STATE OF MICHIGAN

COURT OF APPEALS

CAROL TOBEL, Individually and as Trustee of the CAROL TOBEL REVOCABLE LIVING TRUST and as Trustee of the KEVIN W. TOBEL IRREVOCABLE TRUST dated October 12, 2001, KEVIN TOBEL, Individually and as Trustee of the KEVIN TOBEL REVOCABLE LIVING TRUST, MARY LYNN TOBEL, Individually and as Trustee of the MARY LYNN TOBEL REVOCABLE LIVING TRUST and as Trustee of the CHARLES M. TOBEL IRREVOCABLE TRUST dated October 12, 2001, and CHARLES TOBEL, Individually and as Trustee of the CHARLES TOBEL REVOCABLE LIVING TRUST,

UNPUBLISHED
February 21, 2012

Plaintiffs-Appellants,

v

No. 298129
Wayne Circuit Court
LC No. 09-024832-CK

AXA EQUITABLE LIFE INSURANCE COMPANY, AXA DISTRIBUTORS, L.L.C., and ROBERT W. BAIRD AND COMPANY, INC.,

Defendants-Appellees,

and

JEFFREY HYMAN,

Defendant.

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order compelling plaintiffs to submit all of their claims against defendant Robert W. Baird and Company, Inc. ("Baird") and defendants AXA Equitable Life Insurance Company and AXA Distributors, L.L.C. (collectively referred to as "AXA") to arbitration. We affirm.

Plaintiffs Kevin Tobel and Charles Tobel are brothers who each entered into a Cash Account Agreement with defendant Baird, to obtain financial services. Each agreement provides that it applies "to any and all Baird accounts in which Client is the beneficial owner, including accounts opened prior to the date of execution of this Agreement and any Baird account opened after execution of this Agreement." The agreements also contain arbitration clauses that provide, in pertinent part:

> 19. **Arbitration Agreement.** The Client agrees and, by carrying any account for the Client, Baird agrees that all controversies between the Client and Baird or any of Baird's present or former officers, directors, agents or employees which may arise for any cause whatsoever, shall be determined by arbitration. Any arbitration under this Arbitration Agreement shall be before the National Association of Securities Dealers, Inc., or the New York Stock Exchange, Inc., and shall be conducted in accordance with the rules of such organization. . . .
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> * * *
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> This Arbitration Agreement shall apply to any controversy or claim or issue in any controversy arising from events that occurred prior, on, or subsequent to the execution of this Arbitration Agreement with respect to any and all Client Accounts. . . .

Plaintiffs allege that, based on financial advice from Rex Stanczak, an employee and agent of Baird, and defendant Jeffrey Hyman, an officer of AXA, Kevin and Charles each acquired, through Baird, a $4 million flexible premium variable life insurance policy from AXA. According to plaintiffs' complaint, at some point, the policies were transferred to trusts established by the two families, under which plaintiff Mary Lynn Tobel (Kevin's wife) and plaintiff Carol Tobel (Charles's wife) were named as trustees.[1]

Plaintiffs Kevin and Mary Lynn Tobel and Charles and Carol Tobel filed this action against Baird and AXA, alleging that defendants knowingly misrepresented the cost of the premiums for the policies and failed to explain the various risks associated with variable life insurance policies. Plaintiffs also alleged that both defendants failed to properly supervise and train its agents with respect to the sale of the policies. The complaint alleged that Baird was acting as AXA's agent at all relevant times, and asserted a total of 13 different counts against both defendants under various theories of fraud, securities violations, breach of fiduciary duty, negligence, and breach of contract.

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[1] Plaintiffs' complaint erroneously referred to Carol Tobel as Kevin's wife, and to Mary Lynn Tobel as Charles's wife. Carol is actually Charles's wife and Mary Lynn is actually Kevin's wife. Plaintiffs filed a motion to amend their complaint to correct these errors, as well as to assert that the policies at issue were always owned by the trusts, rather than transferred to them at some point in time, but the trial court denied the motion as moot after it ordered all parties to submit their claims to arbitration.

