in connection with the Consulting Agreement.[38]

The agreement that exists between SPJAM and the Funds, however, explicitly rejects the argument that SPJAM is an agent of the Funds: SPJAM's Management Agreement (to which SPJAM and Master Fund were the sole signatories) provides that SPJAM "shall at all times be an independent contractor of [the Master Fund] and nothing in this [Mangement] Agreement shall be construed to constitute [SPJAM] as an agent or partner of [the Master Fund]."[39] This leads to a somewhat circular argument that SPJAM is *not* an agent of the Funds, although a provision in the *Funds'* formation documents—not in any agreement with SPJAM itself—gave the SPJS defendants the ability to control SPJAM. These seem like a lot of hoops to jump through to create an agency relationship if SPJAM had in fact intended to consent to such an arrangement.

In any event, even if a principal-agent relationship *did* exist between SPJAM and the SPJS defendants (which weeding through the contractual arrangements between the parties fails to convince me of), this is a case where the *agent* is seeking to bind its *principal* to its arbitration agreement. In *Cantor Fitzgerald, LP v. Prebon Securities (USA) Inc.*, then-Vice

[38] *Id.*
[39] Management Agreement ¶ 2(b).

Chancellor, now Chief Justice Steele noted that defendant there (who had moved to dismiss or stay the action in favor of arbitration) had "cite[d] no cases in which a court bound the principal to its agent's arbitration agreement or in which the agent was bound by the principal's arbitration agreement when the principal itself was not a party to the action."[40] Finding that no principal-agent relationship existed between plaintiff in that case and its alleged principal's agreement to arbitrate—and thus holding that plaintiff was not bound by the arbitration agreement under common law agency principles—he explained that he does "not view the cases [movant] cites in support of its argument analogous to this case since in this instance the alleged agent is the signatory to the arbitration agreement and is not even a party to the action."[41]

Similarly, here, an agent is seeking to bind its alleged principal to an arbitration agreement. In these circumstances, the rationale of *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[42] where an agent was bound by a principal's arbitration agreement even though the agent had not signed it,

[40] *Cantor Fitzgerald, L.P. v. Prebon Securities (USA) Inc.*, 731 A.2d 823, 830 (Del. Ch. 1999.
[41] *Id.*
[42] 7 F.3d 1110 (3d Cir. 1993).

"does not apply with equal force."[43] I conclude that no agency relationship exists here between SPJAM and the Funds or between SPJAM and the SPJS Entities in connection with the Consulting Agreement, and even if one did exist, plaintiff's agency argument to bind defendants to the arbitration agreement as SPJAM's principal is denied.

2. Equitable Estoppel

Second, plaintiff argues that defendants may be bound to the arbitration provision of the Consulting Agreement under a theory of equitable estoppel. Specifically, plaintiff asserts that because the claims at issue *implicate* the rights of SPJ-KK (a signatory to the Consulting Agreement) as well as the rights of Kuroda and Fugen (nonsignatories to the Agreement), equitable estoppel thus prevents defendants from frustrating the purpose of the arbitration clause.

Defendants counter that equitable estoppel cannot be invoked here because neither of the parties is a signatory to the contract—that is, this is not a case where a nonsignatory is compelling a *signatory* to arbitrate. Next, defendants argue that they do not "rely on the terms" of the Consulting Agreement with respect to the claims at issue. Moreover, defendants assert

[43] *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001) (holding that appellants' arguments based on agency principles failed).

that plaintiff's contention that the claims at issue implicate the rights of both a signatory and nonsignatories to the Consulting Agreement is simply not the legal standard—the requirement is that there must be "allegations of substantially interdependent and concerted misconduct by both a party to the contract and the non-parties at issue."[44]

In *Wilcox & Fetzer*,[45] Vice Chancellor Parsons held that the theory of equitable estoppel "compels a *signatory* to arbitrate with a nonsignatory in two circumstances"[46]—namely, (1) "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory,"[47] and (2) "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the *signatories* to the contract."[48] The policy reason behind applying equitable estoppel in these situations is that if arbitration could not be compelled under those circumstances, the federal policy favoring arbitration would in effect be thwarted because

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[44] Defs.' Sur-Reply 12 (citing *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 WL 2473665, at *4 (Del. Ch. Aug. 22, 2006).
[45] *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 WL 2473665 (Del. Ch. Aug. 22, 2006).
[46] *Id.* at *4-5.
[47] *Id.* at *5.
[48] *Id.* (emphasis added).

arbitration proceedings between the two *signatories* would then be rendered meaningless.[49]

In that case, *Wilcox & Fetzer*, Vice Chancellor Parsons held that the complaint implicated concerted wrongdoing by both a signatory and a nonsignatory to the agreement containing the arbitration clause. The Court held that the nonsignatory there could compel the signatory to arbitrate, because the signatory and nonsignatory's rights were "intertwined," and the signatory's rights could have been adversely affected by a court ruling interpreting the nonsignatory's rights under the agreement.[50]

Such is not the case here. First, this is not a case compelling a signatory to arbitrate with a nonsignatory—this is an issue of whether nonsignatories can be compelled to arbitrate under an equitable estoppel theory where no parties to the litigation are parties to the Consulting Agreement. I am aware of no case where this Court has required arbitration in similar circumstances. Second, as defendants argue, the claims at issue do not rely or depend on the terms of the Consulting Agreement—particularly as my holding implies that defendants have no legal right to enforce the terms of the Consulting Agreement against Kuroda. Finally, I am not

[49] *Id.*
[50] *Id.*

convinced that any ruling of this Court regarding Kuroda or Fugen's rights or liabilities would implicate SPJ-KK or adversely affect SPJ-KK's rights.

CONCLUSION

In sum, as none of the recognized exceptions exist here, I find that none of the parties to this litigation were parties to the Consulting Agreement and, thus, they cannot be bound by its provisions. Plaintiff's motion to compel arbitration in Japan is therefore denied.

IT IS SO ORDERED.