

A DANGEROUS DOCTRINE: THE CASE AGAINST USING CONCERTED-MISCONDUCT ESTOPPEL TO COMPEL ARBITRATION

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INTRODUCTION

In an increasingly litigious society where the judiciary is overwhelmed by crowded dockets and the cost of litigation seems to rise exponentially each year,¹ there is a clear need for judicial efficiency and Alternative Dispute Resolution (ADR).² Courts, once hostile to the concept, now em-

1. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986) (“[T]he cost of litigation has substantially increased and the number of cases filed in state and federal courts has mushroomed.”).

2. See Ryan Au & Elizabeth Kent, *The Effect of ADR on the Legal System: A Long Term View*, 11 HAW. B.J. 6, 6 (Nov. 2007) (“Our over-crowded court dockets and nearly unmanageable backlog of 20 or 25 years ago would probably still exist if not for the incorporation of ADR within our judicial and legal system as a whole.” (quoting from an interview with Hawaii Chief Justice Ronald Moon)); Anthony J. Jacob, Comment, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099, 1099–1100 (1997) (“Due to the number of people filing suits, courts have become overburdened, forcing the courts either to create or submit to new procedures and methods for resolving disputes. In search of ways to alleviate this overburden, legislatures, governmental agencies, and courts have promoted and utilized various forms of ADR.”).

brace ADR as a way to provide some much needed relief for the court system.³ While ADR serves an important and necessary purpose in today's society, courts must be careful not to push the envelope too far; they must not disregard fundamental legal and equitable principles in the interests of judicial efficiency. This Note argues that through certain applications of the doctrine of equitable estoppel as applied to arbitration agreements, some courts have done exactly that, and there is a desperate need for a Supreme Court decision rejecting this inequitable application.

The change in judicial attitude and increasing popularity of ADR is clearly seen in the arena of arbitration. Since the initial enactment of the Federal Arbitration Act (FAA) in 1925,⁴ arbitration has gone from a seldom used instrument generally disfavored by the judiciary to a universally accepted and endorsed method of dispute resolution.⁵ Given the presumption in favor of arbitration stated by Congress in the FAA,⁶ judicial interpretation upholding and enforcing that presumption,⁷ and the popularity of arbitration among commercial litigants,⁸ it is easy to see the benefits courts see in arbitration and the temptation to compel arbitration even when it might be slightly inequitable or unlawful to do so. Over the years courts

3. See Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Non-signatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225, 229 (2005) (“[T]he judiciary continued to express some reluctance to universally enforce binding arbitration agreements until the later part of the twentieth century Since around [1983, however,] courts have espoused the presumption that arbitration is strongly favored in the law.”); see also *id.* at 225 (“For the past twenty years, the general trend has been to expand the applicability of arbitration clauses.”).

4. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2006)).

5. See Hope T. Stewart, *The Equitable Estoppel Argument For and Against Commercial Arbitration: From Hughes Masonry Co., Inc. v. Clark County School Building Corp. to Northern, Ltd. v. R.E. James*, 103 COM. L.J. 336, 336 (1998) (“The enactment of the Federal Arbitration Act (FAA) has changed the attitude of the courts towards arbitration from being an unacceptable means of ousting the courts out of their proper roles to being a valid method of dispute resolution.”); Alexandra Anne Hui, Note, *Equitable Estoppel and [the] Compulsion of Arbitration*, 60 VAND. L. REV. 711, 717 (2007) (“The FAA fueled the growth of arbitration in the United States, providing an attractive alternative to the traditional litigation proceeding.”); Scott M. McKinnis, Note, *Enforcing Arbitration with a Non-signatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. DISP. RESOL. 197, 197 (1995) (“Since Congress enacted the Federal Arbitration Act, courts have liberally enforced a strong national policy favoring arbitration of commercial disputes.”).

6. See 9 U.S.C. § 2 (2006) (“[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

7. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).

8. See Hui, *supra* note 5, at 717 (“Commercial parties find arbitration attractive for several reasons . . . [including] the effective limitation of exposure to large damage awards . . . [and its being] geared to result in ‘the final disposition of differences between parties in a faster, less expensive, more expeditious, and perhaps less formal manner than is available in ordinary court proceedings.’” (quoting 4 AM. JUR. 2D *Alternative Dispute Resolution* § 8 (2006))).

have expanded the scope of the FAA, increasingly compelling arbitration in types of disputes previously adjudicated only in courts.⁹

Section 4 of the FAA expressly gives the judiciary the power to compel parties “to proceed to arbitration in accordance with the terms of the [arbitration] agreement.”¹⁰ While the language of the statute only explicitly authorizes compelling arbitration “in accordance with the terms of the agreement,” in the interest of judicial efficiency courts have compelled arbitration in situations not expressly within “the terms of the agreement.”¹¹ Courts invoke a variety of justifications for this practice¹² including the subject of this note: equitable estoppel.

After a brief introduction to the theory of equitable estoppel as applied to arbitration agreements, Part II of this Note will trace the doctrine from its origins to the seminal case for modern application of the doctrine, *MS Dealer Service Corp. v. Franklin*.¹³ Part III will examine how recent decisions have interpreted *MS Dealer* in different manners, creating a divided body of judicial opinions on the subject and leading courts and commentators to plead for a Supreme Court opinion definitively ruling on the matter. Finally, Part IV will argue that one of the two lines of cases interpreting *MS Dealer* has pushed the doctrine too far and should be rejected by the Supreme Court.

I. EQUITABLE ESTOPPEL AS APPLIED TO ARBITRATION AGREEMENTS

There is a long-standing principle in contract law that “‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed’ to arbitrate.”¹⁴ While this statement is made by many courts in canonic language¹⁵ there are exceptions to the

9. See Jacob, *supra* note 2 at 1106. See generally Jeremy Kennedy, Comment, *The Supreme Court Swallows a Legal Fly: Consequences for Employees as the Scope of the Federal Arbitration Act Expands*, 33 TEX. TECH L. REV. 1137 (2002).

10. 9 U.S.C. § 4 (2006).

11. See *infra* Parts I, II.

12. See *Fisser v. Int’l Bank*, 282 F.2d 231, 233 & n.6 (2d Cir. 1960) (noting that “of course parties can become contractually bound absent their signatures” and listing a variety of ways courts have bound parties who did not sign the agreement, including assignment, an optionee exercising an option, and addition of a party through novation, among others).

13. 177 F.3d 942 (11th Cir. 1999); see also LaForge, *supra* note 3, at 232 (calling *MS Dealer* one of the “most important cases regarding the use of equitable estoppel to compel signatories to arbitrate with nonsignatories”); *The Use of Equitable Estoppel to Compel Arbitration*, WORLD ARB. & MEDIATION REP., Aug. 2000, at 214, 214–15 (calling the test announced in *MS Dealer* “the most cogent test for determining when equitable estoppel can be used to compel arbitration in circumstances involving non-signatory parties”).

14. *R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 160 (4th Cir. 2004) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)); cf. 9 U.S.C. § 4 (2006) (permitting courts to compel arbitration between parties “in accordance with the terms of the agreement”).

15. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“Arbitration . . . is a matter of consent, not coercion.” (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479

black letter rule.¹⁶ The doctrine of equitable estoppel is one such exception.¹⁷

The doctrine of equitable estoppel is seen most frequently when a party who did not sign or otherwise agree to a contract containing an arbitration clause (the “nonsignatory”) seeks to compel arbitration based on a clause in a contract between two other parties. An example is illustrative: Bob Buyer enters into a sales contract for a car with Suzy Seller. The contract contains an arbitration provision for disputes between Buyer and Seller arising from or in connection to the sale of the vehicle. The contract also incorporates by reference a service agreement in which Buyer is charged a separate fee for a service contract with Sam Servicer. Servicer and Buyer have not signed a separate contract. Buyer subsequently discovers the car is a lemon and files suit against both Seller and Servicer, alleging separate breach of contract claims against each defendant. *Both* Seller and Servicer move to compel arbitration for *all claims* asserted by Buyer. The court, based on the contractual arbitration provision between Buyer and Seller, will compel arbitration of Buyer’s claims against Seller. Invoking the doctrine of equitable estoppel, the court may also compel arbitration of Buyer’s claims against Servicer, even though no contract between Buyer and Servicer existed, and Servicer is not a signatory to the contract between Buyer and Seller.¹⁸

There are a variety of policy reasons for letting Servicer “piggyback” on the arbitration clause between Buyer and Seller. The most cited rationale is that the signatory should not be able to “have it both ways” or “have his cake and eat it too”—i.e., the signatory should not be able to sue the nonsignatory under the contract and at the same time deny the applicability of its arbitration clause.¹⁹ Another justification used for application of the doctrine is the idea that resolving all disputes based on the same underlying facts in the same forum increases judicial efficiency and eliminates the risk of inconsistent results in the same or similar matters.²⁰

The most common application of the doctrine of equitable estoppel arises when a plaintiff brings actions against both a signatory and nonsig-

(1989))).