Baird moved to compel plaintiffs to submit their claims to arbitration in accordance with the arbitration provision in ¶ 19 of the Cash Account Agreements signed by Kevin and Charles. AXA later joined in the motion. Plaintiffs disputed the validity of the arbitration agreements and also challenged the applicability of the agreements to the claims of Mary Lynn and Carol, nonsignatories to the agreements. Plaintiffs also argued that AXA could not rely on the agreements to compel arbitration of the claims against it, because AXA was not a party to the agreements. The trial court determined that the arbitration agreements were enforceable to compel arbitration of the claims by Kevin and Charles, and further determined that Mary Lynn's and Carol's claims could be submitted to arbitration even though they were not parties to the arbitration agreements. The court also ruled that AXA could compel plaintiffs to arbitrate their claims against it because AXA was an agent of Baird and plaintiffs' claims against AXA were so intertwined with their claims against Baird that all claims should go to arbitration.

I. STANDARD OF REVIEW

Although Baird did not identify its motion to compel arbitration as a motion for summary disposition, the motion substantively sought, and the trial court substantively granted, summary disposition of the case. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In addition, when the applicable subrule is not identified, this Court will review the trial court's decision under the correct subrule. *Id.* at 338 n 9. Summary disposition may be granted under MCR 2.116(C)(7) when a "claim is barred because of . . . an agreement to arbitrate[.]" The following standards apply to a motion under MCR 2.116(C)(7):

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

The existence and enforceability of an arbitration agreement is also reviewed de novo as a question of law. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003).

II. VALIDITY OF THE ARBITRATION AGREEMENT

Initially, although we agree with plaintiffs that the Federal Arbitration Act (FAA), 9 USC 1 *et seq.,* applies to this dispute, plaintiffs have not shown that any conflict exists between the FAA and state law. In *Kauffman v Chicago Corp*, 187 Mich App 284, 286; 466 NW2d 726 (1991), this Court explained the scope and application of the FAA as follows:

> The federal arbitration act, 9 USC 1-15, governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Southland Corp v Keating*, 465 US 1; 104 S Ct 852; 79 L Ed 2d 1 (1984); *Scanlon v P & J*

> *Enterprises,* 182 Mich App 347; 451 NW2d 616 (1990). . . . State courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the federal act. *Scanlon*, *supra*.

The Supremacy Clause precludes this Court from applying state law to defeat federal legislation. Therefore, where the FAA applies, it preempts any state law or policy that specifically invalidates arbitration agreements. In *Abela v Gen Motors Corp*, 257 Mich App 513, 525; 669 NW2d 271 (2003), aff'd 469 Mich 603 (2004), this Court explained that "[t]he case law is clear that the FAA surmounts any state law that invalidates agreements to submit claims to binding arbitration." Therefore, a state may not apply its laws to invalidate an otherwise valid arbitration clause because the FAA implicates the Supremacy Clause. *Id*. at 524-525. However, 9 USC 2 recognizes that to be enforceable under the FAA, there must first be a valid and enforceable agreement to arbitrate, which can be decided on the basis of state contract law:

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

Thus, "state laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts." *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 502 n 7; 591 NW2d 364 (1998).

Plaintiffs correctly assert that they cannot be compelled to submit to arbitration any claim for which there is no agreement to arbitrate. As explained in *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 233-234; 590 NW2d 580 (1998):

> "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit.'" *AT & T Technologies, Inc v Communications Workers of America*, 475 US 643, 648; 106 S Ct 1415; 89 L Ed 2d 648 (1986) (citations omitted). Thus, "the basic objective in this area is . . . to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *First Options of Chicago, Inc v Kaplan,* 514 US 938, 947; 115 S Ct 1920; 131 L Ed 2d 985 (1995) (citations omitted).

The parties' agreement generally determines the scope of arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007).

> "To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Huntington Woods* [*v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74-75; 492 NW2d 463

> (1992)]. The court should resolve all conflicts in favor of arbitration. *Id*. at 75. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 15, 17-18; 557 NW2d 536 (1997). Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation. [*Id.,* quoting *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004).]

Where the language of a contract's arbitration clause is clear and unambiguous, the intent of the parties will be determined according to the plain meaning of the language. *Amtower*, 232 Mich App at 234.

> However, consistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*, *supra* at 650. In other words, there is a presumption of arbitrability "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id*., quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). In *First Options [of Chicago, Inc v Kaplan]*, *supra* at [514 US 938,] at 945 [; 115 S Ct 1920; 131 L Ed 2d 985 (1995)], the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id*. [*Amtower*, 232 Mich App at 234-235 (footnote omitted).]

