JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMPLOYMENT SOLUTIONS MANAGEMENT, INC., a Georgia corporation

Plaintiff,

vs.

PARTNERS PERSONNEL —CENTRAL VALLEY, CORP., a Delaware corporation,

PARTNERS PERSONNEL —COMMERCE, CORP., a Delaware corporation,

PARTNERS PERSONNEL — GOLD COAST, CORP., a Delaware corporation,

PARTNERS PERSONNEL — GOLD COAST II, CORP., a Delaware corporation,

PARTNERS PERSONNEL — GOLD COAST III, CORP., a Delaware corporation,

PARTNERS PERSONNEL —INDUSTRY, CORP., a Delaware corporation,

PARTNERS PERSONNEL — INLAND MORENO, CORP., a Delaware corporation,

CASE NO. 8:17-cv-1044-JLS-JCGx

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION (Doc. 30)

PARTNERS PERSONNEL —INLAND, CORP., a Delaware corporation,

PARTNERS PERSONNEL — IRVINE, CORP., a Delaware corporation,

PARTNERS PERSONNEL — NORTH HOLLYWOOD, CORP., a Delaware corporation,

PARTNERS PERSONNEL — SAN DIEGO, CORP., a Delaware corporation,

PARTNERS PERSONNEL — SAN FERNANDO, CORP., a Delaware corporation,

PARTNERS PERSONNEL — SANTA ANA, CORP., a Delaware corporation,

PARTNERS PERSONNEL — SANTA FE SPRINGS, CORP., a Delaware corporation,

PARTNERS PERSONNEL — SOUTH BAY, CORP., a Delaware corporation,

PARTNERS PERSONNEL — MANAGEMENT SERVICES, LLC, a Delaware limited liability company,

THOMAS CORTE, an individual,

PATTIE SMITH, an individual,

CHRISTINA FIERRO, an individual,

MARK MCCOMB, an individual,

And

PATRICIA RICO, an individual,

Defendants.

I. INTRODUCTION

Before the Court is a Motion to Compel Arbitration filed by the Defendants named in Plaintiff Employment Solutions Management (EmployBridge)'s Complaint (Doc. 1), including 15 corporate entities (Partners Defendants) and three employees, Thomas Corte, Pattie Smith, and Christina Fierro. (Employee Defendants). (Mot., Doc. 30.) Plaintiff opposed, and Defendants responded. (Opp., Doc. 34; Reply, Doc. 37.) Following the filing of Plaintiff's First Amended Complaint, the parties submitted a joint stipulation asking that the Court's ruling on this Motion apply to the two new employee and one new Partners defendants. (FAC, Doc. 45; Joint Stip., Doc. 49; Order on Joint Stip., Doc. 50.) Having heard oral arguments and reviewed the papers on file, the Court GRANTS Defendants' Motion to Compel Arbitration.

II. BACKGROUND

This lawsuit follows a protracted dispute between Stephen Sorensen and EB Holding. (Mot. at 4.) Sorensen is former CEO of Select Staffing, a temporary staffing placement business founded under his holding company New Koosharem, LLC (NKC). (*Id.*) In 2014, Select Staffing filed for Chapter 11 bankruptcy, and ultimately Sorensen sold his controlling interests in NKC and Select Staffing to EB Holding. (*Id.*) EB Holding, also known as EmployBridge, is the parent company of Employment Solutions Management, the plaintiff in this suit. (Sorensen Decl. ¶ 2, Doc. 31.) Sorensen and EB Holding then settled a number of claims related to confidentiality, non-solicitation, and the right to compete via a global settlement agreement. (Mot. at 1.) Sorensen now owns a new set of staffing agencies, known as Partners Personnel, which has a number of locations throughout California. (*Id.* ¶ 4; FAC ¶ 7.) Sixteen of these entities are named as defendants in this suit, along with five former EmployBridge employees who now work for Partners Personnel. (FAC ¶¶ 7-12.)

On June 15, 2017, EmployBridge filed a complaint against the fifteen Partners Defendants and three Employee Defendants: Corte, Smith, and Fierro. (Compl. ¶¶ 7-10.)

The complaint includes a total of fifteen causes of action, including theft of trade secrets, breach of fiduciary duty, tortious interference with contractual relations, and unfair competition. (*Id.*) The complaint alleges that following Sorensen's separation from EB Holding, he "started laying the groundwork for a competing company with one transparent purpose–to recapture the business he previous sold by any means necessary." (*Id.* ¶ 15.) It alleges that Sorensen targeted high-level EmployBridge employees, including Corte, Smith, and Fierro, and worked with them to appropriate "EmployBridge's trade secrets including client relationships, contacts, and pricing." (*Id.* ¶ 17.) EmployBridge filed its First Amended Complaint on September 21, 2017. (Doc. 45.) The FAC differs from the original complaint only in that it adds one corporate defendant, Partners Personnel – Santa Fe Springs, Corporation, and two employee defendants, Mark McComb and Patricia Rico. The causes of action and allegations remain identical.

On August 31, 2017, Defendants moved the Court to compel arbitration in this action. They assert that a global settlement agreement between Sorensen and EmployBridge, incorporating a number of covenants and an arbitration clause, covers all of the Defendants in this action. (Mot. at 15.) They further assert that Corte, Smith, and Fierro can compel arbitration pursuant to arbitration clauses in their employment agreements. (Mot. at 23.) On September 26, 2017, the parties filed a Joint Stipulation asking the Court's ruling on the original Defendants' Motion to Compel Arbitration and Stay Action apply to these newly joined defendants.[1] (Doc. 49.) The Court granted the stipulation on September 29, 2017.

III. LEGAL STANDARD

[1] The stipulation notes that both of the new employee defendants signed employment agreements that contain arbitration clauses. (Cottingim Decl. Ex. 1, Doc. 49-2 at 2-5; Ex. 2, Doc. 49-3 at 2.) At oral argument, counsel for Defendants confirmed that Mr. Sorensen owns 95 percent of the voting interest in the new corporate defendant.

Congress enacted the Federal Arbitration Act "in 1925 as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012). The FAA provides that an agreement to arbitrate disputes arising from "a contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The court's role under the Act is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The "party seeking to compel arbitration has the burden under the FAA to show [these two elements]." *Ashbey v. Archstone Property Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), *superseded by statute on other grounds*. However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

In these analyses, a court may consider evidence outside of the pleadings, such as declarations and other documents filed with the court, using "a standard similar to the summary judgment standard of [Federal Rule of Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004); *see also Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1104 n.1 (9th Cir. 2010) ("We take . . . facts from the First Amended Complaint, on file in the district court, and declarations filed in support of and in opposition to the motion to dismiss. All are part of our record.").

IV. DISCUSSION

Defendants contend that the parties in this case have agreed to arbitrate pursuant to the global settlement agreement between Sorensen, EmployBridge,[2] and related parties. Should the Court find that the Defendants are not expressly covered by the Settlement Agreement, Defendants argue that EmployBridge should still be compelled to arbitration under one of several alternative theories. First, they argue that each Defendant is a third-party beneficiary of the Settlement Agreement. (Mot. at 15.) Second, they argue that EmployBridge should be compelled to arbitration under the doctrines of equitable estoppel or agency. (Mot. at 16-19.) To the extent the applicability of the settlement agreement to the Defendants is unclear, Defendants argue that "the threshold issue of 'arbitrability' is subject to arbitration, not adjudication by the Court" per the Agreement. (Mot. at 13.) They further argue that each Employee Defendant can compel arbitration of these claims pursuant to arbitration clauses in their employment agreements. (Mot. at 23.)

EmployBridge's opposition asserts that none of the Defendants are parties to the Settlement Agreement. (Mot. at 3.) It argues that the employee arbitration agreements are unenforceable as a matter of state law. (Mot. at 13.) EmployBridge contends that Defendants, as nonparties to and non-signatories of the Settlement Agreement, cannot properly invoke any of their proffered theories (third party beneficiary, equitable estoppel, or agency) to compel it to arbitration. (Mot. at 5.) To the extent that the Court finds that there is an enforceable agreement to arbitrate between the parties, they argue that these claims are outside the scope of that agreement. (Mot. at 11.)

The Court addresses each of these issues in turn.

A. The Court decides whether these parties have agreed to arbitrate.

Although courts will generally apply state-law contract principles "[w]hen deciding whether the parties agreed to arbitrate a certain matter," they should apply a "clear and

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[2] The parties do not dispute that the plaintiff in this matter, Employment Solutions Management, Inc., is bound by the Settlement Agreement as a subsidiary of EmployBridge.

unmistakable" evidence standard to decide whether a party has agreed to arbitrate arbitrability." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)). Parties may agree to delegation provisions that give authority to the arbitrator to decide gateway issues of arbitrability. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). However, the Ninth Circuit has held that when there is no "clear and unmistakable evidence that [a party] agreed to arbitrate arbitrability with nonsignatories, the district court ha[s] the authority to decide whether the instant dispute is arbitrable." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013) (citations omitted).

The parties have two disputes about arbitrability. The first is whether Defendants can compel arbitration, either as express parties to the settlement agreement or via an equitable theory allowing a non-signatory to enforce the agreement. The second is whether the claims at issue in this suit fall within the scope of the arbitration clause. The first dispute is a threshold issue that must be decided before either the Court or an arbitrator decides the second dispute.

Defendants argue that even the first dispute should be submitted to the arbitrator, per the arbitration clause itself. (Mot. at 14.) The clause states that the "[a]rbitrator shall have exclusive authority to resolve any dispute relating to . . . the determination of the scope or applicability of this agreement to arbitrate." (Settlement Agreement section 7.1(c), Doc. 31-1 at 38.) Defendants contend that this delegation clause applies not only to disputes about whether the claims come within the scope of the agreement, but also "the extent to which the Parties to the Action" fall within the clause's provision. (Mot. at 14.)

EmployBridge argues that the Court has the authority to decide whether Defendants are bound by the Settlement Agreement such that they are able to enforce the arbitration clause. They maintain that Defendants are non-parties, so there cannot be "clear and unmistakable evidence . . . that the parties agreed to have an arbitrator decide if the present dispute is subject to arbitration." (Opp. at 3). Moreover, it is clear from the face of the

agreement that the Defendants are not signatories to the Settlement Agreement. (Settlement Agreement, Doc. 31-1 at 42-47.)

The Court concludes that it, and not the arbitrator, should decide whether these parties have agreed to arbitrate. The parties may have agreed to delegate questions of arbitrability to an arbitrator, but there is no "clear and unmistakable" evidence that EmployBridge has agreed to arbitrate arbitrability with nonsignatories. *See Kramer*, 705 F.3d at 1127. Therefore, the Court should decide whether Defendants may compel arbitration pursuant to the Settlement Agreement as non-signatories.

B. Choice of Law

Defendants contend that the choice of law clause in the Settlement Agreement should govern this dispute. (Mem. at 7.) The Settlement Agreement states that any dispute "shall be governed by and construed under and in accordance with the laws of the State of Delaware." (Settlement Agreement § 7.3, Doc. 31-1 at 39.) EmployBridge argues that the Court should not apply the choice-of-law provision "without first deciding that the non-signatory Defendants have any rights under that contract." (Opp. at 4.)

"Federal courts sitting in diversity look to the law of the forum state . . . when making choice of law determinations." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (citing *Hoffman v. Citibank (S.D.), N.A.*, 5456 F.3d 1078, 1082 (9th Cir. 2008) (per curiam)). "Under California law, the parties' choice of law will govern unless section 187(2) of the Restatement (Second) of Conflict of Laws dictates a different result." *Id*. (citations omitted). Here, the Court must determine whether the parties are bound by the agreement before deciding whether to abide by the Delaware choice of law provision, and also must decide whether California or Delaware law should govern that determination—akin to a chicken and egg scenario. However, if the law of the two states—here, California and Delaware—dictate the same outcome, then the Court "need not engage in this circular inquiry." *Id*. In this case, California and Delaware law dictate the same outcome, so the Court need not resolve this issue.

C. The Partners Defendants are third-party beneficiaries to the Settlement Agreement.

The Partners Defendants argue that they are third-party beneficiaries of the Settlement Agreement. (Mot., Doc. 30 at 15.) EmployBridge counters that "as a matter of black-letter law," the Partners Defendants cannot be third-party beneficiaries as they were not in existence at the time the Settlement Agreement was signed. (Opp., Doc. 34 at 6.) The Court concludes that under both California and Delaware law, the Partners Defendants are third-party beneficiaries of the Settlement Agreement.

California law allows nonsignatories to enforce arbitration agreements as third party beneficiaries. *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1070 (Cal. Ct. App. 2008) (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)). Further, "[a] party need not show that it was intended to benefit as an individual . . . if it is a member of a class the parties intended to benefit." *Epitech, Inc. v. Kann*, 204 Cal. App. 4th 1365, 1372 (Cal. Ct. App. 2012) (quoting *Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 891 (Cal. Ct. App. 2006)). "Whether a third party is an intended beneficiary . . . to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." *Epitech*, at 1371-72 (quoting *Neverkovec v. Fredericks*, 74 Cal. App. 4th 337, 349 (Cal. Ct. App. 1999)).

