UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.18-24530-CIV-UNGARO/O'SULLIVAN

OCEAN M, LTD.,
a Cayman Islands Limited Liability Company,

Plaintiff,
vs.

DAVID DORR and BRIAN DORR,

Defendants.
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REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on the Defendants' Motion to Compel Arbitration and to Dismiss Complaint (DE# 21, 12/14/18). This matter was referred to the undersigned by the Honorable Ursula Ungaro, United States District Judge for the Southern District of Florida (DE# 31, 1/8/19). Having carefully considered the motion, the response and the reply thereto, the Affidavit of Brian Dorr in Support of Defendant's Motion to Compel Arbitration (DE# 21-1, 12/14/19), and the parties' exhibits, the court file and the applicable law, the undersigned recommends that the Defendants' Motion to Compel Arbitration and to Dismiss Complaint (DE# 21, 12/14/18) be **DENIED**.

I. INTRODUCTION

This action involves a single count of breach of fiduciary duties against the individual defendants who served as the sole directors of the plaintiff, Ocean M, Ltd. ("Ocean M"). Ocean M alleges that the defendants, David Dorr and Brian Dorr, (collectively "the Dorrs" or "the defendants") breached their fiduciary duties by causing Ocean M to enter into the Investment Management Agreement ("IMA") and the

Amended and Re-Stated Investment Management Agreement ("Amended IMA") with an entity they controlled to Ocean M's detriment and to their personal benefit. The plaintiff further alleges that the Dorrs breached their fiduciary duties to Ocean M by failing and refusing to contest DAM's excessive performance fee on Ocean M's behalf and by causing nearly half of Ocean M's Bespoke shares to be transferred from Ocean M to DAM, which is controlled by the Dorrs. Complaint ¶ 30 (DE# 1, 10/29/18).

The Dorrs seek to compel Ocean M to arbitrate its claims against them pursuant to an arbitration provision in a Consulting Services Agreement (hereinafter "CSA") that neither the Dorrs individually[1] nor Ocean M signed.[2] See CSA, Section 8.14 (DE# 21-1, 12/14/18).

Based on an agency theory or estoppel, the non-signatory defendants seek to compel the non-signatory plaintiff to arbitrate its breach of fiduciary duty claim pursuant to the arbitration provision in the CSA. Additionally, the defendants maintain that Ocean M's claims are arbitrable under the arbitration provision's broad scope.

In its Response, Ocean M argues the motion to compel arbitration should be denied because none of the parties to the present actions are signatories to the CSA and none of them agreed to be bound by the CSA. Ocean M argues further that its breach of fiduciary duty claim is not arbitrable because it does not arise from the CSA

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[1]David Dorr signed the CSA as the Managing Principal of DAM.

[2]The CSA that contains the subject arbitration provision was signed by Michael Murphy (hereinafter "Murphy"), in his individual capacity, and David Dorr, as the Managing Principal on behalf of Dorr Asset Management, Ltd, a limited liability Cayman Island (hereinafter "DAM"). The CSA defines Murphy as the "Client" and DAM as the "Company." Ocean M is not mentioned in the CSA.

and Ocean M does not seek to enforce any rights or benefits under the CSA. The breach of fiduciary duty claim is based on statutory rights arising from the individual defendants' roles as the directors of Ocean M. Ocean M argues further that if any contracts governed this dispute it would be the IMA and the Amended IMA between Ocean M and DAM. Neither the IMA nor the Amended IMA contain an arbitration provision.

II. FACTUAL BACKGROUND

Murphy hired the defendants to manage his investment funds and entered into the CSA with DAM, a Cayman Islands based investment management company owned and controlled by the Dorrs. Response at 2 (citing the Complaint at ¶ 8 (DE# 1))[3]. Acting on the Dorrs' advice, Murphy created Ocean M on or about October 26, 2016, as a potential investment vehicle and Murphy agreed to the Dorrs' appointment as sole directors of Ocean M. Complaint at ¶¶ 1, 10.

Brian Dorr, as director of Ocean M, and David Dorr, as director of DAM, created and executed an Investment Management Agreement ("IMA") dated November 10, 2016 and an Amended Investment Management Agreement dated March 2, 2018 ("Amended IMA").[4] The IMA pre-dates the CSA; the Amended IMA post-dates the CSA. Murphy was not a party to the IMA and the Dorrs never consulted with him prior to its execution or advised him of its existence or terms. Complaint ¶ 13 (DE# 1, 10/29/18). Ocean M and DAM are signatories to the IMA and the Amended IMA.

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[3]The Complaint does not mention the CSA at all.