Plaintiffs argue that the arbitration clauses in the Cash Account Agreements are not valid and enforceable against any of them because the agreements are illusory, inasmuch as Baird had the right to amend or modify the agreements at any time. Plaintiffs rely on ¶ 17 of the Cash Account Agreements, which provides:

> 17. **Amendment.** Baird may amend this Agreement at any time. Any amendment shall be effective upon notice to the Client. Notice of amendment to this Agreement shall be posted on Baird's Internet website at www.rwbaird.com and shall be made available to Client by Client's Baird Financial Advisor. Baird may, at its discretion, terminate this Agreement at any time, effective upon notice to the Client. In the event of the termination of this Agreement, the Client will continue to be responsible for any obligations incurred by the Client prior to termination.

In *Ile v Foremost Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295685, issued July 14, 2011), slip op at 4, this Court quoted Black's Law Dictionary (9th ed) for the following definition of an illusory contract:

> An "illusory contract" is defined as "[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable."

We disagree with plaintiffs that ¶ 17 renders the Cash Account Agreements illusory. The consideration for the agreements is recited in the first paragraph, which states that Baird is assuming obligations to open and operate accounts for both Kevin and Charles. Although a contract that is cancellable at will by one party can create an illusory obligation, *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 244 n 25; 324 NW2d 732 (1982), a right to amend does not render an agreement illusory when restrictions are placed on that right. In *Hardin v First Cash Fin Servs, Inc*, 465 F3d 470, 478-479 (CA 10, 2006), the court stated:

> Hardin suggests that since the contract reserves to First Cash a unilateral right to terminate or amend the DRP, the contract is illusory and, consequently, unenforceable. We are not persuaded.
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> The Agreement states that First Cash "retains the right to terminate the [Agreement], and/or to modify or discontinue the [DRP]." . . . However, this right is limited:
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> "[N]o amendment shall apply to any claims, disputes, or controversies of which the Company had actual notice on the date of the amendment, and termination of the [Agreement and/or DRP] shall not be effective until 10 days after reasonable notice of termination is given to Employee or as to claims, disputes, or controversies which arose prior to the date of termination." . . .
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> We have held that "an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory." *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir.2002). Here, though, First Cash's right to modify the Agreement was not unrestricted. For example, before amending or terminating the Agreement, First Cash must provide 10-days notice to its current employees. Additionally, it cannot amend the Agreement if it has actual notice of a potential dispute or claim, nor may it terminate the Agreement as to any claims which arose prior to the date of termination.
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> These limitations are sufficient to avoid rendering the parties' Agreement to arbitrate illusory. While "the reservation of a unilateral right to cancel [an] entire agreement is so broad as to negate the existence of any consideration in that the promise is essentially empty or illusory," if "notice of cancellation is required the promisor is bound sufficiently so that his promise to buy or give notice of cancellation meets the requirement of consideration." *Wilson v. Gifford-Hill & Co., Inc.*, 570 P.2d 624, 626 (1977); *see Pierce v. Kellogg, Brown & Root, Inc.*, 245 F.Supp.2d 1212, 1215 (D.Okla.2003) (applying Oklahoma law and finding an arbitration agreement enforceable that permitted the company to amend or terminate on 10-days notice); *see also In re Halliburton Co.*, 80 S.W.3d 566, 570 (Tex.2002) (finding an arbitration agreement not illusory where the employer's

> right to modify was restricted in cases where it had actual notice of the dispute and required 10-days notice to employees before termination).
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> Hardin relies on the Ninth Circuit's opinion in *Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165 (9th Cir.2003), to argue that the restrictions are insufficient to save the Agreement. In *Ingle*, the defendant company's unilateral right to modify an arbitration agreement was restricted in only one respect: modifications required 30 days notice to employees. The court concluded that a 30-day "notice is trivial when there is no meaningful opportunity to negotiate the terms of the agreement." *Id*. at 1179. Finding a lack of mutuality in the right to modify, the court held that the modification provision was "substantively unconscionable." *Id*.
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> Hardin's reliance on *Ingle* is misplaced. First, Oklahoma law suggests that reasonable modification provisions are permissible, unlike in *Ingle* where the court was applying California law. More critically, however, the *Ingle* court explicitly stated that it drew "no conclusion as to whether [the modification clause], by itself, renders the [entire arbitration] contract unenforceable," begging the question of whether the agreement was still effective. *Id*. at n. 23.
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> We conclude under Oklahoma law that an arbitration agreement allowing a defendant company the unilateral right to modify or terminate the agreement is not illusory so long as reasonable restrictions are placed on this right. The Agreement here satisfies Oklahoma law and is therefore enforceable. [internal citations omitted].

Here, in addition to the fact that Baird provided consideration for the Cash Account Agreements through its agreement to open and manage the accounts, Baird's right to amend was subject to it providing specified notice of its intent to amend.

Even if the agreements could be considered illusory at their inception, however, the parties' performances under the agreements preclude any claim that the agreements should be found unenforceable. Because all parties performed under the terms of the Cash Account Agreements, plaintiffs cannot now avoid the terms of those agreements on the ground that any promises made by Baird as consideration at the inception of the agreements rendered the agreements illusory when made. See, e.g., *Petersen v West Mich Com Mental Health*, 2010 WL 3210749, 2 (WD Mich, 2010). Accordingly, we reject plaintiffs' argument that the agreements are unenforceable.

Plaintiffs also argue that the Cash Account Agreements are no longer operable to compel arbitration because they have terminated their relationships with Baird and, therefore, the agreements are no longer in effect. There is no merit to this argument. Whether a claim is subject to arbitration under an agreement that is no longer in effect depends on the terms of the agreement. See *Litton Fin Printing Div v NLRB*, 501 US 190, 204; 111 S Ct 2215; 115 L Ed 2d 177 (1991). Indeed, there is a presumption that favors arbitration of matters after expiration of the agreement unless that presumption is negated expressly or by clear implication in the agreement. *Id*. Here, the arbitration agreements provide that they "shall apply to any controversy or claim or issue in any controversy arising from events that occurred prior, on, or

subsequent to the execution of this Arbitration Agreement with respect to any and all Client Accounts." Because the agreements broadly express an intent for arbitration to apply to all claims relating to any client account, and there is no clear language that negates the presumption in favor of arbitration of such claims after the agreements expire, the agreements apply to plaintiffs' claims, which arose when the arbitration agreements were still in effect.

In sum, the trial court properly rejected plaintiffs' argument that the arbitration agreements were not enforceable or illusory.

III. CAROL AND MARY LYNN TOBEL

Plaintiffs argue that even if the arbitration agreements are enforceable to compel arbitration of the claims of Kevin and Charles, the trial court erred in ruling that Mary Lynn and Carol were also required to arbitrate their claims, because they were not parties to the arbitration agreements. The court reasoned that because the polices were transferred to the trusts by Kevin and Charles, Carol and Mary Lynn, as trustees, were bound by the Cash Account Agreements as Kevin's and Charles's assignees pursuant to ¶ 14 of the agreements. The court further ruled that any individual claims asserted by Carol and Mary Lynn were subject to the arbitration agreements signed by Charles and Kevin because, whether sounding in tort or in contract, the claims were "totally and completely derivative of Kevin and Charles' relationship to the defendants." We agree with the trial court.

Paragraph 14 of the Cash Account Agreements provides:

> 14. **Successors**. The Client hereby agrees that this Agreement and all terms thereof shall be binding upon the Client's heirs, executors, administrators, personal representatives and assigns. This Agreement shall inure to the benefit of Baird's present organization and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever.

In *Javitch v First Union Securities, Inc*, 315 F3d 619, 628-629 (CA 6, 2003), the court explained that there are circumstances in which nonsignatories to an arbitration agreement may be required to arbitrate under the agreement:

> [N]onsignatories may be bound to an arbitration agreement under ordinary contract and agency principles. *Arnold v. Arnold Corp.,* 920 F.2d 1269, 1281 (6th Cir.1990). Five theories for binding nonsignatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel. *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.1995).
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> The court in *Thomson* held that a nonsignatory may be bound to an arbitration agreement under an estoppel theory when the nonsignatory seeks a *direct* benefit from the contract while disavowing the arbitration provision. *Id.* at 778-79. When only an indirect benefit is sought, however, it is only a signatory that may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract. *Id.* at 779. *See Int'l Paper Co. v. Schwabedissen Maschinen*

> *& Anlagen*, 206 F.3d 411, 418 (4th Cir.2000) (nonsignatory asserting breach of contract and breach of contract claims under the contract could not avoid the arbitration agreement in the contract).
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> The district court rejected the estoppel argument, stating that defendants' reasoning was "circular and without merit." It is not clear from the discussion of *Thomson,* however, whether the court found that Javitch, in asserting claims on behalf of VES and CFL, sought to benefit either directly or indirectly from the customer agreements that contained the arbitration clauses. Since this determination would be central to the question of whether to apply estoppel to bind Javitch, a nonsignatory, to the arbitration agreements, we vacate and remand for further consideration of this issue.