16. See *Fisser v. Int’l Bank*, 282 F.2d 231, 233 & n.6 (2d Cir. 1960).

17. See *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) (“[T]here are certain limited exceptions, such as equitable estoppel, that allow nonsignatories to a contract to compel arbitration.”).

18. The fact pattern in this illustration comes from *MS Dealer Service Corp v. Franklin*, 177 F.3d 942 (11th Cir. 1999), one of the most frequently cited cases in support of the doctrine of equitable estoppel as applied to arbitration.

19. See, e.g., *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005).

20. See *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 378 (S.D.N.Y. 2005); *Shetty v. Palm Beach Radiation Oncology Assocs.*, 915 So.2d 1233, 1235 (Fla. Dist. Ct. App. 2005).

natory, and both defendants (signatory and nonsignatory) move to compel arbitration.²¹ The doctrine has also been invoked, however, to require arbitration when one of the plaintiffs is the nonsignatory;²² and in rare instances equitable estoppel can be used to compel arbitration when both the plaintiff and defendant are non-signatories.²³

II. THE EVOLUTION OF THE DOCTRINE: STEADILY MOVING TOWARDS INCREASED ARBITRATION

A. Early Estoppel: Special Relationships Between Parties

For decades courts have compelled arbitration for claims brought against signatory and nonsignatory defendants when equity demands it because of the relationship between the defendants.²⁴ Often without specifically mentioning equitable estoppel, courts would compel arbitration when there were no independent claims asserted against the nonsignatory, and the signatory and nonsignatory defendants had a parent/subsidiary or contribution/indemnity relationship, or sometimes in cases of surety contracts or guarantor situations.²⁵

A good example of how the doctrine was applied in these early cases is *Sam Reisfeld & Son Import Co. v. S. A. Eteco*.²⁶ Plaintiff Reisfeld entered into an agency contract with defendant S. A. Eteco, a sales subsidiary of a large Belgian wire products manufacturer. When Eteco notified Reisfeld that it was terminating the arrangement twelve years later, Reisfeld sued both Eteco and its parent company. When defendants moved to dismiss based on lack of jurisdiction, the district court stayed the claims against both defendants pending arbitration based on an arbitration provision in the contract between Reisfeld and Eteco.²⁷ The circuit court upheld

21. See, e.g., *Grigson*, 210 F.3d 524; *MS Dealer*, 177 F.3d 942.

22. See, e.g., *Becker v. Davis*, 491 F.3d 1292, 1304 (11th Cir. 2007) (plaintiff trustee brought claims against financial advisors on behalf of herself as an individual and on behalf of the trust; the court compelled arbitration of all claims, even though plaintiff as an individual was a nonsignatory to the contract between the trust and financial advisors).

23. See, e.g., *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 71 (2d Cir. 2005).

24. See, e.g., *Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679, 680 (5th Cir. 1976); *Chase Mortgage Co.-West v. Bankers Trust Co.*, No. 00 Civ. 8150(MBM), 2001 WL 547224, at *3 (S.D.N.Y. May 23, 2001).

25. See, e.g., *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001) (holding that power generator, as signatory to an arbitration agreement, was estopped from avoiding arbitration with a nonsignatory where the issues were closely intertwined with the contract signed by the power generator); *Israel v. Chabra*, No. 04 Civ. 4599(DC), 04 Civ. 5859(DC), 2005 WL 589400, at *3 (S.D.N.Y. March 11, 2005) (compelling arbitration of disputes where two former employees had a dispute with employer concerning interest rates on bonuses they were paid when bonuses were guaranteed by a separate agreement with the employer's owner not containing an arbitration clause).

26. 530 F.2d 679 (5th Cir. 1976).

27. *Id.* at 680.

the trial court's inclusion of both Eteco and its parent and successor corporations in its stay order even though the parent and successor were not formally a party to the contract.²⁸ The court reasoned that "[t]he charges against these two defendants were based on the same operative facts and were inherently inseparable from the claims against Eteco," and that "[i]f the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."²⁹ It is easy to see how equity would require Reisfeld to arbitrate his claims against the parent company, as the parent company took no independent actions and therefore Reisfeld had no independent claims against it. It should be particularly noted, however, that in *Reisfeld* and other early cases like it, there were no independent causes of action against the parent, contributor, guarantor, etc.³⁰ This fact is significant because in later years courts invoked equitable estoppel and compelled arbitration based partially on the relationship between the defendants even when independent causes of action against both parties existed.³¹

B. Arbitration of Claims Against Non-Signatories Based on Contractual Obligations

In the early 1980s, courts began using equitable estoppel to compel arbitration against non-signatories in situations outside the parent/subsidiary or other special relationship context.³² The underlying theme that bound these more recent decisions together was the idea that the claims against the nonsignatory arose from the nonsignatory's duties or obligations under the agreement containing the arbitration provision.

A classic example of this type of estoppel is *Hughes Masonry Co. v. Greater Clark County School Building Corp.*³³ In *Hughes Masonry*, plaintiff Hughes entered into an agreement with defendant Clark to provide masonry services for construction of two schools. The agreement incorporated an arbitration provision and designated third party "J.A." as construction manager for the project. Hughes never entered into a separate contract with J.A. However, the Clark-Hughes agreement not only specifically named J.A. as the construction manager for the project, but also

28. *Id.* at 681.

29. *Id.*

30. *See supra* note 25; *see also* discussion *supra* Part II.A.

31. *See, e.g.,* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993) (citing "the integral relationship between [signatory] and [nonsignatory parent]" as a partial justification for applying equitable estoppel); *see also* discussion *infra* Part II.B.

32. *See* David F. Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 VAND. L. REV. 721, 733-40 (1998).

33. 659 F.2d 836 (7th Cir. 1981).

“outlined the responsibilities of . . . J.A.”³⁴ After several disputes, Clark canceled its contract with Hughes. Hughes filed claims against both Clark and J.A., and J.A. moved to compel arbitration between all parties for all claims even though there was no agreement between itself and Hughes. Hughes argued that J.A. was not entitled to invoke the arbitration provision of the Clark–Hughes agreement since it was not a party to that agreement. The Seventh Circuit held that “Hughes is equitably estopped from asserting [that argument] in this case, because the very basis of Hughes’ claim against J.A. is that J.A. breached the duties and responsibilities assigned and ascribed to J.A. by the agreement between Clark and Hughes,”³⁵ and noted in further justification that “[plaintiff] cannot have it both ways. [It] cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage.”³⁶

Almost as an afterthought, the court also addressed whether J.A. could have compelled arbitration if Hughes’s complaint had stated an independent cause of action against J.A. for tortious interference with contract.³⁷ The court stated that equitable estoppel required that J.A. be entitled to the benefit of the arbitration clause for any claims that were “intimately founded in and intertwined with the underlying contract obligations,” and that the hypothetical claim of tortious interference with contract was such a claim.³⁸

Three years after the Seventh Circuit’s decision in *Hughes Masonry*, the Eleventh Circuit again expanded the scope of equitable estoppel as applied to arbitration through its decision in *McBro Planning & Development Co. v. Triangle Electrical Construction Co.*³⁹ Pushing the doctrine further, in *McBro* the Eleventh Circuit required arbitration of claims between two non-signatories based on arbitration provisions contained in the agreements between the non-signatories and a third party when there were no claims by either party against the actual signatory.⁴⁰ In this case plaintiff *McBro* and defendant *Triangle* had separate contracts with *St. Marga-*

34. *Id.* at 837.