California law, therefore, renders the Partners Defendants third-party beneficiaries to the Settlement Agreement. Section 7.7 of the Settlement Agreement states that the "Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, Affiliates, successors, and assigns." (Settlement Agreement § 7.7, Doc. 31-1 at 39.) This clause makes the Settlement Agreement, including the arbitration clause, explicitly binding on future entities like heirs, successors, and assigns. Based on the principle of *noscitor a sociis*, the Court interprets Affiliates in accordance with "heirs,

successors, and assigns" as persons or entities that might come into existence after the Settlement Agreement was signed. The Settlement Agreement defines "Affiliates" as

> any Person directly or indirectly owned by such other Person, any Person directly or indirectly Controlling, Controlled by or under common Control with such other Person . . . [f]or purposes of the foregoing, 'Control' means the possession, directly or indirectly, of the actual or effective power to direct the management or policies of a Person, whether through ownership or voting securities, by contract or otherwise.

(Id. at 4.) Despite not being individually named, or in existence at the time the Settlement Agreement was signed, Sorensen's majority ownership interest in the Partners Defendants makes them Affiliates, and therefore members of a class that the parties intended to both benefit and burden.

EmployBridge cites *Alling v. Universal Manufacturing Corporation* for the proposition that an entity not in existence can never be a third-party beneficiary to a contract; the Court does not read the holding in *Alling* so broadly. 5 Cal. App. 4th 1412 (Cal. Ct. App. 1992). In that case, the court noted that the "existence [of the new entity] could not possibly have been foreseen or considered by the parties entering into the" Agreement. *Id*. at 1441. In this case, reading the contract "in light of the circumstances in which it was entered," it is clear that the parties would have foreseen and considered future Affiliates and members of the Sorensen Group. Therefore, even though the Partners Defendants did not become Affiliates of Sorensen until after the Agreement was signed, the Partners Defendants are part of a class that the Agreement was intended to benefit.

The Partners Defendants are likewise third-party beneficiaries under Delaware law. In Delaware,

> a party must meet three conditions to qualify as a third party beneficiary: (a) the contracting parties must have intended that the third party

> beneficiary benefit from the contract, (b) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.

Appforge, Inc. v. Extended Systems, Inc., No. 04-704-GMS, 2005 WL 705341 at *9 (D. Del. Mar. 28, 2005) (quoting *E.I. DuPont & Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 196 (3d Cir. 2001)). Moreover, "[t]o determine whether the parties intended to make an individual a third-party beneficiary, the Court must look to the terms of the contract and the surrounding circumstances." *Hadley v. Shaffer*, No. 99-144-JJF, 2003 WL 21960406 at *5 (D.Del. Aug. 12, 2003) (citing *Grand St. Artists v. Gen'l Electric. Co.*, 19 F. Supp. 2d 242, 253 (D.N.J. 1998)). Finally, Delaware has approvingly cited the Restatement (Second) of Contracts § 308 (1981), which explains that "[i]t is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." *Willis v. City of Rehoboth Beach*, 03C-11-016-RFS, 2004 WL 2419143 at *2 (Del. Super. Ct. Oct. 14, 2004).

The Partners Defendants fulfill this three-part test. First, the plain language of the contract states that the "Agreement shall be binding upon and inure to the benefit of the Parties and their respective . . . Affiliates," evincing the parties' intention that Affiliates benefit from the Settlement Agreement. Second, although Delaware courts have not provided a test for whether the benefit is intended as a gift or in satisfaction of a pre-existing obligation, the Court can glean the parties' intent from the language of the Agreement. "Where parties . . . expressly state that they intend a third party to have the right to enforce the promisor's obligation, the critical question of whether they intended to benefit the third party is resolved." 9-44 Corbin on Contracts § 44.4 (2017) (citing the Restatement (Second) of Contracts § 302 (1981)). The clause explicitly grants Affiliates both the benefits (like enforcement) and burdens of the Settlement Agreement. Finally, the

Court concludes that binding future Affiliates is a material term of the Settlement Agreement. As Defendants argue, in the context of making the Settlement Agreement EmployBridge would have intended to "ensure[] that Mr. Sorensen could not simply form a new legal entity, start competing under the banner of that newly formed legal entity, and assert that this new entity was not bound by the Settlement Agreement because it did not exist at the time the Settlement Agreement was formed." (Reply, Doc. 37 at 3-4). The Affiliates were expressly included in a clause that binds persons and entities that may not come into existence until after the Agreement was signed. Interpreting the contract in light of the "surrounding circumstances" of its formation, the Court is persuaded that that this clause is a material part of the parties' purpose in making this Agreement.

As to EmployBridge's contention that Delaware law does not allow a corporation not in existence to be an intended third-party beneficiary of a contract, the Court again concludes that EmployBridge reads the case law too broadly. In a single Delaware case, *RHA Construction, Inc. v. Scott Engineering, Inc.*, the court stated in a footnote that a corporation that did not exist at the time of contracting could not have been a third-party beneficiary. C.A. N11C-03-013-JRJ, 2013 WL 3884937 *9 at n97 (Del. Super. Ct. July 24, 2013). The Delaware court cited no authority for the proposition, and in light of its determination that the entity was not an intended beneficiary under Delaware's three-part test, this statement was, at most, dicta. In the present case, the "surrounding circumstances" at the time the parties entered into Settlement Agreement, persuades the Court that future Sorensen group Affiliates were contemplated as third-party beneficiaries under the three-part test.

What is more, there is no dispute that the arbitration clause is meant to apply to members of the Sorensen Group. Under Delaware law, "a third party beneficiary will *only* be bound by the terms of the underlying contract where the claims asserted by that beneficiary arise from its third party beneficiary status." *E.I. DuPont*, 269 F.3d at 197. The arbitration clause sweeps in a broad range of claims, stating that "[a]ny dispute,

controversy, or claim between any member of the Sorensen Group, on the one hand, and the company, on the other hand . . . shall be submitted to and resolved by confidential and binding arbitration." (Settlement Agreement § 7.1(a), Doc. 31-1 at 37.) In defining "Sorensen Group," the Settlement Agreement refers to Section 1(cc) of the incorporated Covenants Agreement. (*Id.* at 8.) In the Covenants Agreement, "Sorensen Group" is defined as

> (i) those individuals listed in clauses (i) through (iii) of the definition of Sorensen Covered Persons [including Sorensen and his wife], (ii) any Family Trust of Sorensen, and (iii) any entity 95% of whose voting interests and 95% of whose economic interests are owned, either directly or indirectly, by one or more persons identified in the forgoing [*sic*] clauses (i) and (ii).

(*Id.* at 142.)

Sorensen asserts that he or his wife own at least 95% of the voting and economic interests in each of the fifteen Partners Defendants, making them members of the Sorensen Group. (Sorensen Decl. ¶ 4, Doc. 31.) The Court concludes that the fifteen Partners Defendants fit squarely within the definition of a Sorensen Group member, making them expressly subject to, and beneficiaries of, the arbitration clause. As explained more fully below, EmployBridge's claims "relat[e] to" the Agreement and are covered by the arbitration clause. Therefore, the Partners Defendants' ability to compel these covered claims to arbitration "arises from" their third party beneficiary status in a manner sufficient to satisfy the *DuPont* standard. (Settlement Agreement § 7.1(a), Doc. 31-1 at 37.)

D. EmployBridge's claims are within the scope of the arbitration clause.

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Delaware

law[3] counsels that if an "arbitration clause is broad in scope, the court will defer to arbitration on any issues that touch on contract rights or contract performance." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002).

The arbitration clause commits "[a]ny dispute, controversy or claim . . . in any way relating to this Agreement [or] the Covenants Agreement" to arbitration. (Settlement Agreement § 7.1, Doc. 31-1 at 37.) Further, the Covenants Agreement prohibits Sorensen from obtaining EmployBridge's confidential information and from soliciting or competing with EmployBridge "including . . . through any member of the Sorensen Group." (Covenants Agreement, Doc. 31-3 at 7-8.)

EmployBridge asserts that its claims are "untethered" from the Settlement Agreement and that the claims "do not hinge[]" on the Covenants Agreement. (Opp. at 10.) It is true that Delaware law counsels that "arbitration clauses should be applied only to claims that bear on the duties and obligations" in an Agreement. *Parfi*, 817 A.2d at 156. But unlike the claims in *Parfi*, EmployBridge's "claims based on fiduciary duties touch on the obligations created in" the Covenants Agreement. *Id*. at 157. EmployBridge's claims that the Partners Defendants—members of the Sorensen Group—appropriated confidential information from EmployBridge, solicited EmployBridge employees and conspired with them to compete with EmployBridge are quite clearly "relat[ed] to" these covenants and "touch on" their performance. (*See* Covenants Agreement, Doc. 31-3 at 7-8.) Moreover, as Defendants point out, Plaintiff alleges that Defendants' tortious behavior began "at least as early as January 2017," prior to the expiration of the covenant not to compete contained in the Covenants Agreement. (FAC ¶¶ 21-25.) Further, Plaintiff states that the Partners Defendants were incorporated in "March, April, and May 2017," when the covenants were in effect. Sorensen's obligations under the Covenants Agreement explicitly include actions taken through Sorensen Group members, including the Partners Defendants.

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[3] Having determined that the Partners Defendants are third-party beneficiaries bound by the Settlement Agreement, the Court applies the Delaware choice of law clause.

EmployBridge's claims relate to the Settlement Agreement and the Covenants Agreement and are therefore within the scope of the arbitration clause.

E. Corte, Fierro, and Smith can enforce the arbitration clauses in their employment contracts.

Defendants Corte, Fierro, and Smith each signed employment agreements with their previous employers, subsidiaries of EmployBridge, that contain arbitration clauses. (Opp., 1-2; Corte Decl. Ex. 1, Doc 30-3 at 5; Fierro Decl. Ex. 1, Doc. 38 at 6; Smith Decl. Ex 1, Doc. 30-2 at 5.) EmployBridge does not contest that it is bound by these employment agreements. In fact, it recently sent letters to each of the three employees reminding them of their obligations to EmployBridge as set out in the contracts with each subsidiary. (Fierro Decl. Ex 2, Doc. 38 at 15; Corte Decl. Ex 2, Doc. 40 at 6; Smith Decl. Ex. 2, Doc. 39 at 5.) The newly-joined employee Defendants, McComb and Rico, also had arbitration clauses in their contracts. (Cottingim Decl. Ex. 1, Doc. 49-2 at 2-5; Ex. 2, Doc. 49-3 at 2.)

EmployBridge argues that Corte's, Fierro's, and Smith's contracts are unenforceable as a matter of California law, because it would be unconscionable to hold the employees to the arbitration clauses. (Opp. at 13.) In other words, EmployBridge argues that it should be able to avoid arbitration because its subsidiaries forced their employees to sign contracts that are unconscionable to the point of being unenforceable. To make such an argument requires a considerable degree of chutzpah.

"To allow [a party] to assert rights and benefits under the contract and then later repudiate it merely to avoid arbitration would be entirely inequitable." *Avina v. Cigna Healthplans of California*, 211 Cal. App. 3d. 1, 3 (Cal. Ct. App. 1989). Unconscionability as a doctrine is designed to protect parties with weaker bargaining power; its use as a sword by the party with superior bargaining power is not contemplated. And to allow EmployBridge to avoid arbitration because the agreements lack mutuality confounds logic. (Opp. at 16.) An entity may not ask its employees to sign a contract authorizing only the entity to bring certain types of claims in court, then later complain when the employee

chooses arbitration instead of a judicial forum. Thus, the Court need not decide whether the clauses at issue are unconscionable, as the parties with weaker bargaining power (the employees) did not plead this issue.

EmployBridge does not dispute that the employee arbitration agreements cover the claims brought in this lawsuit. Therefore, the Court will compel EmployBridge's claims against all five employee defendants to arbitration.[4]

V. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' Motion to Compel Arbitration. Pursuant to the section 3 of the Federal Arbitration Act, the Court STAYS the matter pending arbitration. 9 U.S.C. § 3. The parties are directed to notify the Court within **fourteen (14) days** of any final order in the arbitration proceeding.

DATED: November 08, 2017

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

[4] Although there are provisions in three of the five employees' agreements exempting the EmployBridge predecessor companies from arbitrating any "claims" for injunctive relief against the employees, EmployBridge has not asked the Court to retain jurisdiction over this requested relief and the Court deems such argument waived. (FAC, Doc. 45 at 44; Corte Decl. Ex. 1, Doc 30-3 at 5; Smith Decl. Ex 1, Doc. 30-2 at 5; Cottingim Decl. Ex. 1, Doc. 49-2 at 4.)