In this case, the arbitration provisions in the Cash Account Agreements were enforceable against Carol and Mary Lynn under two theories: incorporation by reference and estoppel. The arbitration clauses specifically provide that any successors to the signatories of the agreement are also bound by it. Thus, Carol and Mary Lynn, as trustees of the signatories, were bound by the arbitration clause.

In addition, any individual claims by Carol and Mary Lynn are subject to arbitration because their claims derive directly from their husbands' relationships with Baird, which are subject to the Cash Account Agreements. Plaintiffs also concede that Carol and Mary Lynn were both signatories to the insurance policies acquired from AXA, the purchase of which was brokered by Baird. Accordingly, there is no valid reason why Carol and Mary Lynn should not be required to arbitrate their claims as well.[2] Although plaintiffs emphasize that Carol and Mary Lynn have asserted individual claims, plaintiffs have not shown how any of their claims are independent of Charles's and Kevin's relationships with Baird.

We also agree that Carol and Mary Lynn are estopped from denying that the arbitration clauses apply to them. As explained in *Javitch*, 315 F3d at 628-629, nonsignatories may be bound by an arbitration agreement based on estoppel where they are seeking a direct benefit from the contract at issue, while disavowing the arbitration provision. That is the situation in this case. Carol and Mary Lynn are asserting claims that derive directly from their husbands' interactions with Baird and AXA over the policies at issue, and those claims are subject to the Cash Account Agreements, which contain the arbitration requirement.

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[2] Contrary to what plaintiffs argue, the trial court did not rely exclusively on *Merrill Lynch, Pierce, Fenner & Smith v Eddings*, 838 SW2d 874 (Tx App, 1992), as support for its conclusion that Mary Lynn and Carol may be required to arbitrate their claims. Regardless, we agree that *Eddings* is consistent with this state's "strong public policy . . . in favor of arbitration as a single, expeditious means of resolving disputes." *Rooyakker & Sitz,* 276 Mich App at 163. Further, plaintiffs' attempt to distinguish *Eddings* on the basis that it involved a settlor who gave a trustee authority to enter into arbitration agreements is unpersuasive. Plaintiffs overlook the fact that the court in that case also held that the nonsignatory trust beneficiaries were also bound to arbitrate any claims related to the trust.

We reject plaintiffs' argument that the trial court's ruling, compelling Carol and Mary Lynn to arbitrate their claims, is an improper attempt to revive coverture, which has been eliminated in this state for many years. See *Canjar v Cole*, 283 Mich App 723, 729; 770 NW2d 449 (2009). Formerly, the "disabilities of coverture" meant that a married woman could not enter into a binding contract. *Id*. Here, however, the trial court did not compel Carol and Mary Lynn to submit their claims to arbitration on the basis of their statuses as wives of the signatories, but rather because of their statuses as successors and the derivative nature of their claims. Accordingly, there is no merit to this argument.

Plaintiffs' reliance on *Moses H Cone Mem Hosp v Mercury Constr Corp*, 460 US 1; 103 S Ct 927; 74 L Ed 2d 765 (1983), to argue that piecemeal litigation must prevail where some claims are subject to arbitration and some are not is also misplaced. That holding only applies where there is no legal basis for compelling certain parties to submit their claims to arbitration. As previously explained, that is not the situation here. See also *Thomson-CSF, SA v American Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995) (explaining that while a party generally cannot be required to submit to arbitration any dispute that he or she did not agree to so submit, it is "clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency'"), and *Arthur Andersen LLP v Carlisle*, 556 US 624; 129 S Ct 1896, 1902-1903; 173 L Ed 2d 832 (2009) (holding that nothing in the FAA prohibits nonparties from enforcing an arbitration agreement based on state law).