35. *Id.* at 838.

36. *Id.* at 839 (alteration in original) (quoting *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966)). It should be noted that J.A. may have been able to enforce the arbitration clause against Hughes based on a third-party beneficiary argument. Generally, “nonsignatories who are third-party beneficiaries may enforce an arbitration clause if the ‘contracting parties intended the third party to directly benefit from the contract.’” *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 356 (Minn. 2003) (quoting *GABRIEL M. WILNER, 1 DOMKE ON COMMERCIAL ARBITRATION* § 10.08 (1983)). However, the court did not address the third-party beneficiary theory, instead relying on equitable estoppel.

37. See *Hughes Masonry Co.*, 659 F.2d at 841 n.9.

38. *Id.* This “afterthought” became extremely important as later cases repeatedly cited the “intimately founded in and intertwined with” language when invoking equitable estoppel to compel arbitration. See *infra* Parts II.C, III.A.

39. 741 F.2d 342 (11th Cir. 1984).

40. *Id.* at 344.

ret's Hospital, both of which contained arbitration provisions for disputes between St. Margaret's and the other signatory party. At the time of the contract, St. Margaret's Hospital was undergoing renovations; Triangle had contracted to do the electrical work, and McBro had contracted to act as construction manager. While the contract between Triangle and St. Margaret's listed McBro as construction manager, it also stated that "[n]othing contained in the Contract Documents shall create any contractual relationship between . . . the Construction Manager [McBro] and the Contractor [Triangle]."⁴¹ During the course of the project, Triangle alleged that McBro harassed its employees and hampered its work, and Triangle subsequently brought tort claims against McBro for intentional interference with a contractual relationship and for negligence. Triangle did not, however, bring any claims against St. Margaret's, the party with whom Triangle actually had a contractual relationship. Relying on the "intimately founded in and intertwined with the underlying contract obligations" language from *Hughes*, the court held that Triangle must arbitrate any and all claims against McBro.⁴² The court reasoned that Triangle was essentially claiming that McBro breached the duties assigned it by the contract between Triangle and St. Margaret's, and therefore equity demanded that Triangle be estopped from avoiding arbitration.⁴³ In applying equitable estoppel to two non-signatories when there was no claim against the actual signatory, the court in *McBro* was beginning to probe for the limits of the doctrine's application. The case stands as the starting point in a series of Eleventh Circuit decisions that attempted to outline the appropriate situations for compelling arbitration of claims against non-signatories based on equitable estoppel.⁴⁴

C. Expanding Equitable Estoppel: Relinquishing the Requirement of Contractual Obligations or Duties for Non-Signatories

Nine years after *McBro*, the Eleventh Circuit took another step towards broadening the scope of equitable estoppel as applied to arbitration with *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*⁴⁵ Sunkist Growers owned the exclusive rights to the Sunkist trademark. Sunkist Growers licensed the brand name to Sunkist Soft Drinks (SSD) to market an orange soda. The licensing agreement between the two entities contained an arbitration provision. Later, the Del Monte corporation acquired SSD and absorbed it into its own beverage products division but did not enter into a

41. *Id.* at 343 (alterations in original) (quoting the Triangle–St. Margaret's agreement).

42. *Id.* at 343–44.

43. *Id.* at 344 (noting that "the general conditions of that contract [between Triangle and St. Margaret's] are replete with references to McBro's duties as construction manager").

44. See Stewart, *supra* note 5, at 343–45; discussion *infra* Parts II.C–D and III.A.

45. 10 F.3d 753 (11th Cir. 1993).

new agreement with Sunkist Growers. Soon after Del Monte took over, Sunkist Growers alleged that Del Monte's management caused SSD to breach the licensing agreement between Sunkist Growers and SSD and brought claims against Del Monte sounding in contract and tort. Del Monte moved to compel arbitration pursuant to the licensing agreement between Sunkist Growers and SSD. Rather than discussing the propriety of arbitration based on successor liability,⁴⁶ the Eleventh Circuit chose instead to base its decision solely on the doctrine of equitable estoppel.⁴⁷ Relying principally on *McBro*, the Eleventh Circuit upheld the district court's grant of Del Monte's motion to compel arbitration.⁴⁸ The court specifically noted that "[a]lthough Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement. We find that each counterclaim maintained by Sunkist . . . relates directly to the license agreement."⁴⁹

The Eleventh Circuit's decision in *Sunkist* represents an expansion of the doctrine as articulated in *McBro* because, unlike the agreement in *McBro*, the licensing agreement between Sunkist and SSD makes no mention of Del Monte and assigns Del Monte no duties or obligations.⁵⁰ The *Sunkist* court attempted to clarify the decisions from *McBro* and *Hughes Masonry*, explaining that "these decisions rest on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims."⁵¹ Through this holding, the Eleventh Circuit promulgated the rule that equitable estoppel could be used to compel arbitration when a dispute between two parties could not exist except for a written agreement containing an arbitration provision.⁵² While it did not specifically state so, the court's decision can be viewed as essentially taking the word "obligations" out of the standard announced in *Hughes Masonry*, thereby establishing that arbitration should be enforced when claims are intimately founded in and intertwined with the underlying contract.⁵³

46. While not mentioned by the court, it seems that Del Monte could have compelled arbitration based on the principle that when one company completely absorbs another it will often assume the second company's contracts (and any arbitration provisions in those contracts) automatically. See Thomas H. Oehmke & Joan M. Brovins, *The Arbitration Contract—Making it and Breaking it*, 83 AM. JUR. PROOF OF FACTS 3D § 98 (2005) ("The law of successor liability can bind a [party] to a predecessor's arbitration contract.").

47. *Sunkist*, 10 F.3d at 757 ("The only issue before us regarding the arbitration clause is whether Sunkist is equitably estopped from contesting Del Monte's standing to invoke the clause . . .").

48. See *id.* at 757-58.

49. *Id.* at 758.

50. See *id.* at 757 ("The license agreement at issue here does not specify or make mention of any duties or obligations that Del Monte owes to Sunkist.").

51. *Id.*

52. See *id.* at 758 ("Although Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement.").

53. See *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (announcing a test for when equitable estoppel should compel arbitration based largely on *Sunkist* and making no mention of duties or obligations).

While *Sunkist* helped to further define (or at least alter) the doctrine of equitable estoppel as applied to arbitration, courts relying on it still had trouble using precedent to easily apply the doctrine to cases before them.⁵⁴

D. Development of the Two-Prong Test

The decision in *Sunkist* was frequently relied on by courts around the country in the years following its publication.⁵⁵ While courts would usually quote the “intimately founded in and intertwined” language found in *Hughes, McBro*, and *Sunkist*, there was still no clear test for determining when claims were intimately founded in and intertwined with the underlying contract, and so the correct application of equitable estoppel remained unclear. Clarification again came from the Eleventh Circuit; in its 1999 decision of *MS Dealer Service Corp. v. Franklin* the court finally attempted to announce a more specific test for when equitable estoppel could properly be used to compel arbitration.⁵⁶ The *MS Dealer* decision is universally regarded as a landmark case in equitable estoppel jurisprudence.⁵⁷ The facts of *MS Dealer* are set out in the “Buyer, Seller, Servicer” illustration in Part I of this Note. The application of the doctrine to the specific facts before the court, however, is not of particular significance.

MS Dealer holds such a lofty position in equitable estoppel jurisprudence because of the test announced in the decision. Synthesizing decades of cases,⁵⁸ the court provided what has been described as “the most cogent test for determining when equitable estoppel can be used to compel arbitration in circumstances involving non-signatory parties.”⁵⁹ The test developed “allows a nonsignatory to compel arbitration in two different circumstances”:

First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause “must rely on the terms of the written agreement in asserting [its] claims” against the non-

54. See Stewart, *supra* note 5, at 345 (“As the Alabama Supreme Court stated in *Ex parte Isbell*, cases coming before the court relying on *Sunkist* and *McBro* are peculiarly fact specific and require a penetrating analysis of the facts and application of traditional contract principles. Hence, a nonsignatory party asking a federal court to compel arbitration must demonstrate that the facts of that party’s case falls within the recognized class of cases to prevail.”).

55. See, e.g., Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000); *MS Dealer*, 177 F.3d at 947–48; E.G.L. Gem Lab Ltd. v. Gem Quality Institute, Inc., No. 97 Civ. 7102(LAK), 1998 WL 314767, at *3 (S.D.N.Y. Jun. 15, 1998); Carlin v. 3V Inc., 928 S.W.2d 291, 296–97 (Tex. App. 1996).

56. See *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

57. See LaForge, *supra* note 3, at 232 (“Together, *MS Dealer* and *Grigson* are the two most important cases regarding the use of equitable estoppel to compel signatories to arbitrate with nonsignatories.”).

58. See *id.* (“*MS Dealer* . . . relied on a small, interconnected series of cases stretching back to 1976.”).

59. See *The Use of Equitable Estoppel to Compel Arbitration*, *supra* note 13, at 214–15.

signatory. When each of a signatory's claims against a nonsignatory "makes reference to" or "presumes the existence of" the written agreement, the signatory's claims "arise[] out of and relate[] directly to the [written] agreement," and arbitration is appropriate. Second, "application of equitable estoppel is warranted . . . when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."⁶⁰

In cutting up the language of *Sunkist* to form the first prong, the court leaves no doubt that the "duties or obligations" requirement is no longer necessary to compel arbitration through equitable estoppel.⁶¹ However, while the first prong is an expansion of the previous rule, it is still grounded in traditional equitable estoppel jurisprudence in that it requires that the claim against the nonsignatory at least relate to the written agreement.

The second prong of the *MS Dealer* test represents a significant departure from the traditional equitable estoppel doctrine. It contains no requirement that the action against the nonsignatory relate in any way to the agreement containing the arbitration provision, instead allowing the nonsignatory to take advantage of the provision if it makes allegations of "substantially interdependent and concerted misconduct."⁶² While the language used is reminiscent of the "intimately founded in" standard from *Sunkist* and its predecessors, the *Sunkist* test still required the allegations to be "intimately founded in and intertwined with the underlying contract obligations."⁶³ By getting rid of the requirement that claims be related to the contract, *MS Dealer* allows courts to compel arbitration for claims asserted against a nonsignatory in almost any circumstance they see fit.⁶⁴

60. *MS Dealer*, 177 F.3d at 947 (alterations in original) (citation omitted) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1433 (M.D. Ala. 1997)).

61. Compare *Sunkist*, 10 F.3d at 757-58, with *MS Dealer*, 177 F.3d at 947.

62. See *MS Dealer*, 177 F.3d at 947.

63. See *Sunkist*, 10 F.3d at 757 (emphasis added) (quoting *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984)); see also *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981).

64. However, as discussed *infra* notes 76-82 and accompanying text, the Eleventh Circuit subsequently limited the second prong of the *MS Dealer* test through its decision in *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002), *rev'd on other grounds sub nom.* *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

III. THE AND/OR DEBATE: A DIVIDED BODY OF JUDICIAL OPINIONS

The language of *MS Dealer* seems to indicate that the existence of either of the two prongs described in its test alone is sufficient to invoke the doctrine of equitable estoppel and compel arbitration.⁶⁵ However, while the test in *MS Dealer* is still the standard used in most equitable estoppel cases, courts have been reluctant to wholeheartedly embrace its second prong as an independent basis for compelling arbitration. In the years since *MS Dealer*, the debate on whether the test announced should be treated as an “and” or an “or” test has come up frequently, and decisions from courts on many levels and in many different areas have answered the question in decidedly different ways.

A. *Suggestions from the Circuits*

One year after *MS Dealer*, in an issue of first impression, the Fifth Circuit addressed the propriety of *MS Dealer*'s test for compelling arbitration based on equitable estoppel through its decision in *Grigson v. Creative Artists Agency, L.L.C.*⁶⁶ The *Grigson* court, over a vehement dissent by Judge Dennis, adopted the *MS Dealer* test verbatim.⁶⁷ The court also addressed the interdependence of the prongs. The Fifth Circuit agreed that either prong would be sufficient to invoke the doctrine but held that it is more applicable and appropriate when both elements of the test are present.⁶⁸ The court also cautioned against blind application of the *MS Dealer* test, stating that “[e]ach case, of course, turns on its facts. . . . The linchpin for equitable estoppel is equity—fairness.”⁶⁹ Finally, while it did conditionally ratify the *MS Dealer* test, the court hedged by noting that “whether to utilize equitable estoppel in this fashion is within the district court’s discretion; we review to determine only whether it has been abused.”⁷⁰

Perhaps persuaded by the cautionary language of the majority or the fiery dissent of Judge Dennis in *Grigson*, the Fifth Circuit later narrowed the application of the *MS Dealer* test in its 2002 decision of *Hill v. G E Power Systems, Inc.*⁷¹ After again emphasizing that the test is not a rigid

65. See *MS Dealer*, 177 F.3d at 947 (“[E]quitable estoppel allows a nonsignatory to compel arbitration in two different circumstances.”).

66. 210 F.3d 524 (5th Cir. 2000).

67. See *id.* at 527.

68. See *id.* at 527–28 (“We agree with the intertwined-claims test formulated by the Eleventh Circuit. . . . Such equitable estoppel is much more readily applicable when the case presents both independent bases advanced by the Eleventh Circuit for applying the intertwined-claims doctrine.”).

69. See *id.*

70. See *id.* at 528.

71. 282 F.3d 343 (5th Cir. 2002).

one,⁷² the court held that the first prong of the test was not met because the claims only “touch[ed] matters covered by the . . . Agreement,” rather than relying upon its terms.⁷³ In further analysis, the court found that “*Grigson’s* second prong is met.”⁷⁴ However, the court held that meeting the second prong of the test was not enough to overturn the trial court’s denial of the motion to compel arbitration.⁷⁵ The court thereby suggested that satisfying the second prong of the test alone may not be enough to invoke equitable estoppel and compel arbitration.

Only three years after it promulgated the quickly famous test in *MS Dealer*, the Eleventh Circuit felt it necessary to clarify its position on the interdependence of the two prongs in *In re Humana Inc. Managed Care Litigation*.⁷⁶ In this case the plaintiffs brought suit against defendant HMOs alleging, among other things, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and conspiracy charges. For the first time, the circuit court was presented with the argument that a nonsignatory defendant should be permitted to use equitable estoppel to compel arbitration based solely on the second prong of the *MS Dealer* test.⁷⁷ The court summarily rejected this argument,⁷⁸ holding:

A plaintiff’s allegations of collusive behavior between the signatory and nonsignatory parties to the contract do not automatically compel a court to order arbitration of all of the plaintiff’s claims against the nonsignatory defendant; rather, such allegations support an application of estoppel only when they “establish[] that [the] claims against [the nonsignatory are] intimately founded in and intertwined with the obligations imposed by the [contract containing the arbitration clause].”⁷⁹

In so holding, the Eleventh Circuit reinstated the pre-*Sunkist* rule found in *Hughes Masonry* and *McBro*, insisting that to invoke equitable

72. See *id.* at 348 (“[T]his is not a rigid test, and . . . each case turns on its facts.”).

73. *Id.* at 348–49.

74. *Id.* at 349.

75. *Id.*

76. 285 F.3d 971 (11th Cir. 2002), *rev’d on other grounds sub nom.* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003).

77. See *id.* at 975 (“The HMOs nonetheless direct our attention to more general language from *MS Dealer*, which notes that equitable estoppel may be appropriate ‘when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.’ The HMOs contend that this language mandates an application of equitable estoppel in this case simply because the doctors allege a RICO conspiracy.” (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999))) (citations omitted).

78. See *id.* at 976 (“This contention is only tenable if the passage is read completely out of context.”).

79. *Id.* at 975 (alterations in original) (quoting *MS Dealer*, 177 F.3d at 948).

estoppel the claim against the nonsignatory defendant must be founded on the obligations imposed on it by the agreement containing the arbitration provision.⁸⁰ By clearly ruling on a test it promulgated itself, the Eleventh Circuit seemed to leave no doubt that equitable estoppel should not be applied if only the “substantially interdependent and concerted misconduct” prong is met.⁸¹ This interpretation of *MS Dealer* has indeed been established and followed in many courts across the country.⁸²

B. Creating a Rift: Modern Decisions Embracing the Second Prong as an Independent Justification for Compelling Arbitration

Despite authority cautioning against compelling arbitration based solely on the second prong of the *MS Dealer* test issued from the circuit that initially formulated the test and a neighboring circuit that thoroughly discussed it,⁸³ a rash of recent opinions in courts throughout the country does precisely that: compel arbitration based solely on allegations of conspiracy or concerted misconduct between the signatory and nonsignatory.

The preeminent and perhaps most confusing of these decisions came from the Fifth Circuit in the 2006 case of *Brown v. Pacific Life Insurance Co.*⁸⁴ In *Brown*, the plaintiffs were investors in a number of Smith Barney securities brokerage accounts. A Smith Barney representative managed these accounts and invested in variable annuities from GE and Pacific, among other stocks. The agreement between the Browns and Smith Barney included an arbitration provision. Upset about the agent’s investment decisions, the Browns filed suit against Smith Barney, the agent, GE, and Pacific, alleging fraud, negligence, and breach of various common law and statutory duties. All the defendants moved to compel arbitration based on the provision in the Smith Barney contract, and the district court granted the motion based on equitable estoppel.⁸⁵

80. See *id.* at 975; see also *id.* at 976 (“The plaintiff’s actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.”).

81. See *id.* at 975.

82. See, e.g., *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 507 (S.D.N.Y. 2003), *aff’d in part, vacated in part*, 388 F.3d 39 (2d Cir. 2004) (holding that conspiracy claim, among other claims, not subject to arbitration because it concerned “matters extrinsic to the contract,” even though the contract contained an arbitration provision); *Norcom Elecs. Corp. v. CIM USA Inc.*, 104 F. Supp. 2d 198, 203 (S.D.N.Y. 2000) (requiring that conspiracy claim, among other claims, be “closely intertwined with duties and obligations arising under” contract containing arbitration provision for equitable estoppel to apply); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 194 (Tex. 2007) (“[T]he concerted-misconduct test . . . would sweep independent entities and even complete strangers into arbitration agreements.”); see also *id.* (“[W]hile conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other’s arbitration agreements.”).

83. See *Hill v. G E Power Sys., Inc.*, 282 F.3d 343 (5th Cir. 2002); see also *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000).

84. 462 F.3d 384 (5th Cir. 2006).

85. *Id.* at 390.

The Fifth Circuit began its review of the district court's decision with a statement of the test from *Grigson* (which is the verbatim test from *MS Dealer*).⁸⁶ The court then stated: "[W]e conclude that the district court did not abuse its discretion in determining that the Browns were estopped under *Grigson's* second prong."⁸⁷ The court did not discuss application of the first prong because *no allegations were made that the claims against GE or Pacific relied on or arose from the underlying contract*.⁸⁸ The court held that meeting the second prong of the test alone was sufficient to invoke equitable estoppel and compel arbitration of all claims.⁸⁹ The court reasoned, "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 [the agent] and Smith Barney."⁹⁰ The court also took care to note "that the complaint asserts concerted misconduct by all parties."⁹¹ Holding equitable estoppel appropriate when a claim against a nonsignatory "depends, in some part," on the claims against a signatory directly contrasts the Fifth Circuit's own ruling three years prior in *Hill v. G E Power Systems, Inc.*, where the court found application of equitable estoppel inappropriate when the claims against the nonsignatory "touch[ed] matters covered by the . . . Agreement," reasoning that "'touching matters' is not the appropriate test here."⁹² The *Brown* decision then went even further, suggesting that equitable estoppel is appropriate when the complaint simply asserts concerted misconduct.⁹³ The *Brown* decision illustrates that there is no unified interpretation of the *MS Dealer* test. Instead of providing clarity, the Fifth Circuit's jurisprudence on equitable estoppel lies in disarray and only creates confusion in others attempting to interpret it.⁹⁴

Brown is not the only recent case creating a body of precedent diametrically opposed to *In re Humana*, *Hill v. G E Power Systems, Inc.*, and other cases holding that the second prong of the *MS Dealer* test is insufficient to compel arbitration by itself. A pair of Florida district court decisions illustrates the willingness of some modern courts to compel arbitration based solely on allegations of conspiracy or concerted misconduct. In

86. See *id.* at 398; see also *Grigson*, 210 F.3d at 527.

87. *Brown*, 462 F.3d 384, 398 (5th Cir. 2006).

88. See *id.* at 398–99.

89. *Id.*

90. *Id.*

91. *Id.* at 399.

92. *Hill v. G E Power Systems, Inc.* 282 F.3d 343, 348–49 (5th Cir. 2002). Compare *Brown*, 462 F.3d at 399, with *Hill*, 282 F.3d at 348–49.

93. See *Brown*, 462 F.3d at 399.

94. The argument can be made that *Brown* and *Hill* are not as contradictory as indicated because both cases were being reviewed for abuse of discretion and the *MS Dealer* test is not a necessarily rigid one. However, this Note argues that while some flexibility in applying the test to specific facts is beneficial, the and/or distinction of the two prongs is a sufficiently vital element of the test to require a unified jurisprudence on the issue.

Shetty v. Palm Beach Radiation Oncology Associates–Sunderam K. Shetty, M.D., P.A.,⁹⁵ the plaintiff filed a complaint individually and on behalf of Palm Beach Radiation Oncology Associates (PBRO) against Dr. Shetty and his wife, alleging that Dr. and Mrs. Shetty conspired to defraud, aided and abetted fraud, conspired to breach fiduciary duty, and were unjustly enriched by misusing and misappropriating funds and engaging in improper billing practices. The Shettys moved to compel arbitration based upon an arbitration clause in the PBRO shareholder agreement, to which Dr. Shetty was a party. Thereafter, Mrs. Shetty (who had no such agreement) was dropped as a defendant, and Dr. Shetty's motion to compel arbitration was granted. Some time later the plaintiff filed another complaint against Mrs. Shetty, alleging conversion and breach of fiduciary duty based upon allegations that Mrs. Shetty had diverted monies collected from PBRO's billings to herself. Mrs. Shetty again moved to compel arbitration based on the provision from her husband's shareholder agreement, but the trial court denied her motion.

The Florida District Court of Appeals reversed, holding that “[e]quitable estoppel is warranted when the signatory to the contract containing the arbitration clause raises allegations of concerted conduct by both the non-signatory and one or more of the signatories to the contract.”⁹⁶ The court explained its decision by noting, “Both [charges] are predicated upon the same allegations and necessarily involve factual determinations as to whether Mrs. Shetty was paid excessively for her services and had engaged in improper billing practices.”⁹⁷ The Florida court was making its decision to compel arbitration not because the plaintiff was depending on the actual contract to make out her claims (which has been described by courts as the *sine qua non* for applying equitable estoppel⁹⁸), but rather on the simple fact that the two allegations were similar in nature and alleged concerted misconduct.⁹⁹

Similarly, in the decision of *Armas v. Prudential Securities, Inc.*,¹⁰⁰ on which the *Shetty* court relies for authority,¹⁰¹ the District Court of Appeals for the Third District of Florida held that “[e]quitable estoppel is . . . warranted” when the “claims against [the nonsignatory defendant] arise out of the same factual allegations of concerted conduct by both the non-signatory . . . and the signatories.”¹⁰² Once again, the court is using “alle-

95. 915 So. 2d 1233 (Fla. Dist. Ct. App. 2005).

96. *Id.* at 1235 (quoting *Armas v. Prudential Sec., Inc.* 842 So. 2d 210, 212 (Fla. Dist. Ct. App. 2003)).

97. *Id.* at 1235.

98. *See In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds sub nom.* *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

99. *See Shetty*, 915 So. 2d at 1235.

100. 842 So.2d 210 (Fla. Dist. Ct. App. 2003).

101. *See Shetty*, 915 So. 2d at 1235.

102. *Armas*, 842 So. 2d at 212.

gations of concerted conduct,” instead of actual dependence on the underlying contract, as the *sine qua non* for invoking equitable estoppel.¹⁰³

The application of equitable estoppel based on similar allegations, conspiracy, or concerted misconduct is found in courts all over the country. In *Douzinias v. American Bureau of Shipping, Inc.*,¹⁰⁴ the Court of Chancery of Delaware initially noted that “[i]t is indisputable that the claims against the [nonsignatory parties] all involve the same course of improper conduct alleged against [the signatory parties].”¹⁰⁵ The court then ordered that arbitration be compelled based on equitable estoppel, holding: “One circumstance that frequently warrants such estoppel is ‘when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct’”¹⁰⁶

In a pair of cases heard in the Southern District of New York involving tax shelters, the district court granted motions compelling arbitration based solely on concert of action and conspiracy by the defendants.¹⁰⁷ In the earlier case, the court applied Indiana law to allegations against a tax advisor, with whom the plaintiffs had an agreement with an arbitration provision,¹⁰⁸ and against two “Law Firm Defendants,” who had separate agreements with the plaintiffs not containing arbitration provisions,¹⁰⁹ but “who acted in concert with [the tax preparer] to allegedly promote an unlawful and unregistered tax shelter”¹¹⁰ The court compelled arbitration of claims against all defendants based on the provision in the tax preparer agreement, offering only that “[a] civil conspiracy is a kind of partnership, in which each member becomes the agent of the other,”¹¹¹ and “[p]laintiffs’ theory of liability can only succeed if they prove their allegation that all Defendants conspired and acted together,”¹¹² as justification for its ruling.

The second case from the Southern District of New York used even stronger language in its application of the doctrine. In this case the court again considered claims of conspiracy between a tax advisor and lawyers

103. *See id.*

104. 888 A.2d 1146, 1148 (Del. Ch. 2006) (applying Texas law but noting “there is no material difference between Texas and Delaware law regarding the issues before me”).

105. *Id.* at 1153.

106. *Id.* (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

107. *See Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 379 (S.D.N.Y. 2005); *Camferdam v. Ernst & Young Int’l, Inc.*, No. 02 Civ. 10100(BSJ), 2004 WL 307292, at *6 (S.D.N.Y. Feb. 13, 2004).

108. *See Camferdam*, 2004 WL 307292, at *1–2.

109. *See id.* at *6 (“Although the Law Firm Defendants entered into separate engagement letters with the Plaintiffs, they now seek a stay based upon the Arbitration Clause in the [agreements with the tax advisor].”).

110. *See id.* at *1.

111. *Id.* at *6 (quoting *Roberson v. Money-Tree of Alabama, Inc.*, 954 F. Supp. 1519, 1529 n.11 (M.D. Ala. 1997)).

112. *Camferdam*, 2004 WL 307292, at *7.

regarding a tax shelter, and again the only arbitration agreement that existed was with the tax preparer.¹¹³ In its application of the equitable estoppel doctrine, the court held, “The fact that the claims against [the nonsignatory] movants do not arise under the [signatory] agreements, while relevant, is but one factor to be considered in determining whether the claims are intertwined.”¹¹⁴ This court is obviously at odds with others that have declared dependence on the actual contract to make the claims as the *sine qua non* for invoking equitable estoppel.¹¹⁵ The court then went on to essentially disavow contract principles centuries old, stating, “The standard that governs such situations looks . . . not to evidence that the estopped party actually intended or expected that any dispute with the nonsignatory would be subject to arbitration,” but rather “[t]he doctrine therefore . . . depend[s] upon . . . considerations of adjudicative economy, not consent.”¹¹⁶

Together, these recent cases that compel arbitration based solely on the second prong of the *MS Dealer* test create a substantial body of jurisprudence at odds with other decisions following the *In re Humana* and *Hill vs. G E Power Systems, Inc.* interpretations. Courts have adopted this alternative interpretation when claims such as conspiracy or other concerted misconduct are alleged.¹¹⁷ Compelling arbitration in these instances has led to an essentially new doctrine, which one court labeled “concerted-misconduct estoppel.”¹¹⁸ In addition to the above judicial decisions, the embrace of concerted misconduct or conspiracy estoppel can also frequently be seen in unpublished opinions and orders granting motions compelling arbitration.¹¹⁹

C. Calling for Clarity: Recent Pleas for a Unified Doctrine

It is clear that the question of whether concerted misconduct by defendants is enough by itself to compel arbitration through equitable estoppel

113. See *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 376 (S.D.N.Y. 2005).

114. *Id.* at 377.

115. See, e.g., *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds sub nom. PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

116. See *Carroll*, 374 F. Supp. 2d at 378.

117. See, e.g., *Camferdam v. Ernst & Young Int'l, Inc.*, No. 02-Civ. 10100(BSJ), 2004 WL 307292, at *6-7 (S.D.N.Y. Feb. 13, 2004).

118. See *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007).

119. See, e.g., *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, No. Civ.A.2037-N, 2006 WL 2473665, at *6 (Del. Ch. Aug. 22, 2006) (holding that “equitable estoppel applies because [the plaintiff] alleges concerted misconduct by both a nonsignatory . . . and a signatory to the Agreement”); *Universal Computer Consulting Holding, Inc. v. Hillcrest Ford Lincoln-Mercury, Inc.*, Nos. 14-04-00819-CV, 14-04-01103-CV, 2005 WL 2149508, at *8 (Tex. App. Sep. 8, 2005) (invoking equitable estoppel when “[i]n its petition, [plaintiff] raises allegations of substantially interdependent and concerted misconduct by [defendants]” and plaintiff “makes no independent factual allegations against [nonsignatory defendants]”).

remains far from settled. The lack of a unified jurisprudence on the issue is a cause of concern for practitioners who are unsure about whether their clients' claims will be settled in courts or arbitration.¹²⁰ Similarly, the split in decisions makes it difficult for attorneys to advise clients on entering contracts or other relationships.¹²¹ A 2005 Special Report in *Texas Lawyer* noted, "These recent decisions mean that even parties who are careful to avoid any written entanglement with a contract subject to arbitration must exercise care to avoid acting in a way that might subject them to arbitration despite their wishes."¹²² From a practitioner's standpoint, clarity on the doctrine of equitable estoppel as applied to arbitration is sorely needed.

The desire for a unified and understandable doctrine is not limited to practitioners of the law. In the past year, courts have begun to express their desire for clarity in equitable estoppel jurisprudence, all but begging the Supreme Court to rule on the issue. Examples of decisions recognizing the problem and calling for clarity are beginning to surface all over the country. In an issue of first impression in Massachusetts,¹²³ the Superior Court of Massachusetts outlined the conflict in the law in its 2007 case *Vassalluzzo v. Ernst & Young LLP*.¹²⁴ In an unreported decision, the court considered claims made by the plaintiff based on a tax shelter gone bad. Claims were made against both the signatory tax advisor and nonsignatory attorneys who had issued opinions to the tax advisor about the legality of the tax shelter. The court initially noted that "[a] surprisingly large number of federal courts have applied the doctrine of equitable estoppel in this context."¹²⁵ The court went on to explain that "[a]fter a review of many of these cases, it emerges that different federal courts have taken two differing approaches to this doctrine . . . 'the broad approach' [and] 'the narrow approach.'"¹²⁶ The court explained the broad approach as one focused on the relationships among the parties and the issues that had arisen among them.¹²⁷ The court contrasted this with the narrow ap-

120. See Doug Uloth & Hamilton Rial, *Enforcing Arbitration Against Nonsignatories*, TEX. B.J., Oct. 2002, at 802, 807 ("[A] split currently exists, at both the state and federal levels, between expansive and restrictive application of equitable estoppel.").

121. See generally Jose de la Fuente, *Arbitration Tango*, TEX. LAW., Dec. 19, 2005, at 36.

122. See *id.*

123. See *Vassalluzzo v. Ernst & Young LLP*, No. 06-4215-BLS2, 2007 WL 2076471, at *2 (Mass. Super. Ct. June 21, 2007) ("[N]o reported Massachusetts case has yet determined whether the doctrine of equitable estoppel may be applied to extend the reach of an arbitration agreement to require a signatory to arbitrate a dispute with a party who did not sign that agreement.").

124. *Id.*

125. *Id.* at *3.

126. *Id.*

127. See *id.* ("Under the 'broad approach,' as articulated by the Second Circuit, 'a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" (quoting *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004))).

proach, which requires the plaintiff's actual dependence on the underlying contract to assert his claims.¹²⁸ The court then examined how the different approaches would apply to the case at hand, holding: "If this Court were to adopt the 'broad approach,' then equitable estoppel would likely be applied here . . . because it is plain from the First Amended Complaint that [the nonsignatory] is alleged to have acted in concert with [the signatory; however, if] this Court were to adopt the 'narrow approach,' then equitable estoppel plainly should not be applied, because [plaintiff] would have an independent right to recover against [the nonsignatory] even if the [agreement] were void or had never been written."¹²⁹ The court decided to apply the "narrow approach": "This Court is confident that Massachusetts law will adopt the 'narrow approach' to equitable estoppel, because that is the approach most consistent with the doctrine of equitable estoppel."¹³⁰ The court went on to denounce the broad approach, stating, "The 'broad approach,' in contrast, is more about judicial efficiency than equity, even though it invokes equity as its justification."¹³¹

The inconsistencies and need for clarity in the doctrine of equitable estoppel were also noted by the United States District Court for the Northern District of California in its 2007 decision *Jones v. Deutsche Bank AG*.¹³² In *Jones*, the district court considered the movant's assertion "that courts have split on the question of whether the doctrine of equitable estoppel allows a non-signatory to an arbitration agreement to compel arbitration where a signatory alleges that all of the promoters of a tax shelter, including the non-signatory promoter, acted in concert to defraud the signatory."¹³³ The court agreed with the movant's assertion, noting that

several district courts have taken an expansive view of equitable estoppel in the arbitration context; they have found that a plaintiff alleging that several tax shelter promoters acted in concert to defraud the plaintiff, was equitably estopped from resisting the non-signatory promoters' attempts to enforce the arbitration clause.¹³⁴

128. See *Vassalluzzo*, 2007 WL 2076471 at *3 ("The narrow approach is perhaps best articulated by the United States District Court for the Eastern District of Pennsylvania when it wrote: 'The essential question . . . is whether Plaintiffs would have an independent right to recover against the non-signatory Defendants even if the contract containing the arbitration clause were void. The plaintiff's actual dependence on the underlying contract in making out the claim against the non-signatory defendant is therefore always the sine qua non of an appropriate situation for applying equitable estoppel.'" (alterations in original) (quoting *Miron v. BDO Seidman, LLP*, 342 F. Supp. 2d 324, 333 (E.D. Pa. 2004))).

129. *Id.*

130. See *id.* at *4.

131. See *id.*

132. No. C 04-05357 JW, 2007 WL 1456041 (N.D. Cal. May 17, 2007).

133. *Id.* at *1.

134. *Id.* at *2 (citing *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 378 (S.D.N.Y. 2005); *Hansen v. KPMG, LLP*, No. CV 04-10525-GLT, 2005 WL 6051705, at *3

In contrast, as described in the Court's previous Order, several courts have found that equitable estoppel is inapplicable on similar facts. The Ninth Circuit has not yet ruled on this issue.¹³⁵

Based on the fact that the law is so unsettled, the district court granted the movant's request for a stay pending the resolution of its appeal to the Ninth Circuit.¹³⁶

The Texas Supreme Court also recently revisited the issue in the case *In re Merrill Lynch Trust Co. FSB*.¹³⁷ The court began its opinion by noting that "[a] corporate relationship is generally not enough to bind a non-signatory to an arbitration agreement,"¹³⁸ and went on to hold "we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here."¹³⁹ The Texas Supreme Court noted the confusion in regards to the interdependence or independence of the two prongs in the test for equitable estoppel:

While the Fifth Circuit has recognized concerted-misconduct estoppel, the theory is far from well-settled in the federal courts. Despite hundreds of federal appeals involving arbitration, it appears in only 10 reported opinions. In the two leading cases, *Grigson v. Creative Artists Agency L.L.C.* and *MS Dealer Service Corp. v. Franklin*, the Fifth and Eleventh Circuits held that *both* direct-benefits *and* concerted-misconduct estoppel were present, so it is unclear what the latter theory added to the result. Of the remainder, the theory was found inapplicable in 4,¹⁴⁰ and it was not reached in 2 more.¹⁴¹ In only 2 cases did the result hinge on the exception [of concerted misconduct estoppel]—and in those the Fifth Circuit compelled arbitration in one *and refused to do so in the other*.¹⁴²

(C.D. Cal. Mar. 29, 2005); *Camferdam v. Ernst & Young Int'l, Inc.*, No. 02-CV-10100, 2004 WL 307292, at *7 (S.D.N.Y. Feb. 13, 2004)).

135. *Id.* (citation omitted).

136. *Id.* at *3.

137. 235 S.W.3d 185 (Tex. 2007).

138. *See id.* at 191 (quoting *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005)).

139. *Id.* (footnotes omitted).

140. *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005); *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 360–361 (5th Cir. 2003); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002); *In re Humana, Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002).

141. *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 n.3 (4th Cir. 2006); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 706 (5th Cir. 2002).

142. *In re Merrill Lynch*, 235 S.W.3d at 192–93; *see also Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 399 (5th Cir. 2006) (compelling arbitration); *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (refusing to compel arbitration).

The opinion later made a plea for clarity on the subject: “Until the United States Supreme Court clarifies whether concerted-misconduct estoppel correctly reflects federal law . . . today’s decision must remain somewhat tentative.”¹⁴³

IV. THE ONLY EQUITABLE OPTION: WHY THE SUPREME COURT SHOULD REJECT “CONCERTED MISCONDUCT” ESTOPPEL

There is substantial disagreement among courts on the propriety of concerted misconduct estoppel. While a handful of practitioners in Texas have been raising concerns about the lack of a unified doctrine for a number of years,¹⁴⁴ it is only recently that courts have begun to take significant notice of the schism in judicial opinions and noted the need for a controlling decision about the correct application of equitable estoppel as applied to arbitration.¹⁴⁵

While some commentators and judges have taken issue with the entire doctrine of equitable estoppel as applied to arbitration,¹⁴⁶ this Note does not argue that the first prong of the *MS Dealer* test is inequitable or unlawful. The thrust of the arguments made against the test in its entirety is that forcing a nonsignatory to arbitrate undermines the well-settled principle that a party should not be compelled to arbitrate disputes if it did not expressly (and contractually) agree to do so.¹⁴⁷ This argument is a difficult if not impossible one to make for a variety of reasons.

First, a careful examination of the first prong of the *MS Dealer* test reveals that it is not opposed to the principle of compelling arbitration only when a party has agreed to do so. In the situation described by the first prong of the test, where the signatory “must rely on the terms of the written agreement” and “each of [the] signatory’s claims against a nonsignato-

143. See *In re Merrill Lynch*, 235 S.W.3d at 195.

144. See generally de la Fuente, *supra* note 121; Uloth & Rial, *supra* note 120; J. Douglas Uloth & J. Hamilton Rial III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593, 633 (2002) (“[T]he expansion of two pronged intertwined claims equitable estoppel sets a course toward troublesome shoals.”).

145. See discussion *supra* Part III.C.

146. See Sawrie, *supra* note 32, at 741 (“[T]he doctrine of equitable estoppel threatens to enforce arbitration against the intent of the contracting parties.”); LaForge, *supra* note 3, at 241 (“The obvious problem with . . . estoppel is that it neglects the contractual principle of consent.”); see also Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 531 (5th Cir. 2000) (Dennis, J., dissenting) (“[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel.” (quoting RICHARD A. LORD, 4 WILLISTON ON CONTRACTS § 8.5, at 73 (4th ed. 1992))); LaForge, *supra* note 3, at 246 (noting that equitable estoppel applied to arbitration agreements “is a misnomer,” and “dispenses with, or at least radically transforms” the traditional elements of estoppel).

147. See *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (“Arbitration . . . is a matter of consent, not coercion”); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 160 (4th Cir. 2004) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed’ to arbitrate.” (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000))).

ry ‘makes reference to’ or ‘presumes the existence of’ the written agreement,”¹⁴⁸ it can be argued that the signatory did, in fact, agree to arbitrate any claims against the nonsignatory that arise or relate to the contract. In this situation the signatory signed a contract that contained an arbitration provision, effectively agreeing to arbitrate claims that depend on and arise from the contract containing the provision, even if those claims turn out to be against a party who did not happen to sign the actual contract. If a plaintiff is depending on the contract for all of his claims against both a signatory and nonsignatory, but trying to avoid the contract’s arbitration provision, then he is most certainly trying to have his cake and eat it too, and equity demands that all of the claims be submitted to arbitration.¹⁴⁹

Second, resolving disputes that arise out of the same underlying facts in one forum helps to prevent inconsistent adjudications on the same or similar claims. Finally, allowing courts to compel arbitration under the first prong of the *MS Dealer* test promotes efficiency, not allowing litigants to further crowd judicial dockets with claims they agreed to arbitrate but are attempting to bring in court based on a technicality. Aided by the presumption in favor of arbitration created by the FAA and favorable precedent,¹⁵⁰ courts have long been allowed to compel arbitration against a nonsignatory when the intent of the party can be inferred and it promotes judicial efficiency.¹⁵¹

Similarly, if the second prong of the test is added as an “and” to the first prong, providing extra justification for claims already meeting the first prong, there is no problem with the test. Compelling arbitration based solely on the “interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories,”¹⁵² however, flies in the face of fairness and undermines basic principles of law. The primary justification for compelling arbitration under the first prong, that “[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act,”¹⁵³ is simply not applicable to the second prong. To extend the metaphor popular among courts discussing

148. See *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757–58 (11th Cir. 1993)).

149. See *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *Denney v. Jenkins & Gilchrist*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005).

150. See 9 U.S.C. § 2 (2006); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

151. See *Hui*, *supra* note 5, at 713.

152. *MS Dealer*, 177 F.3d at 947 (quoting *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1433 (M.D. Ala. 1997)).

153. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (alteration in original) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

the doctrine,¹⁵⁴ a plaintiff is not trying to have his cake and eat it too when there is no dependence on the underlying contract because there is no evidence that the plaintiff is trying to have cake in the first place. Unlike situations falling within the first prong, there is nothing in the language of the second prong which suggests that a court could easily imply the signatory's intent to arbitrate claims against the nonsignatory.¹⁵⁵ Without dependence on the contract to assert a party's claims, proving intent and agreement to arbitrate by a party's signature on whatever contract may tangentially relate to the dispute in question is not possible. Therefore courts compelling arbitration based solely on the second prong are not allowing claimants to weasel out of arbitration the claimants agreed to; they are flatly forcing arbitration upon a party who never agreed to it for the particular claim before a court. Because the second prong of the *MS Dealer* test includes no reference to the underlying contract, the possibility for courts to compel arbitration under the concerted-misconduct estoppel theory in almost ridiculously inequitable circumstances remains open. As noted by the Texas Supreme Court in *In re Merrill Lynch Trust Co. FSB*, "[T]he concerted-misconduct test . . . would sweep independent entities and even complete strangers into arbitration agreements."¹⁵⁶

Without the primary justification for applying equitable estoppel to compel arbitration with non-signatories, proponents of concerted-misconduct estoppel are left with the arguments that allowing a party to litigate in different forums might produce differing adjudicative results in matters based on the same or similar fact patterns and would reduce judicial efficiency. In fact, many of the recent cases applying concerted-misconduct estoppel have used these very ideas as the sole justifications for their decisions. The Florida District Court of Appeals in *Armas v. Prudential Securities, Inc.* justified compelling arbitration because the "claims against [nonsignatory defendant] arise out of the same factual allegations of concerted conduct by both the non-signatory . . . and the signatories."¹⁵⁷ Similarly, in applying concerted-misconduct estoppel in *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, the District Court for the Southern District of New York baldly asserted that "the doctrine . . .

154. See, e.g., *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000); *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005).

155. Compare *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (noting that "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause" relies on the written contract for its claims), with *id.* ("Second, 'application of equitable estoppel is warranted . . . when the signatory raises allegations of . . . substantially interdependent and concerted misconduct.'" (quoting *Boyd*, 981 F.Supp. at 1423)).

156. *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 194 (Tex. 2007).

157. *Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 212 (Fla. Dist. Ct. App. 2003); see also *Douzinis v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1153 (Del. Ch. 2006).

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depend[s] upon . . . considerations of adjudicative economy, not consent.”¹⁵⁸

While the judiciary should be permitted a certain amount of flexibility in sending claims to arbitration or otherwise consolidating them in order to promote efficiency and alleviate some of its overcrowded dockets, compelling arbitration based solely on *MS Dealer*'s second prong is pushing this flexibility too far. In *EEOC v. Waffle House*,¹⁵⁹ a decision that is regarded as the closest the Supreme Court has come to addressing the issue of compelling arbitration against non-signatories based on equitable estoppel,¹⁶⁰ the Court clearly indicated that such policy concerns should not be used to compel parties to arbitrate, holding: “[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.”¹⁶¹ Proponents of concerted misconduct estoppel may attempt to justify the doctrine by comparing it to the common judicial practice of forcing claims (or counter-claims) based on the same underlying facts to be brought in the same action. However, that practice only affects the timing of claims that would all eventually end up being brought in a court of law. Courts invoking equitable estoppel to compel arbitration are not simply affecting the timing of claims that would all eventually be brought in the same forum; they are forcing claims out of the courtroom entirely, submitting parties to adjudication under different rules that oftentimes produce very different results. In doing so the courts are denying claimants their constitutional right to a jury trial. The Supreme Court has refused to enforce arbitration when doing so would interfere with a claimant's statutory or constitutional rights,¹⁶² therefore compelling arbitration based only on concerted misconduct is out of line with both the Constitution of the United States and Supreme Court precedent.

CONCLUSION

Given courts' overcrowded dockets and the presumption in favor of arbitration created by the Federal Arbitration Act, it is easy to see why courts may need to take an expansive view of equitable estoppel in regards to arbitration. However, compelling arbitration based solely on an allegation of concerted misconduct or conspiracy is clearly opposed to federal arbitration doctrine and well established principles of law. The Superior

158. *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 378 (S.D.N.Y. 2005).

159. 534 U.S. 279 (2002).

160. *See LaForge, supra* note 3, at 231 (“Although this case does not directly address the issue . . . the Court reaffirmed the FAA's pro-arbitration policy and the principle of contractual consent.”).

161. *Waffle House*, 534 U.S. at 294.

162. *See Jacob, supra* note 2, at 1107.

Court of Massachusetts summed up the current controversy, and the need for true equity, nicely, stating,

This Court well understands the desire of overburdened courts to resolve related disputes in a single forum, especially when that forum will be arbitration, but courts cannot succumb to the temptation of denying a plaintiff his right to a jury trial and to the various safeguards provided by our trial courts (including the right to an appeal on the merits) in its case against one party simply because the plaintiff has agreed to arbitration with another party.¹⁶³

Because there is a split in state and lower federal court decisions addressing equitable estoppel as applied to arbitration, the only surefire way to create an understandable and unified jurisprudence on the issue is for the Supreme Court to issue an opinion on it. This Note has highlighted some of the lower courts' recent pleas for such an opinion. For the reasons outlined in this Note, if the Court decides to answer those pleas it must rule that allegations of concerted misconduct alone are insufficient to compel arbitration of claims against a nonsignatory.

Christopher Driskill

163. Vassaluzzo v. Ernst & Young, LLP, No. 06-4215-BLS2, 2007 WL 2076471, at *5 (Mass. Super. Ct. June 21, 2007).