IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

PSARA ENERGY, LTD.,

Plaintiff,

vs.

SPACE SHIPPING, LTD., ET AL.,

Defendants.

No.1:18-CV-00178-MAC

REPORT AND RECOMMENDATION GRANTING
DEFENDANT ADVANTAGES' MOTION FOR REFERRAL TO ARBITRATION

This case is assigned to the Honorable Marcia A. Crone, United States District Judge, and referred to the undersigned United States Magistrate Judge for pretrial management. The Defendants, Advantage Arrow Shipping, LLC, Advantage Holdings, LLC, Advantage Tankers, LLC, and Forward Holdings, LLC, (collectively the Advantage Defendants), filed a "Motion for Referral to Arbitration," which is currently pending before the court. Doc. No. 29. The undersigned recommends granting the motion, directing the parties to arbitration, and staying the case pending resolution of the arbitrable issues.

I. BACKGROUND

On April 20, 2018, Plaintiff Psara Energy, Ltd. (Psara) filed suit for breach of contract against the Advantage Defendants pursuant to FED. R. CIV. P. 9(h), Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule B), and the Federal Arbitration Act, 9 U.S.C. §§ 4, 8 in aid of maritime arbitration. Doc. No. 1, at 1–2. In their complaint, Psara alleges that they entered into a bareboat charter party agreement with Defendant Space Shipping, Ltd. (Space Shipping) on February 23, 2010 to charter the CV STEALTH vessel. *Id.* at 5. Through a subsequent amendment to the bareboat charter party on June 2, 2010, Geden Holdings, Ltd.

became the performance guarantor of Space Shipping. *Id.* Despite Space Shipping's obligation to maintain and keep up-to-date classifications on the vessel, they allegedly failed to do so. *Id.*

In 2014, the CV STEALTH was detained in Venezuela for more than three years by prosecutorial authorities, and Space Shipping failed to return the ship by the latest contractual redelivery date of June 22, 2015. *Id.* at 7. When the CV STEALTH was finally released from Venezuela, it was out-of-class and so extensively damaged due to neglect that it was incapable of sailing and in need of extensive repairs. Doc. No. 1 at 8. Space Shipping towed the CV STEALTH to Trinidad where Psara took possession on March 24, 2018. *Id.* Due to extensive damage to the CV STEALTH, Psara initiated a London maritime arbitration claim for damages equivalent to the repaired market value of the ship ($18,000,000.00) and amounts for unpaid charter hire, legal costs, interest, and other costs (an additional $1,860,063.80). *Id.* at 10, 25. Due to the transfer of a vessel fleet from Geden Holdings, Ltd. to other corporate entities (including the Advantage Defendants), Psara brought suit against the current slate of Defendants under fraudulent transfer and corporate succession theories. *See generally id.*

Accordingly, on April 20, 2018, Psara filed a "Motion for Writ of Maritime Attachment and Garnishment" of the Advantage Defendants' vessel, the ADVANTAGE ARROW. Doc. No. 3 at 2. In their motion, Psara showed a valid admiralty claim existed against the Advantage Defendants, who could not be found within the district but that their property (the ADVANTAGE ARROW) could be, and that there was no statutory or maritime bar to the attachment. *Id*. As a result, this court issued an order of maritime attachment due to Psara satisfying the filing and service requirements of Rules B and E to initiate a Rule B attachment proceeding. Doc. No. 4.

Concurrent with this court's Rule B attachment proceeding, on April 20, 2018, Psara also filed a motion in the Eastern District of Louisiana for the issuance of process of maritime

attachment and garnishment of another one of the Advantage Defendants' vessels, the MT ADVANTAGE START. *See Psara Energy, Ltd. v. Space Shipping, Ltd. et al.,* C.A. No. 2:18-cv-04111-ILRL-JCW, Doc. No. 28. Following the seizure of the MT ADVANTAGE START, Psara filed a motion to transfer venue of the Rule B attachment proceeding for the MT ADVANTAGE START from the Eastern District of Louisiana to this court. *Id.* The Eastern District of Louisiana granted the motion to transfer under 28 U.S.C. § 1404(a) and the action consolidated into a single proceeding before this court.

On June 15, 2018, the Advantage Defendants filed the pending "Motion for Referral to Arbitration" arguing that Psara's claims all allegedly arise from the charter party between Psara and Space Shipping, which contains a valid and enforceable arbitration clause. Doc. No. 29. The Advantage Defendants claim that Psara's current arbitration proceedings against Space Shipping should include the Advantage Defendants, particularly because Psara claims that the Advantage Defendants are a successor to Space Shipping and therefore liable for losses incurred by Psara under the charter party. *Id.* However, Psara contends that the Advantage Defendants cannot compel this matter to the London arbitration because the Advantage Defendants are not signatories to the charter party that contains the arbitration agreement. Doc. No. 30 at 5.

II. LEGAL STANDARD

Congress's enactment of the Federal Arbitration Act (FAA) "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006). Chapter One of the FAA makes written arbitration agreements in any maritime transaction or contract "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 (West 2017). The charter party particularly at issue here is

specifically included in the FAA's definition of a "maritime transaction." *See* 9 U.S.C. § 1. Simply put, the FAA creates substantive federal law regarding the enforceability of arbitration agreements, while background principles of state contract law control the interpretation of the scope of the agreements, including the question of who is bound by them. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

A. Legal Standard Surrounding the New York Convention for Compelling International Arbitration

Chapter Two of the FAA, 9 U.S.C. §§ 201–08, implements the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.NT.S. 38, (Dec. 29, 1970), *reprinted in* 9 U.S.C. § 201. Commonly known as the "Convention," actions brought under this chapter are deemed to arise under the laws and treaties of the United States. 9 U.S.C. § 203. The FAA empowers district courts to compel arbitration in accordance with agreements, 9 U.S.C. § 206, and to enforce awards, 9 U.S.C. § 207, falling within the Convention. Importantly, due to the lack of conflict between Chapters One and Two of the FAA, both chapters apply to actions and proceedings brought under the Convention. *See* 9 U.S.C. § 208.

To determine whether to compel arbitration under the Convention, "courts conduct only a very limited inquiry." *Freudensprung v. Offshore Tech. Servs. Inc*., 379 F.3d 327, 339 (5th Cir. 2004). An arbitration agreement falls under the Convention if the agreement "arises out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title." 9 U.S.C. § 202 (1970). Accordingly, the Convention governs the enforcement of an arbitration agreement if (1) it is in writing, (2) the place of the arbitration is in a country that is a signatory to the convention, (3) the dispute arises out of a commercial relationship, and (4) at least one of the parties is not a citizen

of the United States. *See Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 379 (5th Cir. 2018).

If the arbitration agreement satisfies these four requirements, the court must order arbitration unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed." *Freudensprung*, 379 F.3d at 339 (quoting New York Convention, art. II(3)). "This challenge must be grounded in standard breach-of-contract type defenses—such as fraud, mistake, duress, or waiver—which defenses can be applied neutrally before international tribunals." *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1289 (11th Cir. 2015).

B. The Legal Standard Surrounding Non-signatories to an Arbitration Agreement

Although arbitration clauses typically only apply to signatories, the Supreme Court has recognized six circumstances that allow non-signatories to invoke an arbitration agreement. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). These circumstances include: assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel. *Id.* Despite the Convention requiring a written agreement, it does not require the writing to be signed by all parties to a dispute if they are otherwise bound to it under customary principles of contract law. *See e.g., Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 299 (S.D.N.Y. 1997).

The Fifth Circuit follows a two-step approach to analyzing whether the parties have agreed to arbitrate a dispute. *See Sherer v. Green Tree Serv., LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (citing *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 598 (5th Cir. 2007)). The court first determines whether the party agreed to arbitrate the dispute in question. *Id.* This determination requires an assessment of (1) whether there is a valid agreement to arbitrate between the parties and (2) whether the dispute in question falls within the scope of that arbitration agreement. *Id.*

(citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir 2003)). This requires courts to apply the contract law of the particular state governing the agreement. *Wash. Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004).

Currently under Texas law, "[t]he initial burden of establishing the existence of an arbitration agreement requires proof that the party seeking to enforce the agreement was a signatory to the agreement or otherwise had the right to enforce it." *Inland Sea, Inc. v. Castro*, 420 S.W.3d 55, 58 (Tex. App.—El Paso 2012, pet. denied). Therefore, the burden falls on the person seeking to enforce the arbitration agreement. *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 827 (Tex. App.—Dallas 2013, no pet.). "Federal courts have recognized that equitable estoppel can be used by a non-signatory seeking to compel a signatory to arbitration." *Ultra Lane Mgmt. v. McKellar*, No. 9:17-cv-76, 2017 WL 4506813 *3 (E.D. Tex. June 30, 2017) (citing *Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002)); *see also Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 526 (5th Cir. 2000) ("[I]n certain limited instances, pursuant to an equitable estoppel doctrine, a non-signatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff.").

III. ANALYSIS

The Advantage Defendants urge the court to stay these proceedings and direct the parties to arbitration as required by Sections 8 and 206 of the FAA. Doc. No. 29 at 15. Section 8 provides that if the cause of action is one relating to admiralty, then the

> [P]arty claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party . . . and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the reward."

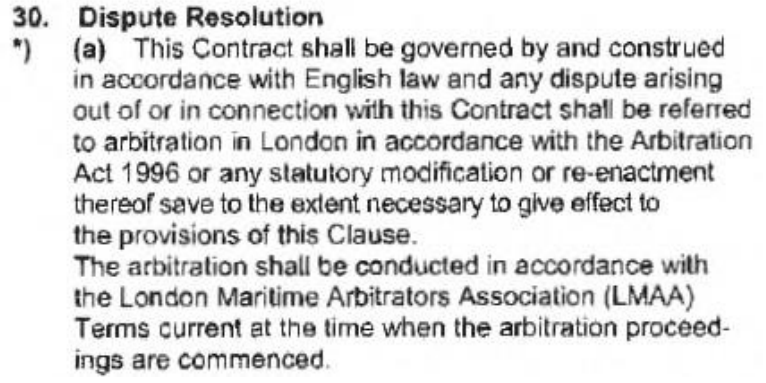
9 U.S.C. § 8.

Section 206 states that if a court has jurisdiction under this chapter, it may direct that arbitration be held in accordance with the agreement irrespective of whether that place is within the United States or not. 9 U.S.C. § 206. Due to Psara proceeding against the Advantage Defendants by libel and seizure of its vessels, the ADVANTAGE ARROW and the MT ADVANTAGE START, this court has jurisdiction to direct the parties to arbitration and to enforce any award following arbitration. Accordingly, the issue before the undersigned becomes whether the Advantage Defendants may compel arbitration in London as contemplated under the agreement, notwithstanding their status as a non-signatory to the arbitration agreement.

A. The Arbitration Agreement is Subject to the Convention

The Convention governs an arbitration agreement if (1) it is in writing, (2) the place of the arbitration is in a country that is a signatory to the convention, (3) the dispute arises out of a commercial relationship, and (4) at least one of the parties is not a citizen of the United States. *Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 895 F.3d 375, 379 (5th Cir. 2018).

First, as shown in the charter party, there is an agreement in writing to arbitrate the dispute. Doc. No. 1-1



30. **Dispute Resolution**

*) **(a)** This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.
The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

Second, the charter party refers "any dispute arising out of or in connection with the Contract" to London, England. Doc. No. 1-1 at § 30. The United Kingdom is a signatory to the Convention (*see* New York Arbitration Convention, Contracting States,

http://www.newyorkconvention.org/countries.), thereby satisfying the second element. Third, the dispute pertains to the commercial hire and performance of the CV STEALTH. *See* Doc. No. 1 at 6–10. Therefore, the dispute arises out of a commercial relationship. Lastly, neither party is a United States citizen. *See* Doc. No. 1 at 2. Both Psara and the Advantage Defendants are organized under the laws of the Republic of the Marshall Islands. *Id.* at 2–3. Thus, the final prerequisite is satisfied because at least one party is not a United States citizen. Therefore, the arbitration agreement falls under Chapter 2 of the FAA.[1]

Because the arbitration agreement satisfies these four requirements, the court must order arbitration unless the agreement is "null and void, inoperative or incapable of being performed." *Freudensprung*, 379 F.3d at 339 (quoting New York Convention, art. II(3)). Psara has not alleged any defenses regarding the validity of the arbitration agreement in the charter party. In fact, Psara is currently involved in arbitration under the arbitration agreement with Space Shipping and Geden Holdings, whom Psara alleges is the Advantage Defendants' predecessor. Yet, Psara claims that the Advantage Defendants cannot compel arbitration because they are not a signatory to the charter party. As a result, the undersigned will examine both federal and state case law to ascertain whether the Advantage Defendants, as a non-signatory, can compel arbitration.

B. Determination of Whether Advantage Can Compel Arbitration as a Non-signatory

As a matter of policy, "both federal and state jurisprudence dictate that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration." *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 612 (5th Cir. 2016) (quoting *McKee v. Home Buyers Warranty Corp.*, 45 F.3d 981, 985 (5th Cir. 1995)). Due to the Supreme Court's determination in *Arthur*

[1] In addition to noting the broad applicability of the arbitration clause, the Advantage Defendants expressly contend in their briefing that "they will not object to the jurisdiction of an arbitral panel appointed . . . as contemplated by the arbitration clause contained in the subject charter party." Doc. No. 29 at 2, n. 2.

Andersen v. Carlisle that any arbitration agreement is necessarily rooted in "traditional principles of state law," courts have interpreted this decision to require the use of state contract law to determine a dispute's arbitrability. *See Arthur Andersen,* 556 U.S. at 631. However, the Advantage Defendants point out that because admiralty disputes are governed by federal law, decisions based on federal common law that were otherwise modified after *Arthur Andersen,* "remain controlling and squarely on point." *See* Doc. No. 29 at 11. As a result, the undersigned will analyze whether the Advantage Defendants may compel arbitration as a non-signatory under both federal and state law in accordance with the FAA and Convention.

i. Analysis of Federal Law for a Non-signatory to Compel Arbitration

When a party "properly invoke[s] admiralty jurisdiction, courts apply federal maritime choice-of-law rules." *Blue Whale Corp. v. Grand China Shipping Dev. Co.,* 722 F.3d 488, 496 (2d Cir. 2013); *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.,* 561 F.3d 1181, 1184 (11th Cir. 2009). Here, Psara, properly invoked admiralty jurisdiction by specifically electing to proceed under admiralty jurisdiction in its complaint, pursuant to 28 U.S.C. § 1333 and Supplemental Rule B (*see* Doc. No. 1 at 1), and by seizing the ADVANTAGE ARROW and ADVANTAGE START, under 9 U.S.C § 8, thereby giving this court admiralty jurisdiction. Under federal choice of law rules, the law of the forum applies to procedural questions, and the chosen law of the parties applies to substantive questions. *See* Restatement (Second) of Conflicts of Law § 122. The choice of law provision in the charter party designates English law as the parties' choice of law. *See* Doc. No. 30 at 12. Therefore, English law applies to any substantive questions and federal law applies to any procedural questions. Because the question of whether a non-signatory may be subject to arbitration is a procedural one, federal law will be analyzed.

Generally, federal common law utilizes a two-pronged approach to determine when a non-signatory can compel arbitration under principles of equitable estoppel. *See e.g., Wash. Mut. Fin. Grp., LLC v. Bailey,* 364 F.3d 260, 267 n. 6 (5th Cir. 2004); *Grigson v. Creative Artists Agency,* 210 F.3d 524, 527 (5th Cir. 2000). Equitable estoppel generally arises to "preclude one who accepts the benefits [of an agreement] from repudiating the accompanying or resulting obligation." *Kingsley Capital Mgmt., LLC v. Sly*, 820 F. Supp. 2d 1011, 1023 (D. Ariz. 2011) (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 60 (2011)). "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Id.* at § 27.

Under federal common law, the Fifth Circuit has held that a non-signatory can compel arbitration under equitable estoppel principles if 1) the signatory to a written agreement containing an arbitration clause relies on the terms of the written agreement to assert claims against the non-signatory, and 2) these allegations raise substantially interdependent and concerted misconduct by both the non-signatory and the signatories to the contract. *Grigson,* 210 F.3d at 527. Further, "when each of a signatory's claims against a non-signatory 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." *Id.* (quoting *MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 947 (11th Cir. 1999)). Thus, a non-signatory can compel arbitration when the claims "factually relate to the interpretation and performance of the agreement and are inextricably intertwined with its claims." *See Caporicci U.S.A. Corp. v. Prada S.P.A.,* No. 18-20859-CIV, 2018 WL 2264194 at *3 (S.D. Fla. May 7, 2018).

Here, Psara's complaint expressly presumes and relies not only on the existence of a written agreement, namely the charter party, but specifically on its terms, conditions, and obligations.

Without the existence and use of the charter party for relief, there would be no action against the Advantage Defendants.[2] Originally, only Psara and Space Shipping were signatories to the charter party. Doc. No. 1-1. Through a subsequent amendment, Geden Holdings became the performance guarantor of Space Shipping.[3] Doc. No. 1 at ¶ 15. Under this agreement, Space Shipping was obligated to maintain the vessel and keep her class certifications up to date. *Id.* at ¶ 16. After Psara filed suit against Space Shipping to recover the alleged amount in damages to the vessel and unpaid charter hire, Psara discovered that Geden Holdings had transferred its entire fleet of vessels to new owners, the Advantage Defendants. *Id.* at ¶ 40–42. Psara avers in its complaint that the Advantage Defendants are "successor corporate business entities of the grouping formerly constituted of: Geden Holdings, Target Shipping, Ltd., Geden Lines, Space Shipping, and 10 other former one-ship-companies." *Id.* at ¶ 43. The complaint then proceeds to enumerate eleven findings describing the proximity and nature of this alleged successor relationship. *Id.* at ¶ 44. To conclude, Psara states that "Plaintiff has maritime claims against the Defendants arising out of the breach of a maritime contract (i.e.–the bareboat charter party with CV STEALTH dated February 23, 2010, and the performance guarantee dated April 4, 2010.)." *Id.* at ¶ 79.

Based on the complaint, Psara treats the Advantage Defendants, Space Shipping, and Geden Holdings as a single unit in its pleadings and raises virtually indistinguishable factual allegations from which to seek relief. *See id.* The interchangeable nature of the Defendants,

[2] At the oral hearing held on October 11, 2018, Psara contended that the dispute with the Advantage Defendants does not actually focus upon the charter party, rather it regards a guaranteed performance provision that Psara had with Geden Holdings, which Psara also alleges applies to the Advantage Defendants under successor corporation liability. However, this specific argument was not briefed in Psara's response to the Advantage Defendants' "Motion for Referral to Arbitration." *See generally* Doc. Nos. 29, 30. It is also inconsistent with the allegations contained within Psara's complaint. Despite Psara's contention that the guarantee provision argument was briefed elsewhere, because it was not within the response to the Advantage Defendants' motion on this issue, it is waived.

[3] Geden Holdings Limited held 100% of the shares of Space Shipping. Geden Holdings Limited's business is entirely carried on by Geden Lines. *See* Doc. No. 1 at ¶ 4, 14, 15.

particularly after Psara explains at length the interconnected nature of the parties, raises allegations of "substantially interdependent and concerted misconduct by both the non-signatory and the signatories to the contract." *See Grigson,* 210 F.3d at 527. Psara cannot "claim the benefit of the contract and simultaneously avoid its burdens," because this disregards equity and the entire purpose of the FAA. *Int'l Paper Co. v. Schwabedissen Maschinen & Anglagen GMBH,* 206 F.3d 411, 418 (4th Cir. 2000). In other words, Psara cannot benefit from compelling arbitration in its litigation against Space Shipping and Geden Holdings while avoiding the same arbitration provision in these proceedings against the Advantage Defendants.

Most importantly, the broad applicability of the arbitration clause to "*any dispute arising out of or in connection with this Contract*" (emphasis added) requires compelling the Psara–Advantage Defendants dispute to London arbitration. Therefore, the undersigned finds that the Advantage Defendants can compel arbitration despite the fact that they did not sign the charter party requiring the arbitration of any dispute.[4]

ii. Analysis of Texas State Law for a Non-signatory to Compel Arbitration

In order to ensure a complete, thorough analysis, the undersigned will now examine the implications of the *Arthur Andersen v. Carlisle* decision and its effects on referral to arbitration for a non-signatory based on potential state law equitable estoppel grounds. Instead of solely utilizing federal law because the dispute is based in admiralty, the undersigned will also analyze the result if Texas law governed here, which is the state where the libel and seizure of the CV STEALTH vessel and the proceedings commenced. Doc. Nos. 1, 4.

Following *Arthur Andersen,* federal courts began making *Erie* guesses about whether a state's contract law principles favored arbitration, based on estoppel principles, in the absence of

[4] It should also be noted that Psara did not meaningfully respond to the equitable estoppel argument raised by the Advantage Defendants in their response. *See generally* Doc. No. 30; Doc. No. 31 at 2.

any guidance from the state. *Todd v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd*., 601 F.3d 329, 336 (5th Cir. 2010). Accordingly, because "*Arthur Andersen* instructs that a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate based on, *inter alia*, equitable estoppel if the relevant state contract law so permits," the Fifth Circuit concluded that "prior decisions allowing non-signatories to compel arbitration based on federal common law, rather than state contract law, such as *Grigson,* have been modified to conform with *Arthur Andersen*." *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.,* 748 F.3d 249, 261 (5th Cir. 2014).

Texas courts have recognized that "a non-signatory can be bound to, or permitted to enforce, an arbitration agreement." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 524 (Tex. 2015) (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (listing (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary)). Because no decision of the Texas Supreme Court precisely discusses equitable estoppel, federal courts "must make an *Erie* guess and determine as best we can what the Supreme Court of Texas would decide." *Hays*, 838 F.3d at 611 (quoting *Harris Cty. v. MERSCORP Inc.*, 791 F.3d 545, 551 (5th Cir. 2015)).

As a result, the Fifth Circuit has employed equitable estoppel, specifically intertwined claims estoppel, based on the Texas Supreme Court's "strongly implied validity of this form of estoppel, particularly to counter the problem of strategic pleading."[5] *Hays*, 838 F.3d at 610 (citing *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 193 (Tex. 2007)). Intertwined claims estoppel involves "compelling arbitration when a nonsignatory defendant has a 'close relationship' with

[5] In *Hays v. HCA Holdings*, 838 F.3d 605, 612 (5th Cir. 2016), the Fifth Circuit concluded that "[b]ecause *Merrill Lynch* [235 S.W.3d 185 (Tex. 2007)] intimated at the validity of intertwined claims estoppel, because lower courts in Texas have applied the theory, and because arbitration of disputes is strongly favored under federal and state policy, we hold that the Texas Supreme Court, if faced with the question, would adopt intertwined claims estoppel."

one of the signatories and the claims are 'intimately founded in and intertwined with the underlying contract obligations.'" *Id.* Further, it applies when a "tight relatedness of the parties, contracts, and controversies" exist. *Id.*

In the instant case, the Advantage Defendants point out that Psara's complaint alleges claims "against all defendants based on the same facts and circumstances, rooted in the same legal theories, and seeking the same form and magnitude of damages." Doc. No. 29 at 13. Indeed, the complaint specifically alleges that the Advantage Defendants not only share common officers and directors with Geden Holdings, who is a party to the pending arbitration in London and a signatory to the charter party, but the complaint further alleges that the Advantage Defendants even "assumed numerous of the latter's obligations, including long term charter parties." Doc. No. 1 at 14. As stated previously, Psara has previously enumerated eleven grounds why the Advantage Defendants should be considered liable as a successor corporation to Geden Holdings, and by extension Space Shipping. *Id.* Yet, seemingly in the same breath, Psara contends that despite this extensive list of reasons to group the defendants under the charter party for liability purposes, the Advantage Defendants cannot compel arbitration under that same charter party. Doc. No. 30. Psara's own contentions about the nature of the relationship among the Advantage Defendants, Geden Holdings, and Space Shipping establishes the "tight relatedness of the parties" in which the Advantage Defendants can compel arbitration under the intertwined claims estoppel doctrine.

Further, Psara's claims against the Advantage Defendants are intimately founded in and intertwined with the underlying contract obligations. As previously discussed, the premise of Psara's claims involves the charter party between Psara and Space Shipping, with the addition of Geden Holdings through an addendum. *See* Doc. No. 1 at 5. Without the use of the charter party and performance guarantee as the basis for suit, Psara would not have a claim against the

Advantage Defendants. Because Psara is suing the Advantage Defendants as though it is a party to the contract, Psara cannot now claim that the Advantage Defendants are not a party to other portions of the contract. Moreover, the enforcement of the charter party and its arbitration provision should apply to the Advantage Defendants because Psara's claims intimately intertwine with and are found within the underlying charter party. Therefore, this court can also direct the parties to arbitration under principles of Texas contract law. Thus, under both federal common law and Texas state law theories of equitable estoppel, the Advantage Defendants can compel arbitration despite the fact that they are non-signatories to the charter party. Because this dispute falls within the arbitration clause of the charter party, after "conduct[ing] a very limited inquiry," arbitration should be compelled under the Convention. *See Freudensprung*, 379 F.3d at 339.

C. The Rule B Attachment Will Remain Effective as Valid Security Pending the Resolution of the Arbitrable Issues

In their response, Psara contends that the arbitration provision of the Psara-Space Shipping charter party subjects the underlying dispute to the jurisdiction of the London arbitration tribunal, but that this separate Rule B attachment proceeding against the Advantage Defendants is not subject to the charter party arbitration clause because of the Advantage Defendants' status as a non-signatory. Psara's own citation to *Anaconda v. American Sugar Refining Co.*, belies their own argument. *See* Doc. No. 30 at 7 (quoting 322 U.S. 42, 46 (1944)). As stated in *Anaconda*, "Congress plainly and emphatically declared that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party *without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court.*" *Id.* (emphasis added). The Advantage Defendants do not seek vacatur of the attachment. Doc. No. 31 at 3. The Advantage Defendants even acknowledge that Psara has a "procedural right to use Rule B to attempt to obtain security in aid of arbitration." Doc. No. 31 at

3. But this procedural right has not lessened Psara's obligation to arbitrate the grievance rather than litigate the merits in court.

The instant dispute can be referred to London arbitration, while the Rule B attachment still remains in effect in this court and applies as valid security for the claim. This court will retain jurisdiction under Sections 8 and 207 of the FAA to decree any arbitral award, which could come from the Rule B attachment, but the existence of a Rule B attachment does not alter the obligation to arbitrate. Psara even acknowledged in their motion to transfer venue from the Eastern District of Louisiana to this court that "Plaintiff's legal research of this issue has found numerous decisions upholding the authority of the court to stay a Rule B proceeding pending the outcome of arbitration." *See Psara Energy, Ltd. v. Space Shipping, Ltd. et al.*, C.A. No. 2:18-cv-04111-ILRL-JCW, Doc. No. 28 at 5. Therefore, the undersigned recommends directing the parties to London for arbitration but keeping the Rule B attachment in place as security for any arbitral award Psara may obtain from the Advantage Defendants in the London arbitration proceeding.

IV. RECOMMENDATION

Based on the foregoing analysis, the undersigned recommends that the Advantage Defendants' "Motion for Referral to Arbitration" should be **GRANTED**. Doc. No. 29. It is further recommended that the court direct the parties to arbitrate their dispute in London, pursuant to the charter party and Section 206 of the FAA, and retain jurisdiction only to enter a decree on any arbitral award, pursuant to Sections 8 and 207 of the FAA.

Alternatively, it is recommended that the suit in the Eastern District of Texas be stayed, in accordance with 9 U.S.C. § 3, pending Psara's voluntary submission of disputes under the charter party relating to the Advantage Defendants to the already pending arbitration in London.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c) (Supp. IV 2011), each party to this action has the right to file objections to this report and recommendation. Objections to this report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen days after being served with a copy of this report, and (4) be no more than eight pages in length. *See* 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(2); LOCAL RULE CV-72(c). A party who objects to this report is entitled to a de novo determination by the United States District Judge of those proposed findings and recommendations to which a specific objection is timely made. See 28 U.S.C. § 636(b)(1)(c); FED. R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this report, within fourteen days of being served with a copy of this report, bars that party from: (1) entitlement to de novo review by the United States District Judge of the findings of fact and conclusions of law, *see Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

SIGNED this 20th day of November, 2018.

Zack Hawthorn
United States Magistrate Judge