For these reasons, the trial court did not err in ruling that the claims by plaintiffs Carol and Mary Lynn may be submitted to arbitration even though they are nonsignatories to the arbitration agreements with Baird.[3]

IV. AXA

Next, plaintiffs argue that because AXA is a nonsignatory to the Baird Cash Account Agreements, it cannot compel them to arbitrate their claims against it in the same proceedings involving Baird. The trial court disagreed, ruling:

> The claims against AXA are so intertwined that they should go to arbitration. AXA is not a signatory. However, as a non-signatory AXA can submit to arbitration. AXA is [sic, was] an agent of Baird at the time that these alleged misrepresentations based upon the descriptions of cash flow through the policies because Baird selected AXA as the vehicle for the plaintiffs to purchase these policies. And when I say "plaintiffs," I mean Kevin and Charles who, I had initially started this ruling by saying clearly they must arbitrate with Baird as individuals.

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[3] Plaintiffs also assert that Mary Lynn's signature was forged on an earlier Cash Account Agreement. However, the trial court did not rely on any purported signature on an earlier agreement to find that her claims must be submitted to arbitration. Rather, the court treated both Mary Lynn and Carol as nonsignatories to the account agreements and found that they were both still bound to arbitrate their claims. The trial court did not err in so ruling.

As discussed in *Javitch*, 315 F3d at 628-629, an agency relationship may be a basis for requiring a nonsignatory to an arbitration agreement to also participate in arbitration. Paragraph 3 of plaintiffs' complaint alleges that Baird was acting as AXA's agent at all relevant times:

> 3. Defendant Robert W. Baird and Company, Incorporated ("Baird") is a foreign corporation, with agents and offices located throughout the State of Michigan. Baird, upon information and belief, is registered with the State of Michigan Office of Financial and Insurance Services to sell insurance. In addition, Baird was, at all times relevant to this Complaint, an agent of AXA and was conducting business in the County of Wayne, State of Michigan.

Plaintiffs also alleged that their financial advisor, Rex Stanczak, an employee and agent of Baird, also acted as an agent for AXA. Plaintiffs' complaint also contained allegations that AXA had not properly trained its agents in selling annuities, which extended to both Baird and Stanczak.

Because plaintiffs' own complaint alleges the existence of an agency relationship, we reject plaintiffs' argument on appeal that there was no evidence of an agency relationship between the parties or that the trial court improperly made a finding of fact concerning the existence of an agency relationship. A party is bound by its pleadings. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 470; 717 NW2d 341 (2006). The relationship between Baird and AXA, as alleged in plaintiffs' complaint, shows that plaintiffs' claims against both defendants are intertwined and based on an agency relationship.

The circumstances in which an agency relationship or "alternative estoppel" will permit a nonsignatory to compel a signatory to arbitrate claims is explained as follows in *PRM Energy Sys, Inc v Primenergy, LLC*, 592 F3d 830, 834-835 (CA 8, 2010):

> As a starting point, we note that a nonsignatory may compel a signatory to arbitrate claims in limited circumstances. *See, e.g., Finnie v. H & R Block Fin. Advisors, Inc.*, 307 Fed. Appx. 19, 21 (8th Cir.2009) (unpublished per curiam) (compelling arbitration based on a close relationship between signatories and nonsignatories); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-99 (8th Cir. 2005) (discussed *infra*); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947-48 (11th Cir. 1999) (same); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (applying an estoppel theory based on a close relationship of parties and claims that were intertwined with contract rights and duties); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993) (applying a "traditional agency theory" regarding a nonsignatory employee of a signatory); *see also Am. Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579-80 (1994).
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> In *CD Partners,* we recognized two such circumstances. *See CD Partners*, 424 F.3d at 798. The first relies on agency and related principles to allow a nonsignatory to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement. *Id.; see also Nesslage v. York Secs., Inc.*, 823 F.2d 231, 233 (8th Cir. 1987) (permitting a nonsignatory to compel arbitration where it was

> the "disclosed agent" of a signatory). The second relies loosely on principles of equitable estoppel, broadly encompasses more than one test for its application, and has been termed "alternative estoppel." *CD Partners*, 424 F.3d at 799 ("A willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory *which takes into consideration the relationships of persons, wrongs, and issues* . . .' ") (quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003)) (alteration omitted, emphasis added). Alternative estoppel typically relies, at least in part, on the claims being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement. *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) (citing with approval and adopting the reasoning of *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.,* 659 F.2d 836, 838 (7th Cir. 1981)).

Here, either theory, agency or alternative estoppel, is applicable to enforce AXA's request for arbitration against plaintiffs. Plaintiffs' complaint alleged concerted conduct by Baird and AXA. The complaint contained 13 different counts, each of which were alleged to be applicable to both defendants. We agree with AXA that the claims alleged against it in plaintiffs' complaint are so intertwined or coordinated with those against Baird that it was appropriate to require Kevin and Charles, as signatories to the Baird arbitration agreement, to resolve those claims in arbitration with both defendants.

Equitable estoppel also compels the conclusion that plaintiffs should be required to pursue their claims against AXA in the arbitration proceedings with Baird. This case is factually similar to *Brown v Pacific Life Ins Co*, 462 F3d 384 (CA 5, 2006). In *Brown*, an arbitration agreement existed between the plaintiffs and Smith Barney. *Id.* at 389-390. Nonparties to the arbitration agreement, defendants G.E. Life & Annuity Insurance Company and Pacific Life Insurance Company, moved to compel arbitration of the claims against them based on the agreement with Smith Barney. *Id*. at 390. The court, *id.* at 398-399, stated:

> Provided the agreements are valid, the Browns do not dispute the arbitrability of their claims against Smith Barney. They argue, however, that the district court erred by estopping the Browns from asserting that the lack of a written arbitration agreement precluded arbitration of their claims against GE and Pacific. We review for abuse of discretion the district court's use of equitable estoppel. *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000).
>
> Although arbitration is a matter of contract that generally binds only signatories, a party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration. *Id.* at 526 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)). In *Grigson*, we held that a non-signatory to an arbitration agreement can compel arbitration: (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 a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. *Id.* at 527. We reasoned that equity does not allow a party to "seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id.* at 528; *see Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004) (stating that a plaintiff should not be able to claim the benefit of a contract and simultaneously avoid its burdens). "[T]he result in *Grigson* and similar cases makes sense because the parties resisting arbitration had expressly agreed to arbitrate claims of the very type that they asserted against the nonsignatory." *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 361 (5th Cir. 2003).

Although close, we conclude that the district court did not abuse its discretion in determining that the Browns were estopped under *Grigson*'s second prong from asserting that a lack of a written arbitration agreement precluded arbitration. The district court's finding that there was no way to bring actions against GE and Pacific without considering the actions of Smith Barney and Patrick Holt, is not patently incorrect.[10] Whether and how GE and Pacific defrauded or breached duties owed to the Browns depends, in some part, upon the nature of tortious acts allegedly committed by Holt and Smith Barney-acts that would be covered by the arbitration agreement-as well as any tortious acts by GE and Pacific. *See Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (finding no abuse of discretion where a plaintiff alleges "interdependent and concerted misconduct," while denying that its claims are intertwined with an agreement containing an arbitration clause). As the Browns fail to allege tortious acts by GE and Pacific that are separate and apart from Holt's, we can only conclude that the complaint asserts concerted misconduct by all parties. "To constitute an abuse of discretion, the district court's decision must be either premised on an erroneous application of the law, or on an assessment of the evidence that is clearly erroneous." *Grigson*, 210 F.3d at 528. "By this measure the district court did not abuse its discretion." *Hill*, 282 F.3d at 349.

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[10] The Browns' claims against Pacific and GE sound in fraud, negligence, and breach of various common law and statutory duties. They allege that, through Holt as their agent, those entities: (1) misrepresented facts and insurance policy provisions to obtain an unjust advantage; (2) failed to disclose that the Browns were purchasing a variable annuity; and (3) misrepresented that the investment plan met the needs of Lonnie and Netty Brown. They also allege that GE and Pacific negligently conferred powers of agency and failed to properly train and supervise Holt.

Here, because plaintiffs' complaint raises allegations of substantially interdependent and concerted misconduct by both Baird and AXA, plaintiffs are equitably estopped from arguing that their claims against AXA should not be subject to arbitration.

Plaintiffs also appear to argue that a theory of estoppel cannot be used to compel Mary Lynn and Carol to arbitrate their claims against AXA because estoppel cannot be used to compel arbitration between two nonsignatories to an arbitration agreement. Plaintiffs cite no authority for this position. As explained previously, Mary Lynn and Carol properly may be compelled to arbitrate their claims under state contract and agency principles.

Accordingly, the trial court did not err in ruling that plaintiffs' claims against AXA were also subject to arbitration.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly