UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-62121-Civ-COOKE/HUNT

NIPRO CORPORATION,

Plaintiff,

vs.

SCOTT VERNER, DEAN SORRENTINO,
AND JASON MONDEK,

Defendants.
_____/

OMINBOUS ORDER DENYING
PLAINTIFF'S MOTION TO REMAND AND GRANTING
DEFENDANTS' RENEWED MOTION TO COMPEL ARBITRATION

THIS MATTER is before the Court on Defendants' Renewed Motion to Compel Arbitration (ECF No. 26), filed November 23, 2020, and Plaintiff Nipro Corporation's Renewed Motion to Remand (ECF No. 29), filed December 21, 2020. Both Motions are ripe for adjudication.

The Court after reviewing the above Motions, the briefing related thereto, the record, and the relevant legal authorities finds, for the reasons set forth below, that Plaintiff's Renewed Motion to Remand should be denied and Defendants' Renewed Motion to Compel Arbitration should be granted.

I. BACKGROUND

On July 18, 2019, Nipro filed a civil action against Defendants in the Circuit Court for the 17th Judicial Circuit in and for Broward County, Florida, entitled *Nipro Corp. v. Verner et al.*, Case No. CACE-19-014820. ECF No. 1-2. The crux of Nipro's Complaint centers around the sale of Nipro's stock in its wholly owned subsidiary Nipro Diagnostics, Inc. ("NDI") and Defendants' alleged actions related to the sale. More specifically, in its Complaint, Nipro asserts that Defendants in their roles as officers of NDI, during the course of advising Nipro with respect to the deal (the "Deal") to sell NDI's stock to Shenzhen Xinnuo Health Industry Investment Company Limited (also known as "Sinocare"), committed the following torts: breach of fiduciary duty, aiding and abetting breaches of a fiduciary duty, fraud, constructive

fraud, negligent misrepresentation, and civil conspiracy. ECF No. 1-2, Compl. ¶ 9. According to Nipro, in derogation of their fiduciary duties to Nipro, Defendants engaged in multiple acts of self-dealing, misrepresentations and omissions that misled Nipro into executing a distribution agreement for the purchase of diabetes monitoring products from Trividia that contained terms to which Nipro did not agree and Defendants' acts of self-dealing, misrepresentations and omissions also misled Nipro into accepting less favorable pricing terms for the products. *Id.* at ¶ 10.

Nipro executed the Purchase Agreement and the International Distribution Agreement (the "IDA") as well as all other ancillary agreements, on or about October 27, 2015, for the sale of NDI to Sinocare. *Id.* at ¶ 81. The Deal closed in January of 2016. *Id.* at ¶ 82. According to Nipro, prior to the closing and execution of the IDA, Defendants repeatedly assured Nipro that the terms of the IDA adequately reflected Nipro's non-negotiable, no minimum volume/no penalty terms. *Id.* at ¶ 55. Based on these repeated assurances, Nipro agreed to be bound to a two-year commitment for purchase minimums that could subject Nipro to a penalty or damages in the event Nipro fell short of the minimum volume purchases in only Years 1 and 2. *Id.* at ¶ 56. While Defendants were misrepresenting the IDA terms to Nipro, they were working with Sinocare and [Greenberg Traurig, LLP] to finalize an IDA that expressly contradicted Nipro's no minimum volume/no penalty terms by omitting any mention of Trividia's waiver of damages and penalty in the event of a purchase minimum shortfall for Years 3 through 5. *Id.* at ¶ 57. It subsequently came to light that, despite Defendants making repeated reassurances to Nipro that it would not be liable for any damages for failing to meet minimum purchase volumes in Years 3 through 5, Defendant Scott Verner failed to ensure that the IDA reflected such terms. *Id.* at ¶ 61.

After the closing, Defendant Scott Verner stayed on with NDI (n/k/a Trividia Health, Inc. ("Trividia")) to serve as the CEO of Trividia. *Id.* at ¶ 83. Likewise, Defendants Dean Sorrentino and Jason Mondek assumed the same roles with Trividia as they had when they worked as officers for NDI. *Id.* Pursuant to the IDA, Nipro purchased more than the annual minimum guarantees for years 1 and 2. *Id.* at ¶ 84. When it came time to negotiate the purchase volume for Years 3 through 5, however, Nipro discovered that Trividia (now through its CEO Defendant Scott Verner) was not negotiating in good faith and was taking a position contrary to what Defendants represented to Nipro while they served as Nipro's

trusted agents for purposes of negotiating and closing the sale of Nipro's stock in NDI. *Id.* In his new role as Trividia's CEO, Defendant Scott Verner took the position that if Nipro failed to meet an annual minimum purchase volume in Years 3 through 5, Trividia could seek damages. *Id.* at ¶ 85.

Prior to Nipro's filing of this case against the individual Defendants, on February 27, 2018, Trividia filed a claim against Nipro in an arbitration proceeding seeking a declaration that Trividia has a contractual remedy it may pursue against Nipro in addition to termination of the IDA in the event Nipro failed to meet the minimum purchase amounts of blood glucose monitoring strips for Years 3 through 5. *See id.* at ¶ 86. Trividia also sought an award of entitlement to damages, which it valued at $56.7 million. *Id.* According to Nipro, an award to Trividia in the arbitration proceeding would constitute damages caused by Defendants' egregious acts. *See id.* at ¶ 95. Additionally, through the present action, Nipro seeks to recoup from Defendants approximately $7 million in transaction bonuses that it payed to Defendants for their efforts in negotiating the Deal. *See id.* at ¶¶ 93-95, 105.

II. PROCEDURAL POSTURE

This case has a bit of a complicated procedural background. The Court held a hearing on Nipro's first motion to remand (ECF No. 9) and Defendant's first motion to stay proceedings and compel arbitration (ECF No. 3) on December 3, 2019. Upon conclusion of that hearing, the Court stayed this action pending completion of the arbitration between Nipro and Trividia concerning Nipro's BGM purchase obligations. ECF Nos. 17 and 19. In staying the case, the Court denied all pending motions as moot and administratively closed the case (ECF No. 17).

Then, on November 23, 2020, the Parties jointly advised the Court that the arbitration panel had issued its final decision through which it concluded that Nipro breached the terms of the IDA by failing to purchase the annual minimums of BGM strips for years 3, 4, and 5 of the IDA. ECF No. 25 at p. 4, ¶ 16. Additionally, the panel ordered Nipro to pay Trividia $17,477,511.00 in damages, plus attorneys' fees and costs. *Id.* Thereafter, Defendants filed their Renewed Motion to Compel Arbitration on November 23, 2020. ECF No. 26. And, as previously mentioned, Plaintiff filed its Renewed Motion to Remand on December 21, 2020. ECF No. 29.

III. MOTION TO REMAND

A. THE FAA AND THE CONVENTION

The Court begins its analysis with an overview of the Federal Arbitration Act (the "FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The FAA applies to all "written" agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The purpose of the FAA is to give arbitration agreements the same force and effect as other contracts. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367-68 (11th Cir. 2005). The U.S. Supreme Court has expressed a liberal federal policy favoring the enforcement of arbitration provisions, especially in the field of international commerce. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (noting that the presumption in favor of arbitration carries "special force" when international commerce is involved, because the United States is a signatory to the Convention).

The Convention is incorporated into federal law by Chapter Two of the FAA. 9 U.S.C. §§ 201-208. Section 202 of the FAA defines an arbitration agreement or award that "falls under" the Convention as:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C.A. § 202. The Convention aims "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Ytech 180 Units Miami Beach Investments LLC v. Certain Underwriters at Lloyd's, London*, 359 F. Supp. 3d at 1260 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, (1974). "The Convention also serves the purpose of 'reliev[ing] congestion in the courts and [ ] provid[ing] parties with an alternative method for dispute resolution that is speedier and less costly than litigation.'" *Id.* (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434l, 1440 (11th Cir. 1998)). Further, "[a]s an exercise of the Congress' treaty

power and as federal law, '[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law.'" *Id.* (quoting *Indus. Risk Insurers*, 141 F.3d at 1440 quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex)*, 767 F.2d 1140, 1145 (5th Cir. 1985)). To determine whether the district court has jurisdiction over an action to compel arbitration, courts look to the language of the Convention. *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004).

1. REMOVAL UNDER THE CONVENTION

The Convention provides for removal "where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention." *Ytech 180 Units Miami Beach Investments LLC*, 359 F. Supp. 3d at 1260 (quoting *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1323 (11th Cir. 2018) rev'd and remanded *sub nom. GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020)[1] (citing 9 U.S.C. § 205)). The Eleventh Circuit has

[1] In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), the U.S. Supreme Court reversed and remanded the Eleventh Circuit's holding, in *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018), that the Convention requires "that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." In doing so, the U.S. Supreme Court did not reach the issue of whether the Eleventh Circuit's affirmance of the district court's denial of the motion to remand was proper. In fact, in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, the U.S. Supreme Court only granted certiorari on the issue of "whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[. . .] conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories." 140 S.Ct. at 1642. Thus, in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), the U.S. Supreme Court did not consider whether it had subject matter jurisdiction over the case. This is critical. **"**A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. It is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking." *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) (citing *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir.1985); *Wernick v. Matthews*, 524 F.2d 543, 545 (5th Cir. 1975); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981)). Accordingly, federal courts, including the U.S. Supreme Court, must inquire into their subject matter jurisdiction whenever it may be lacking. Because the U.S. Supreme Court in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC* did not conduct such an inquiry, this Court must presume that the U.S. Supreme Court determined that it had the necessary jurisdiction to reach the merits of the arbitration

interpreted the "relates to" language of Section 205 to allow "broad removability of cases in federal court." *Id.* (quoting *Outokumpu Stainless USA, LLC*, 902 F.3d at 1323). "[A]s long as the argument that the case 'relates to' the arbitration agreement is not immaterial, frivolous, or made solely to obtain jurisdiction, the relatedness requirement is met for purposes of federal subject matter jurisdiction." *Id.* (quoting *Outokumpu Stainless USA, LLC*, 902 F.3d at 1323-24). To that end, in assessing removability courts must conduct a "limited jurisdictional inquiry, an inquiry colored by a strong preference for arbitration." *Id.* (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005)).

Upon removal under the Convention, district courts must engage in a two-step inquiry to determine jurisdiction, limiting its examination to the pleadings and the notice of removal. *Outokumpu Stainless USA, LLC*, 902 F.3d at 1324. First, the court assesses whether the notice of removal describes an arbitration agreement that may "fall under the Convention." *Id.* To do so, the court considers whether the removing party has articulated a non-frivolous bases that: (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory to the Convention; (3) the agreement to arbitrate arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen. *Id.* (citing *Bautista*, 396 F.3d at 1295-96 n.7 & 9). Second, the district court must determine whether on the face of the notice of removal and the pleadings, there is a non-frivolous basis to conclude that the agreement "relates to" an arbitration agreement that "falls under the Convention." *Id.*

a. DEFENDANTS SATISFY THE *BAUTISTA* REMOVAL JURISDICTION PREREQUISITES

Defendants removed this action pursuant to 28 U.S.C. § 1441 and Section 205 of the Convention. ECF No. 1. Section 205 of the Convention states:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

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arguments. This Court is in no position to question whether the U.S. Supreme Court understands and respects the limitations of its own jurisdiction. And it will not do so. As such, this Court can and will rely on the Eleventh Circuit's decision in *Outokumpo* with respect to its removal jurisdiction analysis as that portion of the decision was not overruled.

9 U.S.C. § 205. Federal courts have original jurisdiction over any action or proceeding falling under the Convention. *Ytech 180 Units Miami Beach Investments LLC*, 359 F. Supp. 3d at 1259 (citing *Indus. Risk Insurers*, 141 F.3d at 1440 citing 9 U.S.C. § 203; H.R.Rep. No. 91-1181, at 2 (1970), reprinted in 1970 U.S.C.C.A.N. 3601, 3602)). "Such cases confer original subject-matter jurisdiction upon a district court because they are 'deemed to arise under the laws and treaties of the United States.'" *Id.* (citing 9 U.S.C. § 203 and *Bautista*, 396 F.3d at 1294).

The Convention "does not require a district court to review the putative arbitration agreement-or investigate the validity of the signatures thereon-before assuming jurisdiction: 'The language of § 205 strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone.'" *Id.* (quoting *Bautista*, 396 F.3d at 1301 citing *Beiser v. Weyler*, 284 F.3d 665, 671 (5th Cir.2002)). Indeed, the Eleventh Circuit has recently cautioned that "in determining jurisdiction the district court need not—and should not—examine whether the arbitration agreement binds the parties before it. Rather, the 'relates to' inquiry requires the court to determine whether, on the face of the pleadings and the removal notice, there is a non-frivolous claim that the lawsuit relates to an arbitration agreement that 'falls under the Convention.'" *Outokumpu Stainless USA, LLC*, 902 F.3d at 1324.

Defendants Notice of Removal describes the arbitration agreement at issue here as follows:

> To maintain the distribution networks during the transition and preserve value for the new parent, Nipro and NDI negotiated an International Distribution Agreement ("IDA") as part of the larger transaction between Nipro and Sinocare. The IDA provided, broadly, that Nipro would be the non-exclusive distributor of NDI's products in a defined territory for five years, granted Nipro a license to NDI's trademarks solely to promote NDI's products, limited Nipro's ability to compete with NDI in the first two years, and required Nipro to annually purchase minimum amounts of product from NDI over the course of the agreement. The IDA was signed on behalf of NDI by its President and CEO, Defendant Verner. A copy of the IDA is attached as Exhibit D . . . The IDA also contains a broad arbitration provision, providing for arbitration of '[a]ll disputes and differences of any kind arising under' the IDA. Ex. D, IDA Art. XVI . . . The arbitration clause within the IDA is an agreement in writing within the meaning of the Convention. *See Outokumpu*, 902 F.3d at 1324. The IDA provides for arbitration in New York, IDA § 16.1, and the United States is a signatory to the Convention, *Ytech*, 359 F. Supp. 3d at 1261 n.2. The agreement to arbitrate arises out of a commercial legal relationship. The IDA

> governs the purchase, marketing, and sale of certain medical products. Plaintiff Nipro, as a Japanese corporation, is a citizen of Japan. *See* Complaint ¶ 2.1 This lawsuit sufficiently relates to the arbitration agreement because the result of the pending ICC arbitration will affect the outcome of the case. Specifically, Nipro claims as damages in this lawsuit the costs of the arbitration and any potential damages awarded by the ICC Panel to Trividia. Moreover, the ICC Panel's ruling on the status of Nipro's defensive claims may have preclusive effect on the issues presented in this lawsuit

ECF No. 1 at ¶¶ 3-4. Accordingly, on its face, Defendants' Notice of Removal alleges the existence of an arbitration agreement in writing that falls under the Convention. Nonetheless, Plaintiff presents a convoluted mix of strained and befuddling arguments to support its position that this Court lacks removal jurisdiction. The Court will endeavor to distill these arguments for purposes of clarity. As an initial matter, it must be noted that Nipro only challenges whether Defendants satisfied factor one (the agreement in writing prerequisite) of the *Bautista* factors.

In purportedly setting out the standard for removal under the Convention, Plaintiff suggests that "it is only after the district court is satisfied that there is an agreement in writing signed by the parties (the first prong of the analysis) that the court may move on to the second prong of the analysis and review the pleadings and removal notice to determine whether the suit 'relates to' an arbitration agreement falling under the Convention." ECF No. 29 at p. 7. Astoundingly, in support of this "statement of the law", Plaintiff only relies upon *Rolls-Royce PLLC v. Royal Caribbean Cruises, Ltd.*, 2005 U.S. Dist. LEXIS 45416 (S.D. Fla. 2005) – an unpublished district court decision from 2005. This confounds the Court given the abundance of more recent published caselaw in this Circuit. To be clear, it seems that Plaintiff has, at great pains, attempted to muddle and alter the removal standard and jurisdictional analysis. Plaintiff's "statement of the law", however, is incorrect. As such, the Court will not adopt Plaintiff's contrived standard for removal jurisdiction. Instead, the Court's analysis will be guided by the Eleventh Circuit's pronouncements regarding the removal standard under the Convention.

Plaintiff's "creative" interpretation of the law continues in its legal argument section where Plaintiff argues that the arbitration clause at issue here does not "fall under" the Convention because Defendants are not signatories or parties to the IDA. *Id.* Plaintiff then goes on to assert that "[i]f the removing party cannot establish that an agreement in writing

exists *between the same parties to the litigation*, its removal fails under the Convention." *Id.* at p. 8 (emphasis contained in original). The problem with this argument is that it relies upon a strained interpretation of dated caselaw and ignores the dictates of the Eleventh Circtuit's *Outokumpu Stainless USA, LLC v. Converteam SAS* decision. While Plaintiff argues that the Eleventh Circuit's *Outokumpu* decision is factually distinguishable from the present action because there "the defendant was incorporated by reference into contracts that contained an arbitration clause and, therefore, successfully argued that it was a party to the arbitration clause for purposes of removal jurisdiction[]", ECF No. 31 at p. 1; *see also* ECF No. 29 at pp. 9-10, the Court finds Plaintiff's argument to be unavailing. Indeed, it appears that Nipro is conflating the issue of jurisdiction with whether the Parties are bound to arbitrate; however, the Court's "initial jurisdictional inquiry is distinct from a determination of whether the parties are bound to arbitrate." 902 F.3d at 1324 (citing *Bautista*, 396 F.3d at 1301). Further, in *Outokumpu*, the Eleventh Circuit held:

> We join the Fifth, Eighth, and Ninth Circuits and agree that the "relates to" language of Section 205 provides for broad removability of cases to federal court. While the link between the arbitration agreement and the dispute is not boundless, the arbitration agreement need only be sufficiently related to the dispute such that it *conceivably affects the outcome of the case*. Thus, as long as the argument that the case "relates to" the arbitration agreement is not immaterial, frivolous, or made solely to obtain jurisdiction, the relatedness requirement is met for purposes of federal subject matter jurisdiction.

902 F.3d at 1323–24 (emphasis added). In reaching this holding, the Eleventh Circuit discussed and relied upon the Fifth Circuit's decision in *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002). The Eleventh Circuit's discussion of the *Beiser* decision is as follows:

> In *Beiser*, a consulting company's principal [was] sued in his individual capacity regarding an oil investment. 284 F.3d at 666. The investment was financed by an agreement between the consulting company and a non-party which contained an arbitration provision. The plaintiff challenged jurisdiction as he did not sign the arbitration agreement. The Fifth Circuit, after noting that the plain meaning of "'relates to' sweeps broadly," held that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit" sufficient for removal jurisdiction. *Id.* at 669 (emphasis in original). Both the Eighth and Ninth Circuits have followed the Fifth Circuit. *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 844 (8th Cir. 2012) ("Joining the Fifth and Ninth Circuits, this court holds that a case may be removed under § 205 if the arbitration could conceivably affect the outcome of the case."); *Infuturia Glob. Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1137–38 (9th Cir. 2011) (noting that the Fifth

> Circuit "construed this language to mean that 'whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement "relates to" the plaintiff's suit.'

Outokumpu Stainless USA, LLC, 902 F.3d at (quoting *Beiser*, 284 F.3d at 669).

Based upon the above, it is apparent that the Eleventh Circuit's removal jurisdiction analysis in *Outokumpu* expressly rests upon a decision from the Fifth Circuit, in which the plaintiff challenged jurisdiction on the grounds that he did not sign an arbitration agreement. This is analogous to the situation presented here as Nipro readily admits that it signed the IDA with NDI (n/k/a Trividia), ECF No. 31 at pp. 4-7, but argues that the IDA's arbitration provisions cannot confer jurisdiction because Defendants did not sign the Agreement. In fact, Nipro's argument here is even less compelling than the argument put forth in *Beiser* where the individual plaintiff did not sign the agreement. Yet, there, the Fifth Circuit still found that the agreement conferred jurisdiction for purposes of removal. 284 F.3d at 675. Additionally, as previously discussed, in *Outokumpu* the Eleventh Circuit cautioned that "in determining jurisdiction, the district court need not and—should not—examine whether the arbitration agreement binds the parties before it." 902 F.3d 1324. Because the Eleventh Circuit has established that this Court should not examine whether the arbitration agreement binds the parties before it, Nipro's argument – that this Court lacks removal jurisdiction because Defendants are not signatories to the IDA – necessarily fails.

Moreover, the Court finds that Defendants have met their burden of proof concerning the agreement in writing prerequisite. To be clear, Defendants attached the IDA as Exhibit D to their Notice of Removal. Article XVI of the IDA contains a written arbitration clause that provides as follows:

> All disputes and differences of any kind arising under this Agreement, including the existence or continued existence of this Agreement and the arbitrability of a particular issue, which cannot be settled amicably by the parties, shall be submitted to final and binding arbitration. The arbitration shall be conducted, in English, and shall be submitted to the International Chamber of Commerce ("ICC") in New York City, New York, to be conducted in accordance with the provisions of the Rules of Arbitration of the International Chamber of Commerce in effect on the date of such controversy or claim as in effect at the time of the arbitration.

ECF No. 1-5 at p. 12. Notably, Plaintiff does not dispute the veracity or authenticity of Exhibit D to Defendants' Notice of Removal. Additionally, Plaintiff and NDI are signatories to the IDA. *Id.* at p. 14.

The Court also finds that Defendants have articulated non-frivolous bases to satisfy the other three *Bautista* prerequisite factors i.e. that the agreement provides for arbitration in the territory of a signatory to the Convention, the agreement to arbitrate arises out of a commercial legal relationship, and a party to the agreement is not an American citizen. The Court will briefly address each of these prerequisites in turn.

i. SECOND *BAUTISTA* PREREQUISITE SATISFIED: THE IDA PROVIDES FOR ARBITRATION IN THE TERRITORY OF A SIGNATORY TO THE CONVENTION

The IDA provides for arbitration in the territory of a signatory to the Convention – the United States. According to Plaintiff's Complaint, NDI – a signatory to the IDA – was a corporation organized and existing under the laws of the State of Delaware; however, upon a change of ownership, NDI's name was changed to Trividia and it is presently alleged to be headquartered in Fort Lauderdale, Florida. ECF No. 1-2, Compl. at ¶ 4. As previously discussed, under the terms of the IDA, the arbitration is to be conducted in New York, New York. And the United States is a signatory to the Convention. *Ytech*, 359 F. Supp. 3d at 1261 n.2. Thus, the second *Bautista* prerequisite is satisfied.

ii. THIRD *BAUTISTA* PREREQUISITE SATISFIED: THE IDA ARISES FROM A COMMERCIAL RELATIONSHIP

The agreement to arbitrate arises out of a commercial legal relationship. As mentioned previously, the Notice of Removal alleges that the IDA arises out a commercial legal relationship – the purchase, marketing, and sale of certain medical products. ECF No. 1 at ¶ 16. Accordingly, the third *Bautista* prerequisite is satisfied.

iii. FOURTH *BAUTISTA* PREREQUISITE SATISFIED: NIPRO IS NOT A U.S. CITIZEN

A party to the agreement is not a U.S. Citizen. According to its own Complaint, Nipro – a signatory to the IDA – is a Japanese Corporation headquartered in Osaka, Japan. Compl. at ¶ 2. Thus, Nipro is not a U.S. Citizen. This satisfies the fourth prerequisite of the *Bautista* factors.

In conclusion, based upon the above, the Court finds that the first step of the removal jurisdiction analysis is satisfied.

b. NON-FRIVOLOUS BASIS TO CONCLUDE THAT THIS LAWSUIT "RELATES TO" AN ARBITRATION AGREEMENT THAT FALLS UNDER THE CONVENTION

With respect to the second step of the jurisdictional inquiry, the Court finds that Defendants have established that there is a non-frivolous basis to conclude that this lawsuit "relates to" an arbitration agreement that falls under the Convention. In its Complaint, Plaintiff alleges:

> Trividia has asserted a claim against Nipro in another forum claiming breach of the IDA for failure to meet the minimum purchase requirements for Year 3. . . . Nipro's reliance on their trusted agents landed them in [a] lawsuit with Trividia where they are exposed to at least $56.7 million in damages and have had to incur substantial legal fees in that claim. . . . An award to Trividia under the IDA would constitute damages caused by Defendants' egregious acts.

ECF No. 1-2, Compl. at ¶ 62, ¶¶ 94-95. *See also id.* at ¶ 86 ("As a result, on February 27, 2018, Trividia filed a claim against Nipro in another forum seeking a declaration that Trividia has a contractual remedy it may pursue against Nipro in addition to termination of the IDA in the event Nipro fails to meet the minimum purchase amounts for Years 3 through 5. Trividia also sought an award of entitlement to damages, which it values at $56.7 million. That claim is still pending."). Accordingly, Plaintiff, by its own allegations, establishes that the vast majority of its damages claims in this action are predicated on its potential $56.7 million in damages to Trividia under the IDA. Meaning that the arbitration agreement between Plaintiff and Trividia is sufficiently related to the present action such that it could conceivably affect the outcome in this case. To be clear, if in the action between Trividia and Plaintiff the arbitration panel determined that Plaintiff did not breach its agreement with Trividia, then Plaintiff's damages in this case would be substantially less than $56.7 million as damages would be limited to the transaction bonus payments. Therefore, the Court finds that there is a non-frivolous basis to conclude this lawsuit relates to an arbitration agreement that falls under the Convention.

Moreover, the Court finds Plaintiff's "chicken or the egg" argument regarding the timing of the accrual of its tort claims against Defendants to be unavailing and disingenuous because Plaintiff's tort claims against Defendants are inextricably intertwined with Plaintiff's claims and defenses at issue in the arbitration between Plaintiff and Trividia. The Court, therefore, finds that the second step of its removal jurisdiction inquiry is satisfied. As a result, for the reasons discussed above, Plaintiff's Renewed Motion to Remand must be denied.

IV. RENEWED MOTION TO COMPEL ARBITRATION[2]

The Court having dispatched with Plaintiff's Renewed Motion to Remand, the Court will now turn to Defendants' Renewed Motion to Compel Arbitration.

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[2] Nipro suggests that Defendants have committed a "bait and switch" because they removed this case under the Convention (Chapter 2) but seek to compel arbitration under Chapter 1 (the FAA). Specifically, Nipro argues "Defendants inconsistently claim this Court has jurisdiction under the Convention (Chapter 2) while concurrently moving to compel arbitration under the FAA (Chapter 1)." ECF No. 27 at p. 8. Nipro makes this argument seemingly in an attempt to suggest that a party cannot remove under the Convention and then seek to compel arbitration under the FAA. What is troubling is that Nipro makes this argument without providing any case law to support it. Moreover, Nipro's argument flies in the face of established law. In relevant part, Chapter 1 of the FAA provides as follows:

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

9 U.S.C.A. § 2. "The 'traditional principles of state law' that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. . . . For example, [the U.S. Supreme Court has] recognized that arbitration agreements may be enforced by nonsignatories through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Outokumpu Stainless USA, LLC*, 140 S. Ct. at 1643–44 (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009)). Meanwhile, Chapter 2 of the FAA grants federal courts jurisdiction over actions governed by the Convention. *Id.*, 140 S. Ct. at 1645. Chapter 2 also provides that "'Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention.' § 208." *Id.* (quoting 9 U.S.C. § 208). In *Outokumpu Stainless USA, LLC*, the U.S. Supreme Court analyzed the Convention to determine whether Chapter 1 (of the FAA) conflicted with the Convention. After conducting its analysis the Court reasoned that "the only provision of the Convention that addresses the enforcement of arbitration agreements is Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention 'conflict[s] with' the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA. 9 U.S.C. § 208." *Id.* at 1645. Accordingly, the U.S. Supreme Court, just as recently as 2020, has held that the Convention does not preclude a nonsignatory from compelling arbitration under Chapter 1 of the FAA. *See Northrop and Johnson Yachts-Ships, Inc. v Royal Van Lent Shipyard, B.V.*, 20-13442, 2021 WL 1157833, at *5 (11th Cir Mar. 26, 2021) (recognizing that "the New York Convention does not prohibit the application of domestic equitable estoppel doctrines[.]"): *see also McCullough v. AIG Ins. Hong Kong Ltd.*, 828 F. App'x 704, 705-06 (11th Cir. 2020) (noting that in *Outokumpu Stainless USA, LLC* "the Supreme Court held

A. Legal Standard

"The Eleventh Circuit treats a motion to compel arbitration as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Tracfone Wireless, Inc. v. Simply Wireless, Inc.*, 229 F. Supp. 3d 1284, 1292 (S.D. Fla. 2017) (citing *McElmurray v. Consol. Gov't of Augusta–Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007)). "Because a factual Rule 12(b)(1) motion challenges the court's power to hear the claim, the court must closely examine the plaintiff's factual allegations and 'is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Vulpis v. Credit Acceptance Corp.*, No. 16-61200-CIV, 2016 WL 10932954, at *2 (S.D. Fla. Sept. 22, 2016) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). Furthermore, in conducting this analysis the court "is not limited to the four corners of the complaint, and it may consider materials outside of the pleadings to determine whether or not it has jurisdiction." *Id.* "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). *See Barnes v. StubHub, Inc.*, 19-80475-CIV, 2019 WL 11505575, at *2–3 (S.D. Fla. Oct. 3, 2019).

In reviewing a motion to compel arbitration, a district court must consider three factors: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. *Yakovee v. Miami Heat Ltd. P'ship*, 20-20540-CIV, 2020 WL 9256557, at *2 (S.D. Fla. Apr. 30, 2020).

B. The Parties Must Arbitrate This Dispute

In their Renewed Motion to Compel Arbitration, Defendants argue that they can compel Plaintiff to arbitrate this dispute despite the fact that they are not signatories to the IDA. And, of course, Plaintiff disagrees.

"The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime

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that nothing in the New York Convention conflicts with the application of relevant equitable doctrines."). The Court, therefore, finds that Nipro's "bait and switch" argument lacks merit.

transaction or 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." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "The FAA thereby places arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)". *Rent-A-Ctr.*, 561 U.S. at 67. "Consequently, when asked to compel arbitration of a dispute courts must first determine whether the parties agreed to arbitrate that dispute." *Ytech 180 Units Miami Beach Investments LLC*, 359 F. Supp. 3d at 1263 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626). "The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the FAA.'" *Id.*

1. THERE IS A VALID ARBITRATION AGREEMENT

As an initial matter, the Court finds that there is a valid arbitration agreement within the IDA. In fact, Nipro does not suggest or argue that the arbitration agreement between itself and Trividia is not valid. Indeed, as discussed herein, Nipro and Trividia have already arbitrated, pursuant to the IDA's arbitration provisions, their dispute related to Trividia's breach of contract claim against Nipro. Nipro's arguments in this action center around whether Defendants *can* invoke the IDA's arbitration provisions not whether those provisions are valid. As such, the Court finds that the arbitration provisions within the IDA are valid as between Nipro and Trividia. The Court will address below Nipro's contentions concerning whether Defendants can invoke them.

2. CHOICE OF LAW: NEW YORK LAW GOVERNS THE DETERMINATION OF WHETHER DEFENDANTS CAN COMPEL NIPRO TO ARBITRATE

The cornerstone of Nipro's arguments throughout its opposition brief as well as its remand motion is that it did not agree to arbitrate against Defendants. In that vein, Nipro contends that the Court cannot compel arbitration because Defendants are not signatories to the IDA.[3] The Court finds this argument to be unpersuasive.

[3] Additionally, Nipro argues that this Court lacks jurisdiction in this matter because "the arbitration clause in the IDA does not fall under the Convention as Defendants have failed to produce an agreement between the parties within the meaning of the Convention." ECF No. 27 at p. 8. The Court has already determined that the IDA *does* fall under the Convention in

With respect to choice of law Nipro argues that Florida law governs this Court's determination of whether Defendants, as non-signatories to the IDA, can compel it to arbitrate. In urging the Court to follow Florida law, Plaintiff's argument is, once again, based upon the faulty assumption that this Court lacks jurisdiction over this matter. More specifically, Nipro assumes that Florida law should guide the Court's analysis because "Defendants reside in Broward County – where the torts were committed and the injury occurred . . . Nipro properly brought this action in Broward, and that is where this case should ultimately be heard." ECF No 27 at n.10. Thus, Nipro's choice of law argument is subsumed within its removal jurisdiction argument. This is unpersuasive given that the Court has already determined that it has removal jurisdiction over this matter. Plaintiff's argument also fails to address Eleventh Circuit and U.S. Supreme Court caselaw. In *Wexler v. Solemates Marine, Ltd.*, 16-CV-62704, 2017 WL 979212, at *4 (S.D. Fla. Mar. 14, 2017), this Court summarized that caselaw as follows:

> As stated by the Eleventh Circuit: 'A rule of contract law is that one who is not a party to an agreement cannot enforce its terms against one who is a party. . . The right of enforcement generally belongs to those who have purchased it by agreeing to be bound by the terms of the contract themselves.' *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1168 (11th Cir. 2011) (internal citations omitted). In the arbitration context, 'arbitration is a matter of contract [and] the FAA's strong proarbitration policy only applies to disputes that the parties have agreed to arbitrate.' *Id.* at 1170 (alteration in the original) (citations omitted). And as explained by the Supreme Court in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), 'an exception to that rule is that a nonparty may force arbitration 'if the relevant state contract law allows him to enforce the agreement' to arbitrate." *Lawson*, 648 F.3d at 1170 (quoting *Carlisle*, 556 U.S. at 632) (emphasis added). Accordingly, pursuant to the Supreme Court's decision in *Carlisle*, 'state law provides the rule of decision' on whether a nonparty can enforce an arbitration clause against a party. *Id.*

Here, the IDA provides that it "shall be governed and construed in accordance with the laws in effect in the state of New York to the exclusion of its rules on conflict of laws and the provisions of the United Nations Convention on Contracts for the International Sale of Goods." ECF No. 26, Ex. A at Art. XVII. As such, the Court finds that New York law governs the rule of decision on the question of whether a non-signatory may enforce an

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its discussion of Nipro's Renewed Motion to Remand. As such, the Court will not re-address that argument here.

arbitration provision against a signatory to the arbitration agreement. *See Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1354 (11th Cir. 2017) (citing *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170-71 (11th Cir. 2011) ("The issue of whether a non-signatory to an agreement can use an arbitration clause in that agreement to force a signatory to arbitrate a dispute between them is controlled by state law."). *See, e.g.*, *Sisca v. Hal Mar., Ltd.*, 20-CV-22911, 2020 WL 6581608, at *5 (S.D. Fla. Nov. 10, 2020) (finding that a non-signatory to an arbitration agreement could not use the doctrine of equitable estoppel to compel enforcement of an arbitration agreement because the law of the British Virgin Islands, the law governing the arbitration agreement, did not recognize such a doctrine); *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1361–62 (S.D. Fla. 2017) ("The law of the Bahamas governs the SEA and the Arbitration Clause therein. . . . Accordingly, for purposes of determining whether a non-party could enforce the Arbitration Clause, the Court must apply the law of the Bahamas"); *Judge v. Unigroup, Inc.*, No. 8:17-CV-201-T-23TGW, 2017 WL 3971457, at *4 (M.D. Fla. Sept. 8, 2017) (applying Florida law where agreement stated it was governed by Florida law, applying Ohio law where agreement stated it was governed by Ohio law, and applying Virginia law where agreement stated it was governed by Virginia law in action where non-signatories to arbitration agreements sought to compel arbitration); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014) ("The relevant Arizona law, made controlling by the Provider Agreement's choice-of-law clause, supports the non-signatory Defendants' motion to enforce the agreement to arbitrate against the Plaintiffs based on state-law equitable estoppel doctrine.").

Having determined that New York law governs this case. The Court must next address whether, under New York law, a non-signatory to an arbitration agreement can compel a signatory to arbitrate a dispute related to the agreement. In interpreting New York law, the Second Circuit "has recognized only 'limited theories upon which it is willing to enforce an arbitration agreement against a nonsignatory.'" *Boroditskiy v. European Specialties LLC*, 314 F. Supp. 3d 487, 493–94 (S.D.N.Y. 2018) (quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003) (quoting *Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 780 (2d Cir. 1995)). "There are five such theories: '1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.'" *Optibase, Ltd.*, 337 F.3d at 130 (quoting *Thomson–CSF*, 64 F.3d at 776). "District courts should narrowly construe

these five theories, each of which is governed by ordinary principles of contract and agency law." *Boroditskiy*, 314 F. Supp. 3d at 493 (citing *Thomson–CSF*, 64 F.3d at 776-80).

Defendants contend that, under New York law, they can compel Nipro to arbitrate this dispute under theories of equitable estoppel, agency, and assumption; however, Defendants also argue that because the IDA delegates the question of arbitrability to the arbitrator, the Court need not reach Defendants' equitable estoppel, agency, and assumption arguments. The Court will address each of Defendants' contentions in turn.

3. THE IDA DELEGATES TO THE ARBITRATOR QUESTIONS OF ARBITRABILITY

"Questions of arbitrability encompass two types of disputes: (1) disputes about 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement,' and (2) threshold disputes about 'who should have the primary power to decide' whether a dispute is arbitrable." *Ytech 180 Units Miami Beach Investments LLC*, 359 F. Supp. 3d at 1263 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). "When addressing the first type of dispute—whether a dispute is arbitrable—'any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). But when resolving the second type of dispute, i.e. whether a party has agreed that arbitrators should decide arbitrability, "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear unmistakable evidence that they did so." *Id.* (quoting *First Options of Chicago, Inc.*, 514 U.S. at 944. "Significantly, the question of who should decide arbitrability precedes the question of whether a dispute is arbitrable." *Id.* (citing *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1291 (10th Cir. 2017). "An Agreement to arbitrate arbitrability constitutes'"[a]n agreement to arbitrate a gateway issue' which 'is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.'" *Id.* at 1264 (quoting *Rent-A-Ctr.*, 561 U.S. at 68-70. Such agreements to arbitrate arbitrability are generally referred to as "delegation clause[es]." *Id.* Moreover, a delegation clause will be upheld if it represents the parties' "clear and unmistakable" intent to allow issues of arbitrability to be decided by an arbitrator.[4] *Id.*

[4] The Eleventh Circuit has cautioned that "[a]rbitration should not be compelled when the party who seeks to compel arbitration has waived that right." *In re Checking Account*

In response to Defendants suggestion that the IDA provides for the arbitrator to resolve issues of arbitrability, Plaintiff argues that "the 'clear and unmistakable evidence' test does not apply to non-signatories. Instead, the sufficient relationship test . . . is applicable." ECF No. 27 at p. 18. Nipro then goes on to argue that the cases upon which Defendants relies to support their delegation argument are "inapposite because the parties moving to compel arbitration in those cases were *signatories* to the respective contracts." *Id.* at 19. The Court, however, disagrees with Nipro's interpretation of Defendants' argument. To be clear, the key case upon which Defendants rest their argument is *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 207 (2d Cir. 2005). In fact, in their initial brief, Defendants devoted no less than 2.5 pages to analyzing and applying the *Contec* decision to the factual circumstances presented here. ECF No. 26 at 15-17. And contrary to Plaintiff's arguments, in *Contec* a non-signatory to an arbitration agreement sought to enforce the arbitration agreement against a signatory. The Second Circuit summarized the issue presented in *Contec* as follows:

> There can be no doubt that the 1999 Agreement bound its signatory Remote Solution to arbitrate any disputes with the Agreement's other signatory, namely, Contec L.P. If Contec remained in its original corporate form, Remote Solution would be compelled to arbitrate the indemnification dispute at the heart of this case. Contec L.P., however, has become Contec Corporation***. The question, therefore, is whether Contec Corporation's ability as a non-signatory to enforce the arbitration clause*** is an issue pertaining to the 'existence, scope or validity of the arbitration agreement' between Remote Solution and Contec L.P.

Contec Corp., 398 F.3d at 208-09 (emphasis added). Moreover, in *Contec*, with respect to "clear and unmistakable evidence" the Second Circuit stated:

Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014) (quoting *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1365 (11th Cir.1995)). "Waiver occurs when both: (1) the party seeking arbitration "substantially participates in litigation to a point inconsistent with an intent to arbitrate"; and (2) "this participation results in prejudice to the opposing party." *Id.* "Prejudice exists when the party opposing arbitration 'undergo[es] the types of litigation expenses that arbitration was designed to alleviate.'" *Id.* (quoting Morewitz, 62 F.3d at 1366). Here, there is no question that Defendants did not waive the right to compel arbitration. Specifically, the Court finds that Defendants did not substantially participate in litigation to a point inconsistent with an intent to arbitrate. Indeed, this Court's docket reflects that after removing this case, Defendants immediately moved to compel arbitration. *See* ECF Nos. 1 and 3. Notably, Nipro does not suggest or argue that Defendants waived the right to arbitrate.

> Under the FAA, there is a general presumption that the issue of arbitrability should be resolved by the courts. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995). Acknowledging this presumption, we have held that 'the issue of arbitrability may only be referred to the arbitrator if there is *clear and unmistakable evidence* from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.' [*Bell v. Cendant Corp.*, 293 F.3d 563, 565–66 (2d Cir.2002)] (internal quotations omitted).

Contec, 398 F.3d at 208. After determining that there was clear and unmistakable evidence from the arbitration agreement that the parties intended that the arbitrator decide the question of arbitrability, the Second Circuit then went on to state:

> As an initial matter, we recognize that just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory. In order to decide whether arbitration of arbitrability is appropriate, a court must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement. *See First Options*, 514 U.S. at 944–45 (discussing the necessity of threshold determination by courts before referring issues of arbitrability to arbitrators). A useful benchmark for relational sufficiency can be found in our estoppel decision in *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, where we held that the signatory to an arbitration agreement "is estopped from avoiding arbitration with a non-signatory 'when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" 271 F.3d 403, 404 (2d Cir.2001) (quoting *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l Inc.*, 198 F.3d 88, 98 (2d Cir.1999)). In *Choctaw*, we summarized the factors laid out in *Smith/Enron* as "the relationship among the parties, the contracts they signed (or did not), and the issues that ha[ve] arisen." *Id.* at 406.

Contec Corp., 398 F.3d at 209 (alteration in original). Next, the Second Circuit "address[ed] the more precise question presented here: whether a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration. Although our circuit has not previously considered this question, we are not without guidance in federal law." *Id.* at 209-210. The Second Circuit then analyzed the First Circuit's decision in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir.1989). There, the First Circuit was presented with the question of whether a non-signatory to an arbitration agreement could compel a signatory to the agreement to arbitrate a dispute. Ultimately, the court answered the question in the affirmative. In doing so, it reasoned and held as follows:

> By contracting to have all disputes resolved according to the Rules of the ICC, however, [the signatory] agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a prima facie agreement to arbitrate whose continued existence and validity is being questioned. The arbitrator should decide whether a valid arbitration agreement exists between [the signatory] and the [non-signatories] under the terms of the contract between [the signatories to the contract].

Id. at 473–74. In analyzing and applying the *Apollo* decision to the facts presented in *Contec*, the Second Circuit reasoned:

> In *Apollo*, the court recognized that the question of arbitrability would ordinarily be subject to judicial determination rather than arbitration. . . . However, because Apollo, like Remote Solution, agreed to be bound by provisions that clearly and unmistakably allow the arbitrator to determine her own jurisdiction over an agreement to arbitrate whose continued existence and validity is being questioned, it is the province of the arbitrator to decide whether a valid arbitration agreement exists. We therefore conclude that as a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, Remote Solution cannot now disown its agreed-to obligation to arbitrate all disputes, including the question of arbitrability.

Contec Corp., 398 F.3d at 211 (citations and internal quotation marks omitted).

Based upon the above, this Court will follow *Contec*'s framework for determining whether Defendants, as non-signatories to the IDA, can compel Nipro to arbitrate this dispute. In relevant part, the arbitration provision within the IDA states as follows:

> All disputes and differences of any kind arising under this Agreement, ***including the existence or continued existence of this Agreement and the arbitrability of a particular issue***, which cannot be settled amicably by the parties, ***shall be submitted to final and binding arbitration***. The arbitration shall be conducted, in English, and shall be submitted to the International Chamber of Commerce ("ICC") in New York City, New York, ***to be conducted in accordance with the provisions of the Rules of Arbitration of the International Chamber of Commerce*** in effect on the date of such controversy or claim as in effect at the time of the arbitration.

ECF No. 26, Ex. A at Art. XVI (emphasis added). Accordingly, the IDA explicitly incorporates rules that empower an arbitrator to decide issues of arbitrability. This is identical to the scenario presented in *Contec* where the Second Circuit held "when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such

issues to an arbitrator." *Contec Corp.*, 398 F.3d at 208. As such, the Court finds that the IDA serves as clear and unmistakable evidence of Nipro's and Trividia's intent to delegate issues of arbitrability to an arbitrator.

Next, the Court finds that that there is a sufficient relationship between Nipro and Defendants and the rights created under the IDA.[5] There are a host of reasons that support this finding. Namely, Nipro's Complaint establishes that: 1) NDI was a subsidiary of Nipro; 2) Trividia is NDI's post-Deal name/amalgamation; 3) Defendants were former officers of NDI; 4) Nipro empowered Defendants, as officers of NDI, to negotiate the IDA on Nipro's behalf; 5) Defendants are now officers of Trividia; 6) Trividia and Nipro both executed the IDA; 7) Nipro's claims against Defendants stem from Nipro's assertions that Defendants acted in fiduciary roles when they purportedly advised Nipro regarding the terms of the IDA and negotiated the IDA on behalf of Nipro; 8) Nipro's tort claims against Defendants are

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[5] Nipro contends that in *Contec* the Second Circuit "found there was a sufficient relationship between the parties and to the rights created under the agreement because the alleged non-signatory was a newly formed company of the signatory to the contract." ECF No. 27 at pp. 19-20. This is not a complete reflection of the Second Circuit's rationale with respect to its sufficient relationship analysis. The *Contec* decision simply does not state what Nipro contends that it does. To be clear, in *Contec*, the Second Circuit found that there was a sufficient relationship between the parties because:

> First, there is or was an undisputed relationship between each corporate form of Contec and Remote Solution. Secondly, Remote Solution signed the 1999 Agreement. Finally, the dispute at issue arose because the parties apparently continued to conduct themselves as subject to the 1999 Agreement regardless of change in corporate form.

Contec Corp., 398 F.3d at 209. Moreover, as discussed above, in providing guidance as to how courts should evaluate whether there was a sufficient relationship between the parties the Second Circuit stated "[a] useful benchmark for relational sufficiency can be found in our estoppel decision in *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, where we held that the signatory to an arbitration agreement 'is estopped from avoiding arbitration with a non-signatory 'when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'" *Id.* (quoting *Choctaw*, 271 F.3d at 404 quoting *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l Inc.*, 198 F.3d 88, 98 (2d Cir.1999)). Thus, the *Contec* court did not solely rest its sufficient relationship analysis on the fact that the non-signatory was purportedly a newly formed company of a signatory to the contract. Instead, in *Contec*, the Second Circuit recognized that a "useful benchmark" for the sufficient relationship analysis is the interrelatedness of the issues that the non-signatory seeks to have resolved through arbitration and the arbitration agreement.

based upon and inextricably intertwined with Nipro's claims at issue in the arbitration between Nipro and Trividia; 9) Nipro's arbitration with Trividia stems from the arbitration clause in the IDA; 10) the vast majority of Nipro's alleged damages against Defendants are based upon Nipro's potential liability to Trvidia; and 11) if Nipro and Trividia had not executed the IDA, then the basis for this dispute would be substantially, if not completely, undermined.

Finally, the Court finds that as a signatory to the IDA, which contains an arbitration clause that delegates questions of arbitrability to an arbitrator and incorporates by reference the Rules of Arbitration of the International Chamber of Commerce, Nipro cannot now disown its agreed-to obligation to arbitrate all disputes arising under the IDA.

4. THE IDA'S ARBITRATION CLAUSE IS BROAD AND ENCOMPASSES NIPRO'S TORT CLAIMS AGAINST DEFENDANTS

The Court has found that the arbitrator should resolve issues of arbitrability pursuant to the delegation clause within the IDA. Nonetheless, alternatively, the Court finds that arbitration clause encompasses Nipro's tort claims against Defendants. The Second Circuit has prescribed a two-step inquiry to determine whether a dispute falls within a particular arbitration clause:

> First, ... a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that "is on its face within the purview of the clause," or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, 'there arises a presumption of arbitrability' and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'

China Auto Care, LLC v. China Auto Care (Caymans), 859 F. Supp. 2d 582, 586 (S.D.N.Y. 2012) (quoting *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (citations omitted)). *See Gerling Glob. Reinsurance Corp. v. Home Ins. Co.*, 752 N.Y.S.2d 611, 618 (App. Term 1st Dep't 2002) (finding the Second Circuit's decision in *Louis Dreyfus Negoce S.A.*, *supra*, to be "instructive" with respect to that court's "analysis of the distinction between a narrow and broad arbitration clause."); *see also Episcopal Health Services, Inc. v. Kurron Shares of Am., Inc.*, 934 N.Y.S.2d 33 (Sup. Ct. 2011), *aff'd*, 939 N.Y.S.2d 853 (2012).

Further, "[a]ny doubts about the scope of the arbitration agreement are resolved in favor of arbitration." *Simon J. Burchett Photography, Inc. v. Maersk Line Ltd.*, 20CIV3288GBDRWL, 2021 WL 1040472, at *3 (S.D.N.Y. Mar. 18, 2021) (citing *Abdullayeva v. Attending Homecare Servs. LLC*, 928 F.3d 218, 222 (2d Cir. 2019)).

As previously mentioned, the IDA's arbitration clause states:

> *All disputes and differences of any kind arising under this Agreement, including the existence or continued existence of this Agreement and the arbitrability of a particular issue*, which cannot be settled amicably by the parties, shall be submitted to final and binding arbitration.

ECF No. 1-5 at p. 13 (emphasis added). Nipro contends that the arbitration clause's use of the phrase "arising under" means that the clause is narrow. Specifically, Nipro argues in an incredibly strained manner that "the narrow scope of the IDA's arbitration provision does not encompass claims that do not 'arise under' the IDA and are not between parties to the IDA – Nipro and **Trividia**." ECF No. 27 at p. 11 (emphasis in original). To support this argument, Nipro cherry picks Florida case law and then contends that the New York case law upon which Defendants' contrary argument rests is inapplicable. *Id.* at pp. 11-12. Nipro's arguments fail.

First, as previously discussed, this dispute is governed by New York law so Nipro's reliance upon Florida case law is misplaced.

Second, Nipro's argument invites this Court to add language to the IDA's arbitration clause to find that the clause somehow contains language that limits its provisions to only Nipro and Trividia. The Court declines such an invitation. Indeed, there is no such limiting language within the clause and the Court cannot add such language. It is telling that Nipro did not cite to any case law that would permit the Court to add such language to an arbitration clause.

Third, courts in the Second Circuit construe the phrase "arising under" to be broad. *See Watson v. USA Today Sports Media Group, LLC*, 17 CIV. 7098 (NRB), 2018 WL 2316634, at *2 (S.D.N.Y. May 8, 2018) ("Here, the Arbitration Clause provides that '[a]ny dispute arising under this Agreement shall be' arbitrated. Agreement ¶ 11 (b). This provision is a paradigmatic 'broad' arbitration clause."); *Donner v. GFI Capital Res. Grp.*, No. 16 Civ. 9581 (CM), 2017 WL 2271533, at *3 (S.D.N.Y. May 2, 2017) ("'[A]ny disputes, differences or controversies arising under [the] Agreement shall be' arbitrated" is a broad arbitration clause);

China Auto Care, LLC, 8 59 F. Supp. 2d 582, 586-87 (S.D.N.Y. 2012) ("All disputes, claims or controversies arising under this Agreement ... shall be finally settled by arbitration" constitutes a broad arbitration clause). This Court, therefore, finds that the IDA's arbitration clause is broad.

Having found that the IDA's arbitration clause is broad "there arises a presumption of arbitrability, such that all issues that 'touch matters' within the main agreement" must be arbitrated. *Watson*, 2018 WL 2316634, at *3 (quoting *ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F. 3d 24, 34 (2d Cir. 2002) (internal quotations marks omitted)). In applying this standard, "the proper focus is on the 'factual allegations in the complaint rather than the legal causes of action asserted[.]'" *Id.* (quoting *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 173 (2d Cir. 2004)). While Nipro only asserts tort claims against Defendants, those tort claims touch matters within the IDA. More specifically, as discussed in more detail below, Nipro's factual allegations supporting its claims that Defendants violated their fiduciary duties because Defendants purportedly did not inform Nipro of better pricing terms necessarily rely upon and touch on the pricing terms contained within IDA. Moreover, as discussed in more detail below, through this action Nipro seeks to recoup from Defendants any damages that it is found liable for in the arbitration proceeding between it and Trividia. Therefore, the IDA's arbitration clause does encompass Nipro's tort claims.

5. NIPRO IS ESTOPPED FROM REFUSING TO ARBITRATE THIS DISPUTE AGAINST DEFENDANTS

In addition to the above, the Court finds that equitable estoppel requires that the Parties arbitrate this dispute.

Under New York law, "[a] signatory to an arbitration clause is estopped from refusing to arbitrate against a non-signatory where (1) the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed and (2) there is a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the non-signatory." *Doe v. Trump Corp.*, 453 F. Supp. 3d 634, 640 (S.D.N.Y. 2020) (quoting *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127 (2d Cir. 2010) (internal quotation marks omitted) and citing *Dowe v. Leeds Brown Law, P.C.*, 419 F. Supp. 3d. 748, 757-58 (S.D.N.Y. 2019)).

a. THE ISSUES DEFENDANTS ARE SEEKING TO RESOLVE IN ARBITRATION ARE INTERTWINED WITH THE IDA

The Second Circuit has not "specified the minimum quantum of 'intertwined-ness' required to support a finding of estoppel." *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 178 (2d Cir. 2004); *accord Bankers Conseco Life Ins. Co. v. Feuer*, No. 16 Civ. 7646, 2018 WL 1353279, at *5 (S.D.N.Y. Mar. 15, 2018). "Intertwined-ness" depends on how related the factual issues of the claims are to the subject matter of the arbitration agreements. *Doe*, 453 F. Supp. 3d at 640 (citing *Ragone*, 595 F.3d at 128 and *Bankers Conseco Life Ins.*, 2018 WL 1353279, at *5)). Stated in a different way, "a determination of intertwined-ness is dependent on the facts and circumstances of the plaintiffs' claims and the underlying agreement containing the arbitration provision." *City of Almaty, Kazakhstan v. Sater*, 19CV2645AJNKHP, 2019 WL 6681560, at *12 (S.D.N.Y. Dec. 6, 2019).

Here, it is difficult to see a basis for Plaintiff's claims against Defendants without the existence of the IDA. In relevant part, Plaintiff alleges the following:

> Defendants in their roles as officers of NDI, during the course of advising Nipro with respect to the deal (the "Deal") to sell NDI's stock to Shenzhen Xinnuo Health Industry Investment Company Limited (also known as "Sinocare"), Defendants committed the following torts: breach of fiduciary duty, aiding and abetting breaches of a fiduciary duty, fraud, constructive fraud, negligent misrepresentation, and civil conspiracy. ECF No. 1-2, Compl. ¶ 9. According to Nipro, in derogation of their fiduciary duties to Nipro, Defendants engaged in multiple acts of self-dealing, misrepresentations and omissions that misled Nipro into executing a distribution agreement for the purchase of diabetes monitoring products from Trividia that contained terms to which Nipro did not agree and Defendants' acts of self-dealing, misrepresentations and omissions also misled Nipro into accepting less favorable pricing terms for the products. *Id.* at ¶ 10.
>
> Prior to the closing and execution of the IDA, Defendants repeatedly assured Nipro that the terms of the IDA adequately reflected Nipro's non-negotiable, no minimum volume/no penalty terms. *Id.* at ¶ 55. Based on these repeated assurances, Nipro agreed to be bound to a two-year commitment for purchase minimums that could subject Nipro to a penalty or damages in the event Nipro fell short of the minimum volume purchases in only Years 1 and 2. *Id.* at ¶ 56. While Defendants were misrepresenting the IDA terms to Nipro, they were working with Sinocare and Greenberg [Traurig, LLP] to finalize an IDA that expressly contradicted Nipro's no minimum volume/no penalty terms by omitting any mention of Trividia's waiver of damages and penalty in the event of a purchase minimum shortfall for Years 3 through 5. *Id.* at ¶ 57. It subsequently came to light that, despite Defendants making repeated

> reassurances to Nipro that it would not be liable for any damages for failing to meet minimum purchase volumes in Years 3 through 5, Defendant Scott Verner failed to ensure that the IDA reflected such terms. *Id.* at ¶ 61. Instead, Defendants are now, on behalf of Trividia, claiming the exact opposite. *Id.* Indeed, Trividia has asserted a claim against Nipro in another forum claiming breach of the IDA for failure to meet the minimum purchase requirements for Year 3. *Id.* at ¶ 62.

Nipro's own allegations demonstrate that its claims against Defendants are intertwined with and based upon the IDA. Indeed, if Nipro had never signed the IDA, the basis for this dispute would be substantially, if not completely, undermined. This conclusion is buttressed by the fact that Nipro directly alleges that the vast majority of its damages against Defendants are entirely based upon the damages it may be found liable for as a result of the arbitration between itself and Trividia. *See* ECF No. 1-2, Compl. at ¶ 62, ¶¶ 94-95. ("Trividia has asserted a claim against Nipro in another forum claiming breach of the IDA for failure to meet the minimum purchase requirements for Year 3. . . . Nipro's reliance on their trusted agents landed them in [a] lawsuit with Trividia where they are exposed to at least $56.7 million in damages and have had to incur substantial legal fees in that claim. . . . An award to Trividia under the IDA would constitute damages caused by Defendants' egregious acts."); *see also id.* at ¶ 86 ("As a result, on February 27, 2018, Trividia filed a claim against Nipro in another forum seeking a declaration that Trividia has a contractual remedy it may pursue against Nipro in addition to termination of the IDA in the event Nipro fails to meet the minimum purchase amounts for Years 3 through 5. Trividia also sought an award of entitlement to damages, which it values at $56.7 million. That claim is still pending.").

Accordingly, the Court finds that the issues that Defendants are seeking to resolve through arbitration are intertwined with the IDA. *See JLM Indus., Inc*, 387 F.3d at 178 (finding requisite interrelated-ness where "[t]he questions the [non-signatories sought] to arbitrate [were] undeniably intertwined with the charters, since as we have already noted it is the fact of [the signatory's] entry into the charters containing allegedly inflated price terms that gives rise to the claimed injury."); *see also Denney v. Jenkens & Gilchrist*, 412 F. Supp. 26 293 (S.D.N.Y. 2005) ("plaintiff's actual dependence on the underlying contract in making out the claim against the non-signatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel").

b. THERE IS A SUFFICIENT RELATIONSHIP AMONG THE SIGNATORIES TO THE ARBITRATION AGREEMENT AND THE NON-SIGNATORY DEFENDANTS

As previously mentioned, the second prong of the estoppel analysis requires that there be "a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute' with the non-signatory." *Doe*, 453 F. Supp. 3d at 640 (quoting *Ragone*, 595 F.3d at 127 (internal quotation omitted) and citing *Dowe*, 419 F. Supp. 3d. at 757-58). On this point, the Court finds that there is a sufficient relationship among the signatories to the IDA and the non-signatory Defendants. As previously noted, Nipro's Complaint establishes that: 1) NDI was a subsidiary of Nipro; 2) Trividia is NDI's post-Deal name/amalgamation; 3) Defendants were former officers of NDI (and thereby former officers of Nipro); 4) Nipro empowered Defendants, as officers of NDI, to negotiate the IDA on Nipro's behalf; 5) Defendants are now officers of Trividia; 6) Trividia and Nipro both executed the IDA; 7) Nipro's claims against Defendants stem from Nipro's assertions that Defendants acted in fiduciary roles when they purportedly advised Nipro regarding the terms of the IDA and negotiated the IDA on behalf of Nipro; 8) Nipro's tort claims against Defendants are based upon and inextricably intertwined with Nipro's claims at issue in the arbitration between Nipro and Trividia; 9) Nipro's arbitration with Trividia stems from the arbitration clause in the IDA; 10) the vast majority of Nipro's alleged damages against Defendants are based upon Nipro's potential liability to Trividia in their arbitration proceeding; and 11) if Nipro and Trividia had not executed the IDA, then the basis for this dispute would be substantially, if not completely, undermined. Based upon these allegations, the Court finds that there was a relationship among the parties of such a nature that justifies the conclusion that Nipro, which agreed to arbitrate with Trividia, should be estopped from denying an obligation to arbitrate its dispute with Defendants. *See E.G.L. Gem Lab Ltd. v. Gem Quality Inst. Inc.,* No. 97 Civ. 7102, 1998 WL 314767, at *3 (S.D.N.Y. June 15, 1998) (compelling signatory plaintiff to arbitrate with non-signatory corporate president of signatory defendant where: (i) the president executed an agreement (on behalf of the signatory defendant); (ii) the agreement contained an arbitration clause; and (iii) the signatory plaintiff's claims against the president, were asserted against him in his individual capacity, but the claims implicated or related to the agreement in question).

6. NIPRO CAN BE COMPELLED TO ARBITRATE UNDER PRINCIPLES OF AGENCY

The Court also finds that principles of agency compel that the Parties arbitrate this dispute. Nipro argues, once again, that Florida law governs this dispute and then relies upon *Beltre v. Micron Devices, LLC*, 18-20399-CIV-MORENO, 2018 WL 6614284, *4 (S.D. Fla. Dec. 13, 2018) to support its contention that under Florida law "principles of equitable estoppel must *also* be satisfied to compel arbitration under an agency theory." ECF No. 27 at 17. This argument misses the mark. As previously discussed, this action is governed by New York law. *See Kroma Makeup EU, LLC*, 845 F.3d at 1354 (citing *Lawson*, 648 F.3d at 1170-71 ("The issue of whether a non-signatory to an agreement can use an arbitration clause in that agreement to force a signatory to arbitrate a dispute between them is controlled by state law."); *see also Sisca*, 2020 WL 6581608, at *5 (finding that a non-signatory to an arbitration agreement could not use the doctrine of equitable estoppel to compel enforcement of an arbitration agreement because the law of the British Virgin Islands, the law governing the arbitration agreement, did not recognize such a doctrine). As such, Plaintiff's reliance upon *Beltre*, which interpreted Florida's agency law, is erroneous. Moreover, as discussed below, New York law compels a different result.

"It is settled law that a corporation, while having an independent legal existence, can only operate through the actions of its officers and directors." *Hirschfeld Prods. v. Mirvish*, 630 N.Y.S.2d 726, 728 (1995), *aff'd*, 88 N.Y.2d 1054 (1996) (citing *Commission on Ecumenical Mission and Relations of United Presbyt. Church in U.S.A. v. Roger Gray, Ltd.*, 27 N.Y.2d 457, 463 (1974)). "The attempt to distinguish officers and directors from the corporation they represent for the purposes of evading an arbitration provision is contrary to the established policy of [New York] and the policy of the Federal courts." *Id.* Thus, "[a]lthough corporate agents are generally not bound by an arbitration provision contained in an agreement they signed only on behalf of the corporation, they are 'protected' by that agreement 'to the extent they are charged with misconduct within the scope of the agreement[ ].'" *McKenna Long & Aldridge, LLP v Ironshore Specialty Ins. Co.,* 14-CV-6633 KBF, 2015 WL 144190, at *7 (S.D.N.Y Jan. 12, 2015) (quoting *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993). "That is, the corporate agent may use the arbitration provision as a sword to compel arbitration, which is to say, a shield against litigation before a court." *Id.* (citing *Campaniello Imports, Ltd. v. Saporiti*

Italia S.p.A., 117 F.3d 655, 668-69 (2d Cir. 1997); *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 650 (S.D.N.Y. 2011)).

Furthermore, under New York law, a non-signatory to an arbitration agreement can compel a signatory to arbitrate under an agency theory. *See City of Almaty, Kazakhstan v. Sater*, 19CV2645AJNKHP, 2019 WL 6681560, at *9 (S.D.N.Y. Dec. 6, 2019) (citing *Degraw Const. Group, Inc.*, 58 N.Y.S.3d 152, 155 (App. Term 2d Dep't 2017)). In *Degraw Const. Group, Inc. v. McGowan Builders, Inc.*, the plaintiff sued the defendant McGowan Builders, Inc. to foreclose a mechanic's lien. *Degraw Const. Group, Inc.*, 58 N.Y.S.3d at 153. The plaintiff contended that it entered into an agreement with McGowan Builders to perform certain construction work and that it had not been adequately paid for the work it had performed pursuant to the agreement. *Id.* The complaint also included causes of action sounding in tort against McGowan Builders, Inc. and certain individual defendants that were alleged to be officers or employees of McGowan Builders, Inc. *Id.* The tort claims included claims for conversion, unfair competition, and tortious interference. *Id.* The defendants moved to compel arbitration; however, the trial court denied the motion because it concluded that the individual defendants were not signatories to the arbitration agreement and were therefore not able to enforce the arbitration agreement against the plaintiff. On appeal, the Appellate Division reversed the trial court's decision. In doing so, the Appellate Division reasoned that the individual defendants could enforce the arbitration agreement because the alleged misconduct attributed to the individual defendants related to their behavior as employees and officers of McGowan Builders, Inc. *Id.* at 155. The Appellate Division then went on to state "[a]s the Court of Appeals has recognized under similar circumstances, a rule allowing corporate officers and employees to enforce arbitration agreements entered into by their corporation is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement." *Id.* (citations and internal quotation marks omitted). *See also Hirschfeld Prods. v. Mirvish*, 88 N.Y.2d 1054, 1056 (1996) (affirming Appellate Division's reversal of trial court's order denying non-signatories' motion to compel arbitration and stating "[t]he Federal courts have consistently afforded agents the benefit of arbitration agreements entered into by their principals to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation. . . . The rule is necessary not only

to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement.") (citations omitted).

Here, as discussed throughout this Omnibus Order, Nipro's claims against Defendants involve Defendants' alleged conduct in negotiating the IDA as officers of NDI (which post-deal became Trividia). *See, e.g., supra* Section IV(5)(a). Based upon the allegations and claims in Nipro's Complaint, the Court finds that Defendants can enforce the arbitration agreement because the alleged misconduct Nipro attributes to Defendants relates to Defendants' alleged behavior as employees and officers NDI and later Trividia. Indeed, this case seems to be a prime example of a situation in which a signatory to an arbitration agreement is attempting to circumvent the agreement by suing non-signatory individual officers and employees. Nipro even alleges that through this action it is seeking to recoup as damages against Defendants any award that it may be ordered to pay to Trividia in the arbitration proceeding for its breach of that agreement. ECF No. 1-4, Ex. C, Compl. ¶ 95 ("An award to Trividia under the IDA would constitute damages caused by Defendants' egregious acts."); *see also id.* ¶ 94 ("Nipro's reliance upon their trusted agents landed them in [a] lawsuit with Trividia where they are exposed to at least $56.7 million in damages and have had to incur substantial legal fees in that claim."). Thus, through this action Nipro seeks to cancel out and potentially completely undermine any damages awarded against it in the arbitration proceeding between Nipro and Trividia. The Court cannot countenance this manipulation. Accordingly, the Court finds that principles of agency compel that Nipro arbitrate its dispute with Defendants.

7. NIPRO CAN BE COMPELLED TO ARBITRATE UNDER AN ASSUMPTION THEORY

As previously mentioned, Defendants also argue that Nipro can be compelled to arbitrate under an assumption theory. The Court agrees. "In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate." *Thomson-CSF, S.A. v Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir 1995) (citing *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991), *cert. denied*, 502 U.S. 910 (1991); *Matter of Arbitration Between Keystone Shipping Co. and Texport Oil Co.*, 782 F. Supp. 28, 31 (S.D.N.Y. 1992); and *In re Transrol Navegacao S.A.*, 782 F. Supp. 848, 851 (S.D.N.Y. 1991)). Again, "[t]he Second Circuit has 'recognized a number of common law principles of contract law that may allow non-signatories to enforce an

arbitration agreement, including equitable estoppel,' as well as 'the common law principles of incorporation by reference, assumption, agency, and veil-piercing/alter ego[.]'" *Butto*, 547 F.3d at 143 (quoting *Ross v. Am. Exp. Co.,* 547 F.3d 137, 143 & 143 n.3 (2d Cir. 2008)).

Here, Defendants argue that "Nipro's participation in the ICC arbitration and the arguments that it raised there against Defendants, demonstrate that it has assumed the obligation to arbitrate the issues and claims it now raises in this lawsuit." ECF No. 26 at 21. Meanwhile, Nipro argues that it "disavowed all of Defendants' attempts to bind it to the IDA regarding the tort claims at issue . . . [and] any defenses raised by Nipro in the arbitration were directed to Trividia – the only adverse party in [those] proceedings." ECF No. 27 at 18. Defendants provided the Court with a chart that purportedly compares Nipro's Complaint in this action with the arguments Nipro submitted in the arbitration. ECF No. 26-2, Ex. B. Nipro disputes the veracity of that chart. ECF No. 27 at p. 10. Nipro also argues that the affirmative defenses it asserted in the arbitration proceeding are of no consequence to this case because "these particular defenses of fraudulent inducement and aiding and abetting breach of fiduciary duty were withdrawn and not reasserted" in the arbitration proceeding. *Id.* To support this contention, Nipro directs the Court to its "Statement of Defense" dated July 31, 2019, filed in the arbitration proceeding. ECF No. 27-1. This 177-page document does not appear to directly assert arguments related to Defendants' purported breach of their fiduciary duties or misrepresentations to Nipro. However, this stands in stark contrast to Nipro's Corrected Statement of Rejoinder, dated November 22, 2019, which *does* assert multiple arguments related to Defendants' purported breach of their fiduciary duties and alleged misrepresentations to Nipro. ECF No. 28-1, Ex. A. For instance, in its Corrected Statement of Rejoinder, Nipro asserted the following:

- "Having switched sides now, since he works for Trividia, Verner conveniently disavows his own prior assurances to Nipro, supporting an interpretation of the IDA that makes no commercial sense, is contradicted by the plain language of the IDA, and to which Nipro never would have agreed. Verner knows what really happened, and so does Trividia. They also know that the story they are telling in this arbitration is divorced from the business realities of the situation." *Id.* at ¶ 2.

- "Here, assuming arguendo the contemporaneous communications and other evidence is not evidence of the actual agreement reached (and it clearly is), and thus, a mutual mistake requiring reformation, then Trividia, innocently, if not negligently or fraudulently, misled Nipro regarding Trividia's ability to recover damages in Contract Years three through five under the IDA. Under any of those scenarios, Verner's

misrepresentation materially and knowingly induced Nipro's signature. Indeed, this representation regarding the preclusion of damages under the terms of the IDA, as interpreted under New York law, proved to be false, as demonstrated by this Tribunal's decision in the Partial Final Award of October 29, 2018." *Id.* at ¶ 197.

- "It can hardly be disputed that Verner's 'no penalty for years 3, 4, or 5' representation was material to Nipro and induced its signature of the IDA." *Id.* at ¶ 198.

- "As such, this Tribunal can and should rescind the portions of the IDA relating to Contract Years three through five because Trividia has committed legal, i.e., equitable, fraud in the inducement based on a material—even if innocent—misrepresentation." *Id.* at ¶ 199.

- "In addition, as a matter of law, Trividia may not profit from aiding and abetting Verner's breaches of fiduciary duties to Nipro." *Id.* at ¶ 199 n.14.

- "Sorrentino misrepresented Trividia's commitment. Trividia had agreed to deliver 90,000 TRUE result 50-count strips on August 26, 2019, not as timely as possible after a new agreement was in place." *Id.* at ¶ 250.

The above reflects that Nipro did in fact assert arguments regarding Defendants' purported breaches of their fiduciary duties and misrepresentations in the arbitration proceeding. Indeed, the November 22, 2019 Corrected Statement of Rejoinder demonstrates that Nipro attempted to use Defendant's purported breaches of their fiduciary duties and misrepresentations as a basis for the Arbitration Panel to rescind the portions of the IDA relating to contract years three through five. In fact, in the Corrected Statement of Rejoinder, Nipro directly argued:

> A claim for rescission can be based on a: (1) a false material representation, (2) that plaintiff relied on, (3) to his detriment. RLA-068, *Albany Motor Inn & Rest., Inc. v. Watkins*, 445 N.Y.S.2d 797 (3d Dep't 1981). As set forth in detail in the Revised Initial Submission and Reply, Nipro has established each of these elements and is therefore entitled to partial rescission. *See* Respondent's Revised Initial Submission ¶¶ 96-122 and Reply Submission ¶¶ 56-84. Here, assuming arguendo the contemporaneous communications and other evidence is not evidence of the actual agreement reached (and it clearly is), and thus, a mutual mistake requiring reformation, then Trividia, innocently, if not negligently or fraudulently, misled Nipro regarding Trividia's ability to recover damages in Contract Years three through five under the IDA. Under any of those scenarios, Verner's misrepresentation materially and knowingly induced Nipro's signature. Indeed, this representation regarding the preclusion of damages under the terms of the IDA, as interpreted under New York law, proved to be false, as demonstrated by this Tribunal's decision in the Partial

> Final Award of October 29, 2018. It can hardly be disputed that Verner's 'no penalty for years 3, 4, or 5' representation was material to Nipro and induced its signature of the IDA. This is why Nipro refused to accept the prior version of the IDA, which provided for NDI's recovery of damages in all five years of the term if Nipro failed to meet its Annual Minimum Purchase obligations. (R036; *see also* RWS Iwasaki, ¶ 6; RWS Minoura, ¶ 10; RWS Wakatsuki, ¶ 8.). Nipro refused even under Verner's warning that resistance on this particular damage term could potentially risk the deal. (R-013.) In other words, it was so material to Nipro that it was willing to risk the entire deal rather than execute an IDA with five years of damages. . . . As such, this Tribunal can and should rescind the portions of the IDA relating to Contract Years three through five because Trividia has committed legal, i.e., equitable, fraud in the inducement based on a material—even if innocent—misrepresentation.

See id. at ¶¶ 195-199.[6]

In addition to the above arguments and statements that Nipro put forth in its briefing before the Arbitration Panel, the Arbitration Award also indicates that the Arbitration Panel recognized that Nipro presented those claims and arguments to the Panel. In that regard, the Arbitration Award states:

> On December 14, 2018, the Tribunal and the Parties held a conference call and arising from that was the Procedural Order of December 18, 2018 ("PO 12/18") which provided, in part, as follows:
>
> Turning now to a consideration of the issues which flow from the foregoing, and taking into account the issues which the Parties have each suggested in writing together with their oral comments during the telephone conference on December 14, 2018; it appears to the Tribunal that the following matters for resolution logically arise:
>
> A. For the purposes of either misrepresentation and/or mistake at the time of the execution of the Agreement, which are the relevant entities vis a vis the Respondent?
>
> B. Why did the Respondent not see or appreciate that the Agreement, which it

[6] It is disconcerting that Nipro did not advise the Court of the existence of its November 22, 2019 Corrected Statement of Rejoinder especially given that Nipro argued in the present action that it withdrew its defensive claims related to Defendants' purported breach of their fiduciary duties and misrepresentations and directed the Court to a July 31, 2019 document to purportedly demonstrate that it withdrew those defenses in the arbitration proceeding. This glaring omission could be construed as a violation of counsel's duty of candor to the Court. The Court will not make that leap at this juncture; however, Nipro's counsel is cautioned that any similar such conduct in the future may result in immediate sanctions.

> was about to execute, did not comport with the belief it had about years 3, 4, and 5? Is the reason given (namely, the contents of the email its then negotiator and servant, Mr Verner sent to it) legally sufficient as a matter of New York law to permit it not to be bound to the terms of the Agreement?
>
> C. In light of the resolution of issue 1, does Mr Verner's email constitute, as a matter of New York law, a misrepresentation? In what way, specifically? If it is a misrepresentation as a matter of New York law, then who, at the time it was made, is responsible for it?
>
> D. What, precisely, is the mistake alleged by the Respondent? Is it one of material fact (and why), or one of legal consequence (and why)? In the case of mutual mistake as at the moment of execution of the Agreement, (in light of the resolution of issue 1) who were the "parties" to such mutual mistake and how is this manifested?
>
> E. Are there matters which would preclude the Respondent's claims: (a) clause 16.2 of the Agreement; or (b) timely raising of the claims for rescission and/or reformation.
>
> F. What was the extent of Mr Verner's fiduciary duty to the Respondent, was it breached by any of his actions up to the execution of the Agreement, and if so, are there consequences for the performance of the Agreement now?
>
> G. Did the Parties use good faith efforts to mutually agree on the Annual Minimum Purchase for Contract Year 3 prior to the end of Contract Year 2?

ECF No. 26-3, Ex. C at at p. 9. The Arbitration Award also reflects that the Arbitration Panel resolved Plaintiff's claims and arguments related to Defendants' purported breaches of their fiduciary duties and misrepresentations. More specifically, the Arbitration Award states:

> In summary, the Tribunal concludes that an objective reading of the Agreement does not permit Respondent to terminate its commitments under the Agreement after the first two Contract Years. As best as it can ascertain from the evidence before the Tribunal, the Ringi was undermined by a fatal mistake in its preparation (which conclusion arises from the matters discussed at paras. 37 and 38 above). *Thus, while the Tribunal accepts that the Ringi was a bona fide source of mistake as to the consequences of the Agreement for persons within the Respondent, that mistake was caused not by Mr Verner, or Sinocare, but those who prepared that document*. In any event, the Tribunal mentions in passing that the Respondent's execution of the Agreement is not made subject to the Ringi. As a matter of New York law, Respondent is bound by an objective interpretation of the Agreement, and is not excused from its obligations under the Agreement by a subjective mistake it may have made arising from the Ringi when it entered into the Agreement.

Id. at p. 54 (emphasis added).

According to the Arbitration Award, "[t]he 'Ringi', namely, a detailed memorandum prepared by Mr. Minoura (confirmed at p. 819 of the transcript) describing the deal as a whole . . . The Ringi (R-357, p.11 thereof in translation) sets out [Mr. Minoura's] summary of the Agreement prior to its signature by the Respondent." *Id.* at p. 48. Moreover, the Arbitration Panel found that during Mr. Minoura's cross-examination "he conflated the 'no commitment in and after 3rd year' language with the 'no penalty' language contained in Mr. Verner's email as recorded above at para. 33." *Id.* And the Arbitration Panel found:

> [o]n its careful review of the foregoing matters in particular, and the evidential record generally, the Tribunal has considerable difficulty in accepting the Respondent's position. While there is evidence that the Respondent may have misunderstood the Agreement as a result of a mistake it made in preparing the Ringi, New York law requires contracts to be interpreted objectively. An objective interpretation of the Agreement does not excuse the Respondent from performing its obligations after Year Two where the parties fail to reach a good faith agreement on modifying purchase quantities in future years. Rather, the Agreement permits the parties to engage in good faith modifications, but, failing agreement, Respondent remains bound to purchase the pre-determined quantities for Years Three through Five.

Id. at p. 50. Furthermore, the Arbitration Award states:

> [T]he Tribunal finds that the email from Mr Verner (para. 33 above) in which he uses a particular phrase ("no penalty") was not reasonably relied upon to prepare the Ringi, rather than the actual text of the Agreement. Based on the evidence presented, the Tribunal concludes that in the Ringi process precision is deeply attached, with even the most minute level of detail thoroughly considered. The Tribunal accordingly is not persuaded that the preparation of the Ringi at hand relied, not on the actual contractual language, but an entirely separate email itself expressed in terse terms.

Id. at p. 51. And, finally, the Award states:

> The Tribunal records that it has taken note of, and considered, all submissions and evidence put before it. It has referred in this Final Award to those parts of the submissions and evidence it has considered necessary for the explanation of its reasoning; however, all submissions and evidence were taken account of, whether expressly referred to or not, in the formulation and articulation of the reasons and conclusions in this Final Award.

Id. p. 83.

Based upon the foregoing, the Court concludes that Nipro presented its claims and arguments related to Defendants' purported misrepresentations and breaches of fiduciary duties in the arbitration proceeding and, thereby, assumed the obligation to arbitrate these

claims. *See Thomson–CSF*, 64 F.3d at 777 ("In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."). Therefore, the Court finds that Nipro can and should be compelled to arbitrate this dispute under an assumption theory.

8. NIPRO'S ACCRUAL ARGUMENT LACKS MERIT

As an additional ground to avoid arbitrating this dispute, Nipro argues that "[t]here is no applicable agreement to arbitrate [its] tort claims against [Defendants] because, most notably, the injuries giving rise to the tort claims occurred before the existence of the IDA's arbitration clause." ECF No. 27 at p. 9. This argument is unavailing. Here, the IDA's arbitration clause states:

> *All disputes and differences of any kind arising under this Agreement, including the existence or continued existence of this Agreement and the arbitrability of a particular issue*, which cannot be settled amicably by the parties, shall be submitted to final and binding arbitration.

ECF No. 1-5 at p. 13. This clause does not have a temporal limitation. Meaning that the provisions do not contain language that could even suggest that the only claims that can be arbitrated are those that accrued after the signing of the IDA. This is dispositive. Where, as here, an arbitration clause does "not contain any temporal limitation," the Second Circuit has compelled arbitration despite the fact that the challenged conduct predated the signing of the parties' agreement. *See Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) ("SCI's argument that its claims against Enron concern events that predate the 1994 Agreement does not persuade us that the district court erred here in ordering arbitration. In *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972), we held that arbitration under the New York Stock Exchange Rules applied to actions predating the signing of the contract by the petitioner because the contract stated that it governed 'any controversy' between the parties. As the arbitration clause here similarly does not contain any temporal limitation, the relevant inquiry is whether SCI's claims 'relat[e] to any obligation or claimed obligation under' the 1994 Agreement, not when they arose."); *see also ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 31, 34 (2d Cir. 2002) (arbitration clause's "temporally non-limiting" language did not exclude disputes arising "pre- and post-contract formation."). As a consequence, Nipro's arguments related to the timing of its claims against Defendants are without merit.

Therefore, as discussed above, the Court finds that Defendants Renewed Motion to Compel Arbitration should be granted.[7]

CONCLUSION

For the reasons discussed above, it is **ORDERED and ADJUDGED** as follows:

1. Plaintiff's Renewed Motion to Remand (ECF No. 29) is **DENIED**; and
2. Defendants' Renewed Motion to Compel Arbitration (ECF No. 26) is **GRANTED**.
3. The Parties are directed to arbitrate this matter in accordance with the terms of the IDA.
4. The Clerk of Court is directed to **STAY**[8] this case pending completion of the arbitration. This case shall remain **CLOSED** for administrative purposes only, and

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[7] The Eleventh Circuit has cautioned that "[a]rbitration should not be compelled when the party who seeks to compel arbitration has waived that right." *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) (quoting *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg)*, 62 F.3d 1356, 1365 (11th Cir.1995). "Waiver occurs when both: (1) the party seeking arbitration "substantially participates in litigation to a point inconsistent with an intent to arbitrate"; and (2) "this participation results in prejudice to the opposing party." *Id.* "Prejudice exists when the party opposing arbitration "undergo[es] the types of litigation expenses that arbitration was designed to alleviate." *Id.* Here, there is no question that Defendants did not waive the right to compel arbitration. Specifically, the Court finds that Defendants did not substantially participate in litigation to a point inconsistent with an intent to arbitrate. Indeed, this Court's docket reflects that after removing this case, Defendants immediately moved to compel arbitration. *See* ECF Nos. 1 and 3. Notably, Nipro does not suggest or argue that Defendants waived the right to arbitrate.

[8] Section 3 of the FAA provides as follows:

> [i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. "Within this District, a number of courts have dismissed the case where all claims were subject to arbitration." *Valiente v. Holiday CVS, LLC*, 20-CV-20382, 2020 WL 2404701, at *2 (S.D. Fla. May 12, 2020) (first citing *Perera v. H & R Block Eastern Enters., Inc.*, 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012); then citing *Kivisto v. Nat'l Football League Players Assoc.*, No. 10-24226-CIV, 2011 WL 335420 (S.D. Fla. Jan. 31, 2011); then citing *Olsher Metals Corp. v. Olsher*, No. 01-3212-CIV, 2003 WL

without prejudice to the parties to move to re-open the case once the arbitration has been completed.

5. All pending motions not otherwise ruled upon herein are **DENIED as moot**.

DONE and ORDERED in this Chambers at Miami, Florida this 24th day of June 2021.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:

The Honorable Patrick M. Hunt, U.S. Magistrate Judge
All counsel of record

25600635 (S.D. Fla. Mar. 26, 2003); then citing *Caley v. Gulfstrearn Aerospace Corp.*, 333 F. Supp. 2d 1367 (N.D. Ga.2004); and then citing *Athon v. Direct Merchants Bank*, No. 5:06-cv-l, 2007 WL 1100477 (M.D. Ga. 2007)). "Ultimately, however, the Eleventh Circuit 'has [ ] indicated that a stay, rather than dismissal, is preferred where a stay is requested.'" *Valiente*, 2020 WL 2404701, at *2 (quoting *Stephens v. Checkr, Inc.*, No. 8:19-cv-2252-T-36AAS, 2019 WL 8138178, at *8 (M.D. Fla. Nov. 25, 2019)). Here, as previously discussed, this Court has determined that the claims that Nipro brings against Defendants are referable to arbitration pursuant to the IDA. Defendants, moreover, request that this Court stay this case pending the completion of arbitration. Accordingly, the provisions of Section 3 of the FAA compel the Court to stay this action pending the Parties' completion of arbitration to be conducted in accordance with the terms of the IDA.