[4]Brian Dorr signed the Amended IMA on behalf of Ocean M and David Dorr signed on behalf of DAM. Id. at ¶ 18.

Neither the IMA nor the Amended IMA contains an arbitration provision.

The IMA purported to authorize DAM SEZC to charge Ocean M a performance fee equal to 20% of the "New Net Profit" in the account at the end of each quarter." Id. at ¶ 12 (DE# 1-4:20). The Amended IMA granted DAM an equitable mortgage over unspecified shares owned by Ocean M and gave Brian Dorr an irrevocable power of attorney "to give proper effect to the intent and purposes of the mortgage." Id. (DE# 1-5; 4-5).

As director of DAM, David Dorr tendered DAM's resignation effective September 7, 2018 and attached DAM's fee note setting out all fees, paid disbursements etc. as are due pursuant to DAM's agreement with the Company, Ocean M. Ocean M was advised that "DAM opted to accept payment of Fees in kind [as Shares of Bespoke Extracts, Inc." as permitted under "its Agreement with the Company." Complaint, Ex. 7 (DE# 1-7, 10/29/18).

The CSA between Murphy and DAM contains the arbitration provision at issue.[5] Section 8.14 titled "Arbitration" in the CSA states:

> **Any controversy, dispute or claim arising out of or related to this Agreement or breach of this Agreement** shall be settled solely by confidential binding arbitration by a single arbitrator in accordance with the commercial arbitration rules of JAMS in effect at the time the arbitration commences. The award of the arbitrator shall be final and binding. No party shall be entitled to, and the arbitrator is not authorized to, award legal fees, expert witness fees, or related costs to a party. However, recognizing the irreparable harm that could result from the misuse of Confidential Information as defined in this agreement, an arbitrator is authorized to award equitable remedies designed to prevent the improper use and disclosure of Confidential Information, or the violation of the Non-

[5]David C. Dorr signed the CMA as Managing Principal of Dorr Asset Management, Ltd.

> Circumvention and Non-Compete provisions of this agreement.

CSA, Section 8.14. (DE# 21-1, 12/14/18) (emphasis added). Pursuant to Section 8.15, the CSA, including any exhibits thereto,

> states the entire Agreement between the parties and supersedes all previous contracts, proposals, oral or written, and all other communications between the parties respecting the subject matter hereof, and supersedes any and all prior understandings, representation, warranties, agreements or contracts (whether written or oral) between Client and the Company respecting the subject matter hereof.

CSA, Section 8.15. (DE# 21-1, 12/14/18). Ocean M and the Dorrs in their individual capacities are non-signatories to the CSA.[6] The CSA does not mention Ocean M.

The CSA contains a choice of law provision that provides that it "[w]ould be governed by and construed in accordance with the laws of the Cayman Islands, without regard to principles of conflicts of law." CSA, Section 8.13.[7]

III. STANDARD OF REVIEW

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[6]Notably, Section 8.17 of the CSA titled "Use by Third Parties" states:

> Work performed by the Company pursuant to this Agreement is only for the purpose intended and may be misleading if used in another context. Client agrees not to use any documents produced under this Agreement for anything other than the intended purpose without the Company's written permission. This Agreement shall, therefore, not create any rights or benefits to parties other than to Client and the Company.

CSA, Section 8.17. (DE# 21-1, 12/14/18).

[7]The parties cite and rely upon Florida and United States federal law, not Cayman Island law, with the exception of a single footnote in Ocean M's Response that simply states that Cayman Islands law would not conflict with Florida law. Response at 9, n.12 (DE# 27, 12/28/19) Ocean M argues that "Cayman Islands law imposes duties 'to avoid self-dealing and conflicts of interest; to act with loyalty, fidelity, good faith and honesty; and to exercise reasonable care, skill, diligence, and independent judgment." Id. (citing Krys v. Aaron, 106 F. Supp. 2d 472, 482 (D. N.J. 2015)).

The Eleventh Circuit treats a motion to compel arbitration as a Rule 12(b)(1) motion to dismiss for lack of subject matter consideration. Shriever v. Navient Solutions, Inc., 2014 WL 7273915, at *2 (M.D. Fla. Dec. 19, 2014)(citing McElmurray v. Consol. Gov't of Augusta-Richmond Cnty., 591 F.3d 1244, 1251 (11th Cir. 2007)). Accordingly, in ruling on a motion to compel arbitration, the Court may consider matters outside of the four corners of the complaint. Mamani v. Sanchez Berzain, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009).

"Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of arbitration agreements." Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2009) (citing Perry v. Thomas, 482 U.S. 483 (1987)). "Federal law counsels that questions of arbitrability, when in doubt, should be resolved in favor of arbitration." Id. (citing Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004) (explaining that "it is the role of courts to rigorously enforce agreements to arbitrate and to construe any doubt in favor of arbitrability")). The [Federal] Arbitration Act [("FAA")] established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mercury Construction, 460 U.S. at 24-25 (footnote omitted).

"Under the [FAA], no party can be compelled to arbitrate unless that party has entered into an agreement to do so." Id. (citation omitted); see Seaboard Coastline R.R. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982) (The federal policy

favoring arbitration "cannot stretch a contract beyond the scope originally intended by the parties."). State-law principles of contract law govern the determination of whether an arbitration agreement exists. Courts have held that non-signatories may be bound to the arbitration agreements of others based on various theories that arise out of common law principles of contract and agency law. Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1170 (11th Cir. 2011); Employers Ins. of Wasau v. Bright Metal Specialties, Inc., 251 F.3d 1316,1322 (11th Cir. 2001).

"Although federal courts generally 'have been wiling to estop a *signatory* from avoiding arbitration with a non-signatory ...' they have been hesitant to estop a non-signatory seeking to avoid arbitration. The distinction is not insignificant: 'arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate the courts have no authority to mandate that they do so.'" Seth v. Rajagopalan, No. 12-61040-CIV, 2013 WL 11927712, at *7 (S.D. Fla. Jan. 25, 2013) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)) (emphasis in original).

A district court must consider three factors on a motion to compel arbitration: "1) whether a valid agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitrate was waived." Pierre-Louis v. CC Solutions, LLC, No. 17-60781, 2017 WL 4841428, at *2 (S.D. Fla. Oct. 26, 2017)(citing Nat'l Auto Lenders, Inc. V. SysLOCATE, Inc., 686 F. Supp. 2d 1318, 1322 (S.D. Fla. 2010)).

To compel a nonsignatory to arbitrate, a signatory must satisfy one of the following five theories: "(1) incorporation by reference, (2) assumption, (3) agency, (4) piercing/alter ego, and (5) equitable estoppel." American Personality Photos, LLC v. Mason, 589 F. Supp. 2d 1325, 1330 (S.D. Fla. 2008) (citations omitted). "[W]here a

non-signatory seeks to invoke an arbitration clause, the five theories are not available." Id. at 1331 (citation omitted); cf. Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1902 (2009) (acknowledging that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'") (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)).[8] Most of the cases cited by the parties in this action that have allowed a non-signatory to compel or be compelled to arbitrate have been determined in the context of at least one of the parties being a signatory to the agreement containing an arbitration provision.

Blinco v. Green Tree Servicing LLC, 400 F.3d 1308 (11th Cir. 2005), which was cited for the first time in the defendants' Reply, appears to be the only case in the Eleventh Circuit that has held "that the language of the arbitration clause at issue [in the Note] is broad enough to permit both Green Tree entities to invoke it, regardless of their signatory status." Blinco, 400 F.3d at 1312. In Blinco, the Eleventh Circuit explained

> [b]ecause ... the Blinco's [Real Estate Settlement Procedures Act] claims derive from a "relationship" that "results from" the Note (i.e. loan servicing), the arbitration clause easily encompasses both Green Tree Servicing and Green Tree Investment as alleged servicers of the Note. The scope of the Note's arbitration clause is sufficiently broad to allow non-signatories to invoke the clause where, as here, they face claims derived from the Note. See MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947-48 (11th Cir. 1999) (where a signatory's claims against non-signatory depend on a contract containing an arbitration clause, signatory

[8] In Carlisle, the Supreme Court held that "a litigant who was not a party to the relevant arbitration agreement may invoke [9 U.S.C.] § 3 [of the FAA to obtain a stay] if the relevant state contract law allows him to enforce the agreement." 129 S. Ct. at 1903.

must arbitrate with non-signatory).

Id. The Eleventh Circuit concluded that "although a non-signatory to the Note, Mrs. Blinco may nonetheless be held to the arbitration clause of the Note under the doctrine of equitable estoppel." Id. (explaining that "[e]quitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes") (citations omitted).

IV. ANALYSIS

A. Motion to Compel Arbitration

The defendants move to compel arbitration and argue that the breach of fiduciary claims raised in the Complaint are arbitrable. The defendants rely on the broad arbitration provision contained in the CSA. The defendants argue that the plaintiff's breach of fiduciary duty claim arises out of or relates to the CSA and is arbitrable. Neither Ocean M nor the Dorrs are signatories to the CSA.

The IMA and the Amended IMA, which were signed by Brian Dorr as a director of Ocean M and David Dorr as a director of DAM, do not contain an arbitration provision. The CSA is not incorporated by reference in either the IMA, which pre-dates the CSA, or the Amended IMA, which post-dates the CSA.

In its Response, Ocean M argues that DAM and the Dorrs relied on the IMA and the Amended IMA that they secretly created between Ocean M and DAM, not the CSA, in claiming the allegedly excessive performance fee for DAM that forms the basis of Ocean M's breach of fiduciary duty claim.

The crux of plaintiff's claim is "whether the [individual] defendants breached their

fiduciary duties as directors of Ocean M by engineering – and causing Ocean M to enter into – the IMA and the Amended IMA with detrimental and ambiguous terms that favored their own personal interests over those of Ocean M." Response at 8 (DE# 27, 12/28/18). The plaintiff contends that its breach of fiduciary duty claim against the defendants does not require arbitration because the breach of fiduciary duty claim does not arise out of the CSA, none of the exceptions that subject non-parties to an arbitration agreement apply, and no arbitrable issue exists. The undersigned agrees.

The undersigned must determine two of the three issues: 1) whether a valid arbitration exists; and 2) whether Ocean M's breach of fiduciary duty claims are arbitrable. Neither party raises or addresses the factor of whether arbitration has been waived, so the undersigned will not address waiver.

1. Ocean M and the Individual Defendants Are Non-Signatories to the Arbitration Provision in the CSA and the IMA and Amended IMA Do Not Contain an Arbitration Provision

The defendants argue even though neither the plaintiff nor the defendants are signatories to the CSA that the plaintiff should be compelled to arbitrate its breach of fiduciary duty claim because the plaintiff's claim against the defendants arises out of or relate to the CSA. Motion at 2 (DE# 21, 12/14/18). The defendants argue further that the arbitration provision should apply to non-signatories where the relationship between the signatory and non-signatory parties is sufficiently close that only by having the arbitration provision apply to the non-signatory parties may evisceration of the underlying arbitration provision between the signatories be avoided. The defendants contend that if Ocean M is not compelled to arbitrate its dispute, then Ocean M and its owner, Murphy, would be allowed to escape the arbitration provision of the CSA and

thwart the federal policy in favor of arbitration. Id.

"[State] law governs the issue whether a contract may be enforced by or against a nonparty." Kong v. Allied Professional Ins. Co., 750 F.3d 1295, 1302 (11th Cir. 2014) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-631 (2009) (recognizing that state law governs issues regarding "the validity, revocability, and enforceability of contracts generally" as well as whether "a contract may be enforced by or against nonparties to the contract"). Under Florida law, a non-signatory may be bound to arbitrate under the following five theories: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel. Johnson v. Pires, 968 So. 2d 700, 701 (Fla. 4th DCA 2007) (citing Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2nd Cir. 1995)); see MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999). In their Motion, the Dorrs rely on an agency theory. In a footnote in their Reply (at 4 n.2 (DE# 28, 1/4/19), the Dorrs argue that their motion should be granted on the doctrine of estoppel. As explained below, the Dorrs have failed to show that agency or estoppel require the non-signatory Ocean M to arbitrate its breach of fiduciary duties claim against the non-signatory defendants.

a. Agency

The defendants argue that the arbitration provision in the CSA should apply to non-signatory Ocean M based on the theory of agency or related principles. Motion at 10 (DE# 21, 12/14/18). The defendants rely on Axa Equitable Life Ins. Co. v. Infinity Financial Group, LLC, 608 F. Supp. 2d 1330 (S.D. Fla. 2009); Hall v. Internet Capital Group, Inc., 338 F. Supp. 2d 145 (D. Maine 2004); and Bolamos v. Globe Airport Security Serv., Inc., 2002 WL 1839210 (S.D. Fla. May 21, 2002). In the present case,

the defendants contend that

> the relationships between (1) Plaintiff and Murphy (where Murphy is the 100% owner of Plaintiff and Plaintiff was formed for Murphy as a result of the agreement between Murphy and Defendants' company, DAM), and (2) Defendants and DAM (where Defendants are the 100% owner of DAM and only engaged in the conduct at issue as agents of DAM) are sufficiently close that only by having the arbitration provision apply to both Plaintiff and Defendants may evisceration of the underlying arbitration provision in the Consulting Agreement be avoided."

Motion at 11 (DE# 21, 12/14/18).

In its Response, Ocean M argues that signatory Murphy's status as sole shareholder of Ocean M does not impute the terms of the CSA to Ocean M. Response at 7 (citing Pirelli Tire LLC v. Cronath, No. 12-CV-00075, 2013 WL 12291552, at *4, 6 (N.D. Ga. Feb. 8, 2013) (refusing to allow non-signatory to compel arbitration despite his status as sole shareholder of the signatory corporation)). Ocean M also cited a Third Circuit case, Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir. 1994), aff'd, 514 U.S. 938 (1995). In Kaplan, the corporation was required to arbitrate, but Kaplan, the president, director and sole shareholder of the signatory corporation, was not individually obligated to arbitrate because he did not execute the agreement to arbitrate in his individual capacity. By contrast, Murphy signed the CSA in his individual capacity, not on behalf of Ocean M.

Ocean M argues further that the defendants seek to expand the law to permit non-signatories to an arbitration agreement to compel another non-signatory to arbitrate without citing a case. Ocean M argues the three cases cited by the Dorrs involved situations in which non-signatories sought to compel arbitration against signatories. The Court agrees. None of the cases cited in the defendants' Motion involve a non-

signatory compelling a non-signatory to arbitrate. Axa Equitable Life, Hall, and Bolamos are distinguishable and inapposite.

In Axa Equitable Life, the district court required the plaintiff to arbitrate the civil conspiracy count against the signatory and non-signatory defendants because the plaintiff alleged that the defendants engaged in "'substantially interdependent and concerted misconduct." Axa Equitable Life, 608 F. Supp. at 1342 (quoting MS Dealer, 177 F.3d at 947. In Axa Equitable Life, the plaintiff was a signatory to two agreements that contained broad arbitration provisions and pursuant to the contracts the signatory defendant served as the plaintiff's agent for the purpose of selling insurance policies. Although the court discussed the agency theory for compelling arbitration, the court granted the motion to compel arbitration on the estoppel theory. Unlike Axa Equitable Life, Ocean M is not a signatory to a contract containing an arbitration provision and the IMA and Amended IMA do not contain an arbitration provision. Additionally, unlike the plaintiff in Axa Equitable Life, Ocean M's complaint against the non-signatory individual defendants does not allege "substantially interdependent and concerted misconduct" with a signatory to the arbitration provision. The defendants' reliance on Axa Equitable Life is misplaced.

The plaintiff in Bolamos was a signatory to an arbitration provision in the Pre-Dispute Resolution Agreement with the defendant's parent company. The scope of the arbitration provision governed "all matters directly or indirectly related to [the plaintiff's] recruitment, hire, employment or termination of employment...." Bolamos sued her employer, the wholly-owned subsidiary of the parent company that signed the agreement containing the arbitration provision. The Bolamos court found that the non-

signatory defendant had standing to compel the signatory plaintiff to arbitrate because the non-signatory defendant was the agent of the signatory parent company and that the signatory plaintiff's claims based on violations of the Fair Labor Standards Act fell within the scope of the arbitration provision. In Bolamos, the plaintiff did not dispute that the defendant was the wholly-owned subsidiary of the signatory or that the defendant was the signatory's agent. The court held that "[a]llowing Plaintiff to escape the terms of the Agreement by naming [the wholly-owned subsidiary] instead of the [signatory parent company] would thwart the federal policy in favor of arbitration." Bolamos, 2002 WL 1839210, at *2. Unlike the plaintiff in Bolamos, Ocean M is not a signatory to the CSA and Ocean M's claims against the Dorrs are in their individual capacities serving as Ocean M's directors – not as agents of DAM. Unlike the wholly-owned subsidiary defendant in Bolamos, which the court found was an agent of the signatory parent company, the Dorrs as Ocean M's sole directors owed Ocean M fiduciary duties. Bolamos is distinguishable as the motion to compel was filed by an agent of a signatory against the plaintiff signatory. Bolamos is inapposite.

In Hall, the court found that non-signatory shareholders in one company involved in a merger had standing to invoke the arbitration provision in the purchase agreement against the second company and its individual officers who were signatories to the contract. The Hall court considered whether a non-signatory could invoke the arbitration provision against signatories and whether the claims arose under the purchase agreement. The Hall court acknowledged that "federal courts generally 'have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the

agreement that the estopped party has signed.'" Hall, 338 F. Supp. 2d at 151 (quoting Intergen N.V. v. Grina, 344 F.3d 134, 145 (1st Cir. 2003) (citation omitted)). The Hall court found that the nonsignatory shareholders' claims against the signatory defendants arose out of the purchase agreement that contained a broad arbitration provision. Id. Unlike Hall, neither Ocean M nor the Dorrs are signatories to the CSA containing the arbitration provision. The breach of fiduciary claim arises from the Dorrs role as Ocean M's directors. Hall is factually distinguishable and inapposite.

In their Reply, for the first time, the defendants rely on Blinco v. Green Tree Servicing, LLC, 400 F.3d 1308 (11th Cir. 2005), abrogated on other grounds, as recognized in Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1171 (11th Cir. 2011). In Blinco, the Eleventh Circuit held, irrespective of determining whether the loan servicer was an assignee of the mortgagor on the Note, that the non-signatory plaintiff wife was subject to the arbitration provision in the Note that her husband signed because her statutory claims of RESPA violations against the loan servicer on their home mortgage arise from the Note. Id. at 1311. The Eleventh Circuit explained "it is difficult to understand how Green Tree could be a servicer if there were no Note, and more importantly, how Green Tree could face statutory servicer liability if there were no Note to service." Id. "Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." Id. (citations omitted). In Blinco, the Eleventh Circuit held that "Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims." Id.

Unlike Mrs. Blinco, Ocean M's breach of fiduciary duty claim against the non-

signatory defendants does not arise from the CSA containing the arbitration provision. Ocean M's claim arises from the Dorrs' failure to fulfil the fiduciary duties they owed Ocean M in their capacities as Ocean M's sole directors. Blinco is distinguishable and inapposite.

In its Response, Ocean M cited cases from this district as well as sister districts that have rejected attempts to compel arbitration between two non-signatories. Response at 7; see Am. Personality Photos, LLC, 559 F. Supp. 2d at 1331 ("This Court has found no cases where one non-signatory has compelled another non-signatory to arbitrate a dispute, nor has [defendant] provided any."); Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC, No. 06-2234-CIV, 2007 WL 601992, at *11 (S.D. Fla. Feb. 21, 2007) ("[T]he Court is mindful that Petitioners have not presented a single case to the Court whereby one nonsignatory has compelled another nonsignatory to arbitrate claims pursuant to a remote arbitration agreement."); Betancourt v. Green Tree Servicing, LLC, No. 13-2759-CV, 2013 WL 6644560, at *3 (M.D. Fla. Dec. 17, 2013) ("[T]he exceptions to the general rule do not allow [defendant] to compel [plaintiff] to arbitration. [Defendant] has not pointed to any legal or factual basis why this exception ... should extend to a situation where a non-signatory moves to compel another non-signatory to arbitration."); Chemence, Inc. v. Quinn, No. 11-01366-CV-, 2012 WL 12873615, at *5 (N.D. Ga. Oct. 15, 2012) ("As a preliminary matter, the defendants attempt to assert that nonsignatories may compel another nonsignatory under some remote contract containing an arbitration clause. Defendants have not cited, and the court cannot find, any cases for this assertion.").

This Court should deny the defendants' Motion to compel the plaintiff to arbitrate

its breach of fiduciary duty claim because the Dorrs have not shown an agency relationship between themselves and DAM in their capacities as Ocean M's directors. Additionally, the Dorrs had not shown an agency relationship between Ocean M and Murphy.

B. The Arbitration Clause Does Not Cover the Plaintiff's Breach of Fiduciary Duty Claim

In order to compel arbitration, the Court must determine the second issue: whether plaintiff's claims fall within the scope of the subject arbitration provision. See Steele, No. 14-60741-CIV (S.D. Fla. Aug. 15, 2015) (Moreno, J.) (citing Gilmer, 500 U.S. at 26 (1991)). In the Eleventh Circuit, "[t]o determine what disputes the parties agreed to arbitrate, [the court] begin[s], as [it] must, with the language of the applicable arbitration provision, keeping in mind 'that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" World Rentals and Sales, LLC v. Volvo Const. Equipment Rents, Inc., 517 F.3d 1240, 1245 (11th Cir. 2008) (quoting Klay v. All Defendants, 389 F.3d 1191, 1201 (11th Cir. 2004)).

The arbitration provision in the CSA states in pertinent part:

> **Any controversy, dispute or claim arising out of or related to this Agreement or breach of this Agreement** shall be settled solely by confidential binding arbitration by a single arbitrator in accordance with the commercial arbitration rules of JAMS in effect at the time the arbitration commences....

CSA, Section 8.14. (DE# 21-1, 12/14/18) (emphasis added).

"The law is clear that tort claims and claims other than breach of contract are not automatically excluded from a contractual arbitration clause." H.S. Gregory v. Electro-Mechanical Corp., 83 F.2d 382, 384 (11th Cir. 1996) (citations omitted). "Whether a

claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted." Id. (citations omitted).

The Dorrs argue that Ocean M's "claim arise out of, or relates to (and exists solely because of), the agreement between Murphy and the defendants, which was later memorialized in the [CSA] (superseding all prior agreements between the parties." Motion at 8 (DE# 21, 12/14/19). The Dorrs contend that "if there were no agreement between Murphy and Defendants, as memorialized in the Consulting Agreement, there would be no Plaintiff; no investment by Murphy, through Plaintiff, in Bespoke, and no dispute or claim between the parties." The Dorrs argue that "the real nature of Murphy's complaint against the Defendants is not a breach of fiduciary duty but instead a breach of contract by Defendants under the [CSA], insofar as it is Murphy's contention in this action that the formula Defendants used to calculate the 20% performance fee that they caused Plaintiff to pay Defendants' company, DAM, exceeded and thus breached his agreement with Defendants and their company DAM)." Id. at 9. Thus, Ocean M should be compelled to arbitrate its claim against them.

Ocean M did not assert a breach of contract claim, but maintains that if any agreements gave rise to its claim against the Dorrs it would be based on the IMA and the Amended IMA between Ocean M and DAM that the defendants secretly negotiated without Murphy's knowledge or consent and upon which DAM and the defendants relied in calculating their fee and seizing Ocean M's shares in Bespoke. Additionally, in response to Ocean M's demand letter, the Dorrs relied on the IMA and Amended IMA to justify assessing their allegedly excessive performance fee and taking almost half of

Ocean M's Bespoke shares pursuant to mortgage. Neither the IMA nor the Amended IMA contains an arbitration provision.

Ocean M argues that the Dorrs cannot have their cake and eat it too[9] by relying upon the CSA for the arbitration provision, but relying on the IMA and Amended IMA as a basis for the $705,143.62 performance fee and taking nearly half of Ocean M's Bespoke shares pursuant to the mortgage. Response at 10 (DE# 27, 12/28/19).

The plaintiff relies on Leidel v. Coinbase, Inc., No. 16-81992-CIV, 2017 WL 2374269, at *1-3 (S.D. Fla. June 1, 2017). In Leidel, the defendant sought to compel a the non-signatory plaintiff to arbitrate his tort claims under the doctrine of equitable estoppel. Id. at *2. "According to the [d]efendant, [p]laintiff's claims are based upon the assertion that when [d]efendant agreed to open the accounts, [d]efendant took on a duty to [p]laintiff and other Cryptsy account holders to oversee the activities of Cryptsy and Vernon with regard to the accounts." Id. The defendant in Leidel argued further that "because [p]laintiff's claims are based upon the accounts established pursuant to the user agreement [that contained the arbitration provision], [p]laintiff must arbitrate his claims under the principles of equitable estoppel." In Leidel, the court disagreed and found that the plaintiff's claims were based on duties and breaches that did not arise from the agreement containing the arbitration provision. The court explained that the plaintiff "received no benefits from the [user] agreement ... and Plaintiff is not asserting any rights or benefits under the [user] agreement." Id. at *3 (citing In re Humana, Inc.

[9]Ocean M argues that "if, as the [Dorrs] now claim, the [CSA] governs the parties' relationship, then they should be bound by its terms and forced to concede error in calculating the performance fee and seizing Ocean M's stock to secure payment." Motion at 10.

Managed Care Litigation, 285 F.3d 971, 976 (11th Cir. 2002), rev'd on other grounds, 538 U.S. 401 (2003) ("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.")).

Both parties rely on Seth v. Rajagopalan, 2013 WL 11927712 at *2-3, *5 (S.D. Fla. Jan. 25, 2013). The Dorrs rely on Rajagopalan for the general proposition that a court "should follow the presumption of arbitration and resolve doubts in favor of arbitration" when the arbitration clause is broad like the one at issue in the present case. In Rajagopalan, the court held that the signatory cross-plaintiff's breach of fiduciary duty claim, among others, was subject to arbitration because the fiduciary relationship between the signatory cross-plaintiff and cross-defendants was created as a result of an agreement containing an arbitration provision, namely the Special Service Agreement ("SSA"). Pursuant to the SSA, the cross-defendants owed the cross-plaintiff a fiduciary duty because they were the trustee of Seth's funds. Unlike Ocean M, in Rajagopalan, the cross-plaintiff was a signatory to the agreement that contained the arbitration agreement.

The plaintiff also relies on Rajagopalan because the court denied a motion to compel arbitration of the non-signatory plaintiff's claims, which included a breach of fiduciary claim. The Rajagopalan court determined that the plaintiff was not a signatory to the SSA that contained the arbitration provision. Thus, the court found that no valid written agreement to arbitrate existed between Seth, the plaintiff, and the Vernetti defendants. The Court found that the defendants could not compel arbitration of non-signatory Seth's claims because: 1) "Seth's claims did not entirely hinge on the SSA;" 2)

"Seth is not seeking damages in accordance with the SSA;" 3) "Seth did not directly benefit from the SSA;" and 4) "Seth was not an intended beneficiary of the SSA." Rajagopalan, 2013 WL 11927712 at *8-10. Likewise, in the present case, the motion to compel Ocean M to arbitrate its breach of fiduciary claim against the defendants should be denied because none of the exceptions to require a non-signatory to arbitrate exist.

The undersigned finds that although the arbitration provision in the CSA is a broad arbitration clause, it does not cover Ocean M's breach of fiduciary duty claims against the Dorrs "as directors of Ocean M by engineering – and causing Ocean M to enter into – the IMA and Amended IMA with detrimental and ambiguous terms that favored their own personal interests over those of Ocean M." Response at 8 (DE# 27, 12/28/19). Ocean M is not relying on the CSA. Like Leidel and Rajagopalan, as Ocean M is a non-signatory to the agreement containing the broad arbitration provision, this Court should not compel arbitration of Ocean M's breach of fiduciary duty claims against the Dorrs.

D. Dismissal/Stay

The Eleventh Circuit has held that "the FAA requires a court to either stay or dismiss a lawsuit and to compel arbitration" when all of the claims are subject to mandatory arbitration." Lambert v. Austin Indus., 1192, 1195 (11th Cir. 2008). The Eleventh Circuit has also affirmed dismissal on those grounds. See Caley v. Gulfstream Aerospace Corp., 333 F. Supp. 2d 1367 (N.D. Ga. 2004), aff'd, 428 F.3d 1359 (11th Cir. 2005). The defendants seek dismissal with prejudice in the event the Court grants their motion to compel Ocean M to arbitrate. The defendants rely on recent cases in which district courts dismissed the actions after compelling the parties

to arbitrate all of the claims. See, e.g., Perera v. H&R Block E. Enters., Inc., 914 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2012) (citing Caley); Kivisto v. National Football League Players Ass'n, No. 10-24226-CIV, 2011 WL 335420, at *2 (S.D. Fla. Jan. 31, 2011), aff'd, 435 Fed. App'x 811 (2011) (unpublished).

Ocean M requests the Court to stay the action rather than dismiss it if the Court concludes that the CSA mandates arbitration of Ocean M's claims. Additionally, pursuant to Section 8.7 of the CSA, Ocean M asks the Court to compel the parties to mediate first before being ordered straight to arbitration. Response at 10 (DE# 277, 12/28/19). Ocean M maintains that courts in this district routinely stay proceedings pending arbitration. Id. (citing VVG Real Estate Invs. v. Underwriters at Lloyd's, London, 317 F. Supp. 3d 1199, 1207 (S.D. Fla. 2018); Amat v. Rey Pizza Corp., 204 F. Supp. 3d 1359, 1367 (S.D. Fla. 2016) ("The FAA provides, in pertinent part, that a court compelling arbitration 'shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement' ... There is no statutory reference to dismissal.'")); Wiles v. Palm Springs Grill, LLC, No. 15-CV-81597, 2016 WL 4248315, at *4-5 (S.D. Fla. Aug. 11, 2016)).

In Wiles, the district court stayed the action pending arbitration. The Wiles court explained that a stay rather than a dismissal "has the virtue of furthering the two goals of the FAA – 'enforcement of private agreements and encouragement of efficient and speedy dispute resolution'– rather than only the one goal of enforcing agreements." Id. at *5. The court explained that if it dismissed the action, the plaintiff would be able to file an immediate appeal, but that if it stayed the action, the parties would be required to arbitrate immediately. Id.

Because the undersigned recommends that the motion to compel arbitration be denied, the motion to stay or dismiss should be denied. However, if this Court rejects the undersigned's recommendation and compels arbitration, the undersigned finds the Wiles approach reasonable and recommends a stay rather than dismissal. Additionally, if this Court compels arbitration, the parties should be required to mediate first as required by Section 8.7 of the CSA.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that the Defendants' Motion to Compel Arbitration and to Dismiss Complaint (DE# 21, 12/14/18) be **DENIED**. The motion to dismiss or stay should also be **DENIED**.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Ursula Ungaro, United States District Judge. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 15th day of February, 2019.

JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE