IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D13-716

ALLSCRIPTS HEALTHCARE SOLUTIONS, INC.,

Appellant,

v.

PAIN CLINIC OF NORTHWEST FL, INC., AMERICAN PAIN CARE SPECIALISTS, LLC, ADVANCED PAIN SPECIALISTS, INC. and SOUTH BALDWIN FAMILY PRACTICE, LLC.,

Appellees.

ANSWER BRIEF OF APPELLEES

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION

Appellant Allscripts Healthcare Solutions, Inc. (the "Allscripts Parent"), acquired and marketed a software program to small physician practice groups. The Allscripts Parent distributed the software through distribution channels, including the Allscripts Parent's wholly owned subsidiary, Allscripts Healthcare LLC (the "Allscripts Subsidiary"). Appellees, the plaintiffs below, were among the small physician practice groups that purchased licenses for the software from the Allscripts Subsidiary. Problems with the software prompted the Allscripts Parent to terminate all effective support for the software, cease all attempts to maintain the software to ensure it met the purposes for which it was marketed, and to push Plaintiffs to purchase a replacement software product. The underlying litigation against only the Allscripts Parent followed.

Plaintiffs' claims against the Allscripts Parent fall into two categories: (i) misconduct by the Allscripts Parent in producing and marketing the software; and (ii) misconduct by the Allscripts Parent in effectively discontinuing the software and seeking to impart a *different* non-conforming software program onto the Plaintiffs. No claims were asserted against the Allscripts Subsidiary.

The Allscripts Parent moved to compel arbitration based on a boilerplate contract between each Plaintiff and the Allscripts Subsidiary (the Master Agreements) for the purchase of licenses to utilize the software. Because the Master Agreements relate solely to distribution and licensing, are expressly limited to the identified signatories, and exclude all others including the Allscripts Parent, the Allscripts Parent sought to invoke non-contractual bases to compel arbitration.

As the trial court ruled, the non-contractual bases to compel arbitration by a non-signatory are inapplicable. First, a motion to compel arbitration is determined from the four corners of the complaint and resolution of the allegations in the complaint does not require reference to or construction of the Master Agreements. No reading of the complaint can support a contrary conclusion. Second, the Master Agreements are expressly limited to Plaintiffs and the Allscripts Subsidiary, such that Plaintiffs did not agree to arbitrate any claim, much less claims unrelated to the licensing of the software, against the Allscripts Parent.

STATEMENT OF THE CASE AND FACTS

I. THE COMPLAINT.

A. The Allegations.

Pain Clinic of Northwest FL, Inc. initiated the underlying litigation by filing a class action complaint against Allscripts Healthcare Solutions, Inc. (the "Allscripts Parent"). Appendix to Initial Brief of Allscripts Healthcare Solutions, Inc. ("Initial Brief Appendix") at 1-13. Three additional plaintiffs later joined in the litigation in the First Amended Class Action Complaint (the "First Amended Complaint"): (i) American Pain Care Specialists, LLC; (ii) Advanced Pain Specialists, Inc.; and (iii) South Baldwin Family Practice, LLC (collectively, and together with Pain Clinic of Northwest FL, Inc., the "Plaintiffs"). *Id.* at 14.

Beginning in 2009, the Allscripts Parent, a developer and distributer of healthcare information technologies for physicians, produced and marketed a "defective electronic health records software," which software the Allscripts Parent

branded "MyWay." *Id.* at 14.[1] MyWay was an Electronic Health Record system which allowed physicians to store and access patient information through an electronic interface in different healthcare settings. *Id.* at 17.

The software, which initially was developed by a company that the Allscripts Parent subsequently acquired, was marketed to small physician practice groups and sold "predominantly through authorized re-sellers." *Id.* at 18. More than 5,000 physicians nationwide purchased MyWay, with each physician spending approximately $40,000 on the software. *Id*. at 14. The product had many problems, however, including its inability to integrate with other systems, and poor performance when retrieving information from the internet. *Id.* at 19. As a result of high costs to remediate the defects, the Allscripts Parent withdrew MyWay from the market in late 2012. *Id*. at 14.

In 2009, "the Health Information Technology for Economic and Clinical Health (HITECH) Act was enacted under Title XIII of the American Recovery and Reinvestment Act of 2009." *Id.* at 18. "The HITECH Act mandates that all health care providers who provide services under federal programs like Medicare and Medicaid acquire, upgrade, and implement health information systems to comply, *inter alia*, with [Electronic Health Record] specifications." *Id*. This required healthcare software vendors to update their products to become HITECH act compliant, or "risk obsolescence." *Id.* at 19.

[1] The Allscripts Parent distributed MyWay through its wholly owned subsidiary Allscripts Healthcare LLC, (the "Allscripts Subsidiary"), which sold licenses for the MyWay software via Master Agreements. Initial Brief Appendix at 30-31.

The Allscripts Parent ostensibly endeavored to bring MyWay compliant through software enhancements and upgrades, but was unsuccessful, and its product continued to fail to work properly and to be compliant with the HITECH Act's compliance and certification requirements. *Id.* at 19. Throughout 2011, the Allscripts Parent nonetheless made public statements regarding the viability and indeed the workability of its MyWay software. *Id.* at 19-20.

By October 2012, the Allscripts Parent announced it would discontinue the software. *Id.* at 20. The Allscripts Parent responded to its MyWay customers by offering a free "upgrade" to a different program "which is built on an entirely separate platform, regardless of whether the customer wanted to change to this different product." *Id.* "In many instances, [the Allscripts Parent] misled its customers into believing that there was no choice but to consent to the required 'upgrade.'" *Id*. The new product was no upgrade at all, but rather an entirely separate product, requiring substantial investment in training employees and migrating data. *Id.* Moreover, the "upgrade" required a significant license fee because the "upgrade" was designed for larger healthcare offices and "was not designed for the small physician group[s] who purchased the MyWay program." *Id*. Moreover, the Allscripts Parent deterred its MyWay customers from switching to another company altogether by assessing substantial fees to "release the database of information back to" the physician groups. *Id.* at 21.[2]

[2] Plaintiffs also set forth "Class Representation Allegations," *see* Initial Brief Appendix at 21-25, which allegations are not pertinent to this appeal from an order denying a motion to compel arbitration.

B. The Claims.

(1) The claim labeled "Breach of Warranty."

Count I of the First Amended Complaint, labeled "Breach of Warranty," sought to hold the Allscripts Parent accountable for manufacturing and distributing a defective product that did not conform to the Allscripts Parent's public representations or to the purpose for which the Allscripts Parent marketed the product. Initial Brief Appendix at 25-26. The entire claim is as follows:

> 40. [The Allscripts Parent][3] promised, represented, and warranted to the Plaintiffs and the Class members that the MyWay product was free of defects and would conform to its intended purpose and perform in the manner it was represented to work.
>
> 41. The Plaintiffs and all Class members similarly situated purchased the MyWay product manufactured, distributed and sold by [the Allscripts Parent] based upon the representations made by [the Allscripts Parent] that it was suitable for its intended purpose.
>
> 42. The Plaintiffs and all the Class members purchased the MyWay product with the expectation that it would be free of defects and be suitable for its intended purpose.
>
> 43. At all times, the Plaintiffs and the Class were using the MyWay product in its intended manner.
>
> 44. The product was defective when sold to the Plaintiffs and the Class members, and further, [the Allscripts Parent] has announced that the defects will not be remedied.
>
> 45. [The Allscripts Parent] breached its warranty to the Plaintiffs and the Class members because the product it sold was not free of defects, did not conform to its intended purpose, will not conform to

[3] The First Amended Complaint defined the Allscripts Parent as "Allscripts." Initial Brief Appendix at 14.

> its intended purposes, and does not and will not otherwise perform in the manner it was represented to work.
>
> 46. As a result of [The Allscripts Parent's] breach, the Plaintiffs have been harmed and have suffered damages in the same manner as each Class member.

Id.

(2) The claim labeled "Unjust Enrichment."

Count II of the First Amended Complaint, labeled "Unjust Enrichment," sought to hold the Allscripts Parent accountable for its deceptive marketing of MyWay and for collecting monies from the sale of MyWay even though the Allscripts Parent had not directly sold the product to the Plaintiffs. Initial Brief Appendix at 26-27. The entire claim is as follows:

> 47. Purchasers of the MyWay product were to receive a software product intended to perform as an EHR program.
>
> 48. Plaintiffs and other purchasers of the MyWay product conferred a benefit on [the Allscripts Parent] when they paid money for the MyWay product and related maintenance services.
>
> 49. [The Allscripts Parent] appreciated the benefits conferred upon it by Plaintiffs and purchasers and users of the MyWay product in the form of revenues.
>
> 50. [The Allscripts Parent] accepted and retained those benefits from Plaintiffs and other MyWay purchasers and users when it should have delivered a software program that performed as it was intended to work.
>
> 51. [The Allscripts Parent] failed to deliver an EHR software program that performed as it was intended to work, and further has represented that the MyWay product will not perform as it was intended to work.

> 52. [The Allscripts Parent's] receipt and retention of the money it received from Plaintiffs and other My Way purchasers and users without delivery of an EHR software program that performed as it was intended to work would be inequitable and constitutes unjust enrichment.

Id.

II. THE ALLSCRIPTS PARENT'S MOTION TO COMPEL ARBITRATION.

A. The Motion.

On February 5, 2013, the Allscripts Parent moved to compel arbitration under an arbitration provision embedded within boilerplate agreements between Plaintiffs and the Allscripts Subsidiary. Initial Brief Appendix at 30-31. Those agreements were the vehicle by which the Allscripts Subsidiary sold licenses for MyWay to the Plaintiffs (the Master Agreements). *Id*. The Master Agreements contain an arbitration clause as follows:

> Any dispute or claim arising out of, or in connection with this Agreement shall be finally settled by binding arbitration in Raleigh, NC, in accordance with the then-current rules and procedures of the American Arbitration Association by one (1) arbitrator appointed by the American Arbitration Association. The arbitrator shall apply the law of the State of North Carolina, without reference to rules of conflict of law or statutory rules of arbitration, to the merits of any dispute or claim. Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. In the event any action or proceeding is brought in connection with this Agreement, each party shall be responsible for its own costs and attorneys' fees. *Except for Client and [the] Allscripts [Subsidiary], no other party may sue or be sued under this Agreement*.

Id. at 32 (emphasis added).[4]

Based on that provision in the Allscripts Subsidiary's contracts with Plaintiffs, the Allscripts Parent contended that the arbitration provisions should be enforced because the Plaintiffs' claims "arise out of and are directly related to the [Master] Agreements." *Id.* at 34-38.

B. The Plaintiffs' Response.

Plaintiffs argued that the Allscripts Parent could not avail itself of an arbitration provision in the Master Agreements that explicitly limits itself to Plaintiffs and the Allscripts Subsidiary. Initial Brief Appendix at 82-84. Plaintiffs further contended that the First Amended Complaint in no way calls up the Master Agreements because all allegations arise from the misconduct of the Allscripts Parent, not the Allscripts Subsidiary. *Id.* at 85-87. Thus, there was no basis for the court to apply the "rare exceptions" to the rule that non-signatories may not enforce an arbitration agreement. *Id.* at 86-87.

C. The Allscripts Parent's Reply.

The Allscripts Parent argued that because Plaintiffs purchased a license for MyWay pursuant to the Master Agreements, Plaintiffs are limited to contract-based claims to resolve *any* grievance related to MyWay, regardless whom that grievance is with. Initial Brief Appendix at 151. The Allscripts Parent further argued that

[4] The Master Agreements define each Plaintiff signing the particular agreement as "Client" and the Allscripts Subsidiary as "Allscripts." *Id.* at 164.

the only way Plaintiffs could state a cause of action against it would be by asserting it is the alter ego of the Allscripts Subsidiary. *Id*.

The Allscripts Parent further invoked the doctrine of equitable estoppel to contend that Plaintiffs' claims "are entirely dependent on and … 'presume the existence of'" the Master Agreements. *Id.* at 153-54. The Allscripts Parent further argued that because Plaintiffs would not have access to the MyWay software without the Master Agreements, it must be that Plaintiffs' claims are "interrelated" with the Master Agreements thereby allowing for reliance on the Master Agreements' arbitration provisions. *Id.* at 154.

D. The Hearing.

At the hearing on its motion to compel, the Allscripts Parent argued that although it is a non-signatory stranger to the arbitration provision in the Master Agreements, the arbitration provision should nonetheless be enforced against Plaintiffs to preclude its lawsuit against the Allscripts Parent. Initial Brief Appendix at 252. In other words, it argued that Plaintiffs should not be able to sue the Allscripts Parent, who did not sell the MyWay software to Plaintiffs, to circumvent the Master Agreements' arbitration provisions. *Id*. The Allscripts Parent then asserted that whether the Plaintiffs could even state a claim against the Allscripts Parent, given the lack of privity, "will eventually be resolved by the arbitrator." *Id*. at 253. The Allscripts Parent lastly called up the doctrines of alter ego and equitable estoppel as the non-contractual bases to compel arbitration. *Id*. at 254-56.

Plaintiffs responded that the Allscripts Parent "collected all the revenues for the MyWay product" and accordingly the Allscripts Parent was unjustly enriched. *Id.* at 257. And Plaintiffs' counsel clarified that the count, though labeled "breach of warranty," was in fact based on the allegations giving rise to a claim for breach of "implied warranty." *Id.* at 258. Plaintiffs contended that the arbitration provision at issue is atypical because it explicitly limited its reach to Plaintiffs and the Allscripts Subsidiary only, whereas most arbitration provisions specifically include related corporations or merely use the word "parties." *Id.* at 260.

Addressing alter ego and equitable estoppel, Plaintiffs stated that they were not proceeding on an alter ego theory and instead are focusing on the Allscripts Parent's independent actions. *Id.* at 264-65. The First Amended Complaint does not rely on the Master Agreements in any way which would preclude Plaintiffs' "independent claims directly against" the Allscripts Parent. *Id.* at 269.

III. THE ORDER DENYING THE ALLSCRIPTS PARENT'S MOTION TO COMPEL ARBITRATION.

The trial court denied the Allscripts Parent's motion to compel arbitration on February 27, 2013. Initial Brief Appendix at 280-81. The court ruled that ordinarily a non-signatory parent corporation may not compel arbitration based on an arbitration provision within a subsidiary's contract. Applying that general rule here, the court concluded that the Allscripts Parent could not invoke the Master Agreements' arbitration provision which is explicitly limited to the identified signatories, Plaintiffs and the Allscripts Subsidiary. *Id.* at 280-81. The trial court

further noted that its ruling in this case is bolstered "in light of the claims asserted." *Id.* at 281.[5]

SUMMARY OF ARGUMENT

There is a disconnect between the explication of equitable estoppel presented by the Allscripts Parent, and its application to the allegations and claims actually set forth in the First Amended Complaint. There are two circumstances in which equitable estoppel is applied to bar a signatory from avoiding a non-signatory's attempt to compel arbitration: (i) where the complaint alleges a conspiracy between the signatory and the non-signatory; and (ii) where the signatory's claims against the non-signatory rely on the terms of the underlying contract, such that resolution of those claims requires reference to or construction of the underlying contract. Neither circumstance applies here.

[5] During the pendency of this appeal and responsive to the Allscripts Parent's misapprehension in light of the labels Plaintiffs assigned to their claims -- which misapprehension, incidentally, the trial court did not share -- Plaintiffs moved to further amend their complaint by filing their Second Amended Complaint, to conform the causes of action to the allegations. Appendix to Answer Brief of Appellees ("Answer Brief Appendix") at 7-36. The claims and causes of action set forth in the Second Amended Complaint rely on the same allegations raised in the First Amended Complaint, and are now laid out as claims for: (i) Unjust Enrichment; (ii) Tortious Interference with Business Relationships; (iii) Violations of the Florida Deceptive and Unfair Trade Practices Act; and (iv) Violation of Other State Consumer Protection Laws. *Id.* at 22-36. The trial court granted Plaintiffs leave to amend on May 6, 2013. *Id.* at 42. On June 10, 2013, the Allscripts Parent moved to dismiss the Second Amended Complaint on the ground, among others, that *it has no connection whatsoever to the Master Agreements*. *Id.* at 44-45.

The Allscripts Parent did not argue below, nor in its initial brief, that Plaintiffs alleged concerted misconduct, and understandably so, because the First Amended Complaint contains not even a single allegation of misconduct by the Allscripts Subsidiary. And the Allscripts Parent has not shown, nor could it, that any claim or allegation in the First Amended Complaint requires reference to or construction of the contract. Plaintiffs' claims relate *solely* to the Allscripts Parent's independent actions in manufacturing and marketing a defective software product, and the Allscripts Parent's refusal to fix that product.

In the trial court and in its initial brief, the Allscripts Parent repeatedly invoked the maxim that equitable estoppel lies in fairness, arguing that it would be unfair for a party to rely on some terms of a contract in formulating its claims while repudiating an arbitration provision in that same contract. But here, the Plaintiffs do not invoke any aspect of the Master Agreement in formulating their claims.

By its own admission, the Allscripts Parent is the party that seeks to have it both ways. It seeks to invoke the arbitration clause in the Master Agreements, while at the same time repudiating any connection to those contracts by announcing that it will move to dismiss based on that lack of connection even if it prevails and the claims are sent to arbitration. Equity does not permit a defendant to "have its cake and eat it too," any more than equity would permit a plaintiff to do so.

If that were not enough to sustain the trial court's well-reasoned order, the Master Agreements' arbitration provisions explicitly exclude the Allscripts Parent

from their purview. Such specific exclusionary language is not often examined in the decisional authority, but where it exists, such language may not be overridden by a non-contractual basis to compel arbitration.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews *de novo* a trial court's order denying a motion to compel arbitration, and such review is limited to "the four corners of the complaint and its incorporated attachments." *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013).

II. THE NON-SIGNATORY ALLSCRIPTS PARENT MAY NOT COMPEL ARBITRATION UNDER THE MASTER AGREEMENTS.

Florida's courts consider three elements to evaluate whether to compel arbitration: (i) whether a valid written agreement exists; (ii) whether an arbitrable issue exists; and (iii) whether the right to arbitration has been waived. *Jackson*, 108 So. 3d at 593; *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). There is no dispute that no written agreement exists between Plaintiffs and the Allscripts Parent, and so only the exceptions to the first two elements are implicated on this appeal. Initial Brief at 2. That is, the question before this Court is whether to apply one of the limited exceptions to the requirement that a written agreement to arbitrate exists.

The Court's analysis is guided in the first instance by two bedrock principles of arbitration law. First, Florida has a strong and immutable policy in favor of

arbitration as the alternative means of dispute resolution. *Jackson*, 108 So. 3d at 593; *Seifert*, 750 So. 2d at 636. Second, and tempering the emphasis on arbitration, "arbitration provisions are contractual in nature" and the "construction of such provisions and the contracts in which they appear remains a matter of contract interpretation." *Seifert*, 750 So. 2d at 636. "A natural corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Id.*

That principle notwithstanding, the courts have fashioned five limited non-contractual bases for a non-signatory to compel a signatory to arbitrate: (i) incorporation by reference; (ii) assumption; (iii) agency; (iv) veil piercing/alter ego; and (v) equitable estoppel. *Liberty Cmmc'ns, Inc. v. MCI Telecomm. Corp.*, 733 So. 2d 571, 574 (Fla. 5th DCA 1999). The Allscripts Parent invokes two of these bases: (i) equitable estoppel; and (ii) alter ego. Initial Brief at 9-14.

A. The Allscripts Parent May Not Compel Arbitration of Plaintiffs' Claims Based Upon Equitable Estoppel.

(1) Plaintiffs' claims do not rely on the terms of the Master Agreements.

Equitable estoppel is applied to bar a signatory from avoiding arbitration with a non-signatory under two circumstances: (i) where the complaint alleges a conspiracy between the signatory and the non-signatory; and (ii) where the signatory's claims against the non-signatory rely on the terms of the underlying contract, such that resolution of those claims requires reference to or construction

of the underlying contract. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

The Allscripts Parent has raised only the second test, *i.e.*, reliance on the contract's terms, Initial Brief Appendix at 30-38, 151-54; Initial Brief at 10-19, because the First Amended Complaint contains not a single allegation of wrongdoing by the Allscripts Subsidiary. *See* Initial Brief Appendix at 14-28. Thus, the inquiry on this appeal is limited to whether Plaintiffs "rely on the terms" of the Master Agreements in asserting their claims against the Allscripts Parent. *Bailey v. ERG Enters., LP*, 705 F.3d 1311, 1321 (11th Cir. 2013).[6]

"For a party's claims to rely on a contract, the party must actually depend on the underlying contract to assert the claims." *Bailey*, 705 F.3d at 1321.

> The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from relying on the contract when it works to his advantage by establishing the claim, and repudiating it when it works to his disadvantage by requiring arbitration. The plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is

[6] *Roman v. Atlantic Coast Constr. & Dev., Inc.*, 44 So. 3d 222, 223-24 (Fla. 4th DCA 2010), extensively relied on by the Allscripts Parent, (*see* Initial Brief at 12-14), is an example of the inapplicable "concerted conduct" test. There, the plaintiff sued the contracting developer *and* its agents, and the counts plaintiff argued were not subject to arbitration were directed at both the signatory and non-signatory defendants based on concerted conduct. *Id*. at 223. The Fourth District held that arbitration should be compelled because "there are allegations of concerted action by both a non-signatory and one or more of the signatories." *Id*. at 224. The court's discussion of the reliance on contractual terms test was gratuitous and, in any event, inapplicable because the plaintiff's claims for civil theft and escrow violations were directly tied to the contract for purchase of a condominium. *Id*. at 223-24. *Roman* has no application to this appeal.

> therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.

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

Dependence on the underlying contract can be said to exist where the plaintiff seeks to hold the non-signatory to the terms of the contract. *Becker v. Davis*, 491 F.3d 1292, 1300 (11th Cir. 2007); *Marcus v. Fla. Bagels, LLC*, 112 So. 3d 631, 634 (Fla. 4th DCA 2013). Thus, in determining whether to apply equitable estoppel, courts look to whether resolution of the plaintiff's claims requires "reference to or construction" of the underlying contract. *E.g.*, *Rolls-Royce PLC v. Royal Caribbean Cruises, Ltd.*, 960 So. 2d 768, 771 (Fla. 3d DCA 2007) (claims that pod propulsion system was defective did not require construction of ship-building contract). *See also Mundi v. Union Sec. Life Ins.*, 555 F.3d 1042, 1047 (9th Cir. 2009) (affirming order denying motion to compel arbitration because "resolution of [the] claim does not require examination of any provisions of the" contract containing an arbitration clause). This inquiry "turns on the factual *allegations* in the complaint rather than the legal causes of action asserted." *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996) (emphasis added).

That there is a mere factual relationship between a dispute and the subject contract is insufficient for the application of equitable estoppel because "[a] simple but-for relationship does not constitute the actual dependence on the underlying

contract that equitable estoppel requires." *Bailey*, 705 F.3d at 1321-22. *Accord*, *Lawson v. Life of S. Ins. Co.*, 648 F.3d 1166, 1168-69, 1174 (11th Cir. 2011) (holding that "a 'but for' relationship … alone is not enough to warrant equitable estoppel"); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 Fed. Appx. 704, 709 (10th Cir. 2011) (explaining that "[f]or a plaintiff's claims to rely on the contract containing the arbitration provision, the contract must form the legal basis of those claims; it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but for' relationship with them").

A review of the allegations raised in the First Amended Complaint leads to the inexorable conclusion that Plaintiffs neither relied on the Master Agreements to formulate their claims, nor sought to hold the Allscripts Parent to the terms of those Master Agreements. Consider the allegations:

- The Allscripts Parent acquired the MyWay product and "began an aggressive marketing campaign of the product to small physician practice groups" without conforming the product to that market. Initial Brief Appendix at 18-19.
- The Allscripts Parent failed to correct design flaws in the software that became magnified when used in connection with the internet in order to share data as required by the HITECH Act. *Id.*
- The Allscripts Parent made false public statements regarding MyWay in order to induce physicians to purchase and use the product. *Id.* at 19-20.

- Realizing the failures of its product, the Allscripts Parent discontinued the manufacture, marketing, and sale of the product in October 2012. *Id.* at 20.
- When it pulled the product, the Allscripts Parent misled its customers into believing that the only choice to fix the problem was to "upgrade" to a different product sold by the Allscripts Parent. *Id.* The "upgrade" was no upgrade at all, but rather a completely different product constructed on a separate platform that was incompatible with the small physician groups MyWay had been marketed and sold to. *Id*.

Thus it is clear: Plaintiffs made allegations against the Allscripts Parent, and none of the allegations invoked the Master Agreements.

Nor do the causes of action rely on the terms of the Master Agreement. Attempts by the Allscripts Parent to rest its argument on the cause of action labeled "Breach of Warranty" should not at all be compelling. Initial Brief Appendix at 25-26. Though perhaps imprecise in its label, it is undeniable that Plaintiffs did not allege any contractual breach of warranty. *Id.* at 25-26. Rather, Plaintiffs alleged that the Allscripts Parent made fraudulent misrepresentations regarding the product which induced Plaintiffs to purchase the product. *Id.* at 25-26. Plaintiffs further alleged that the product was inherently defective for the purpose for which it was marketed and that the Allscripts Parent announced that the defects would not be remedied. *Id.* at 25-26.

Review of the First Amended Complaint in its entirety makes apparent that Plaintiff's claims and allegations fall into two categories: (i) the Allscripts Parent's misconduct prior to the time Plaintiffs purchased licenses for the MyWay software, *i.e.*, misleading marketing, manufacture and distribution of the defective software system (Initial Brief Appendix at 18-20, 25-27); and (ii) the Allscripts Parent's misconduct following its decision to terminate all effective support for the software, to cease all attempts to maintain the software, and its misleading actions to force Plaintiffs to purchase an entirely different, but still non-conforming, software (*Id.* at 20, 25-27). Such are not the allegations of a contractual breach of warranty claim. In fact, Plaintiffs' counsel dispelled any misconception about this at the February 25, 2013 hearing, explaining that the breach of warranty claim was perhaps mislabeled. *Id.* at 258.

In an effort to address the labels in the First Amended Complaint, the Plaintiffs were granted leave further to amend their complaint during the pendency of this appeal. Answer Brief Appendix at 42, *see* n.5, *supra*. That Second Amended Complaint relies on the same allegations raised in the First Amended Complaint regarding the Allscripts Parent's pre- and post-contract conduct in inducing the purchase of the MyWay software and then the mandated switch to the purported "free upgrade." *Compare* Initial Brief Appendix at 14-27, *with* Answer Brief Appendix at 7-36.

The Second Amended Complaint does nothing more than conform the causes of action to the factual allegations as previously alleged. But the causes of action asserted have been re-stated so as to eliminate any confusion regarding the

basis of the claims. *Compare* Initial Brief Appendix at 14-27, *with* Answer Brief Appendix at 22-36. Plaintiffs bring the post-order amendment to the Court's attention merely to highlight that the Allscripts Parent's quarrel is with the labels and not the substance of the Plaintiffs' causes of action.

Because the allegations asserted in the First Amended Complaint do not actually depend on the terms of the Master Agreement – and that is so in the Second Amended Complaint as well – "the *sine qua non* of an appropriate situation for applying equitable estoppel" is conspicuously absent. *In re Humana*, 285 F.3d at 976. Nor does resolution of Plaintiffs' claims require the examination of any provision of the Master Agreements. *See Rolls-Royce PLC*, 960 So. 2d at 771; *Mundi*, 555 F.3d at 1047. Nevertheless, the Allscripts Parent focuses on the labels of the causes of action to assert that Plaintiffs rely on the Master Agreements to state their claims. Initial Brief at 16-18. "Whether a claim falls within the scope of an arbitration agreement," however, "turns on the factual allegations in the complaint rather than the legal causes of action asserted." *Gregory*, 83 F.3d at 384. Under Florida law, of course, labels are not determinative of a party's claims. *Fontainebleau Hotel Corp. v. Walters*, 246 So.2d 563, 566 (Fla.1971) ("it is the facts alleged, the issues and proof, and not the form of the prayer for relief, which determine the nature of the relief to be granted"). *Accord, Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 825 (Fla. 2d DCA 1997); *Kala Invs., Inc. v. Sklar*, 538 So. 2d 909, 918 n.8 (Fla. 3d DCA 1989); *Xamnad, Inc. v. Patio Café, Inc.*, 486 So. 2d 699, 700 (Fla. 4th DCA 1986).

Nothing in the count labeled "Breach of Warranty" indicates that Plaintiffs have sought to hold the Allscripts Parent to the terms of the contract. *Marcus*, 112 So. 3d at 634; *Stalley v. Transitional Hosps. Corp. of Tampa, Inc.*, 44 So. 3d 627, 632 (Fla. 2d DCA 2010). Nor does resolution of a claim steeped in the marketing, distribution, and discontinuation of the MyWay software require "reference to or construction of" the Master Agreements. *Rolls-Royce*, 960 So. 2d at 771.[7]

Indeed, "[i]t would be rather puzzling to say that" Plaintiffs' claims "rely on" the Master Agreements "when the alleged [conduct] occurred before any of the [Plaintiffs] purchased" MyWay. *Bailey*, 705 F.3d at 1322-23. *Accord*, *Becker*, 491 F.3d at 1300-01 (recognizing that because some of plaintiffs' allegations relate to conduct prior to formation of the contract containing an arbitration clause, a finding that those claims must be arbitrated "would lead to an illogical result").

Based on the reasoning in *Bailey* and *Becker*, it would be equally "puzzling" to find that Plaintiffs seek to hold the Allscripts Parent to the terms of the Master Agreement for seeking to force Plaintiffs into different software *after* the Allscripts Parent repudiated the very product sold by the Master Agreements.

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[7] The Allscripts Parent's reliance (Initial Brief at 13-14) on *Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940 (Fla. 1st DCA 2004), is misplaced. The signatory plaintiff in that action alleged concerted conduct between the signatory company and its non-signatory agents. 870 So. 2d at 943. That the plaintiff there alleged such concerted conduct in separate lawsuits was of no moment because "the facts" relied upon in both lawsuits were "substantially the same facts." *Id*. at 945. And to the extent the court *also* relied on a relation to the underlying contract, *id*., each claim asserted by the plaintiff undeniably required reliance on the terms of the underlying contract. *Id*. at 942-43.

The Unjust Enrichment cause of action is to the same effect. Plaintiffs alleged that the Allscripts Parent was the ultimate beneficiary of the money used to purchase the MyWay licenses, and it therefore had been unjustly enriched. Initial Brief Appendix at 26-27. If it is true, as the Allscripts Parent contends, (*see* Initial Brief at 17), that the Allscripts Parent did not benefit from its fraudulent marketing, then the Allscripts Parent may prevail on a motion for summary judgment. But that would be getting ahead of the present posture.

Boiled to its core, and the labels aside, the Allscripts Parent's argument is that Plaintiffs cannot state a claim for relief without relying on the Master Agreements. *See* Initial Brief at 16-18. Thus, the Allscripts Parent invites the Court to re-write the First Amended Complaint to include such allegations and then to construe that re-written complaint to assert claims which rely on the Master Agreements. Initial Brief at 16-18. Based on the allegations actually asserted, however, there is no basis to find that the Plaintiffs "seek to hold" the Allscripts Parent "to the terms of the … contracts." *Bailey*, 705 F.3d at 1322.

(2) It is of no moment that the Master Agreements are factually significant to Plaintiffs' claims.

The Allscripts Parent asserts that the Plaintiffs' claims rely on the Master Agreements because if Plaintiffs had not purchased the license for the MyWay software from the Allscripts Subsidiary, "Plaintiffs would have no right to use the software, and would have no cause of action …." Initial Brief at 15. That argument misses the point. "For a plaintiff's claims to rely on the contract containing the arbitration provision," "*the contract must form the legal basis of*

those claims; it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but for' relationship with them." *Medtronic, Inc.*, 449 Fed. Appx. at 709 (emphasis added).

And so it is that the federal courts have roundly rejected the "but for" test urged by the Allscripts Parent.[8] In *Lawson*, 648 F.3d at 1168-69, 1172-73 the Eleventh Circuit examined the quantum of interrelatedness necessary for equitable estoppel to apply in the context of an underlying loan agreement which permitted the plaintiff to purchase credit life insurance. The plaintiff did so purchase credit life insurance through a separate entity. *Id*. at 1168. The loan agreement contained an arbitration clause, but the insurance policy did not. *Id*. at 1168-69. Notwithstanding that the plaintiff sued only the insurance company on claims unrelated to the loan agreement, the insurance company argued that equitable estoppel applied because there would not have been an insurance contract "but for" the underlying loan agreement. *Id*. at 1172.

The Eleventh Circuit rejected the insurer's argument because "a plaintiff's claims must directly, not just indirectly, be based on the contract containing the arbitration clause in order for equitable estoppel to compel arbitration of those claims." *Id.*

[8]As the Allscripts Parent notes, "[f]ederal case law is considered 'highly persuasive' in the determination of a motion to compel arbitration." Initial Brief at 9 n.7, *citing*, *Marcum, LLP v. Potamkin*, 107 So. 3d 1193, 1195 n.3 (Fla. 3d DCA 2013).

> There is, to be sure, a "but for" relationship between the loan agreement, which created the debt obligation, and the credit life insurance policy that gave rise to the [plaintiff's] claims against [the insurer]. But that alone is not enough to warrant equitable estoppel. If it were, every credit insurer could use an arbitration clause in the underlying credit agreement to compel its insureds to arbitrate disputes arising from their credit life insurance contracts, despite the absence of an arbitration clause in those contracts, and even though state law prohibited an insurer from including an arbitration clause in any of its insurance contracts.

Id. at 1174. *Accord, Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1130-31 (9th Cir. 2013) (rejecting non-signatory manufacturer's argument that "Plaintiffs' claims are intertwined with the Purchase Agreements because Plaintiffs' claims rely on the existence of Plaintiffs' vehicle purchase transactions"; and holding that the plaintiffs' consumer protection and breach of the implied warranty of merchantability claims "arise[] independently from the Purchase Agreements, rather than intimately relying on them"); *Medtronic*, 449 Fed. Appx. at 709 (rejecting an argument that a plaintiff's antitrust claims against a non-signatory were interrelated with a contract containing an arbitration clause because the anti-competitive conduct could not have occurred but for the underlying agreement); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005) (holding that "the mere existence of a loan transaction [which contains an arbitration clause] requiring plaintiffs to purchase mortgage insurance cannot be the basis for finding their federal statutory claims [against the insurer with no arbitration clause], which are wholly unrelated to the underlying mortgage agreement, to be intertwined with that contract"); *QPro, Inc. v. RTD Quality Servs. USA, Inc.*, 761 F. Supp. 2d 492, 500 (S.D. Tex. 2011) (explaining that "[u]nder governing law the claim raised in

litigation must rely on the language of the agreement containing the arbitration clause, rather than just presume its existence, for the basis of equitable estoppel to apply"; claim for refusal to enter into a second agreement presumed existence of first agreement containing an arbitration clause but did not "rely on the terms of that [first] agreement").

Florida law is aligned with the reasoning set forth in the federal decisions. In *Seifert*, the Florida Supreme Court examined the test for whether a tort claim relates to a contract, and would therefore be arbitrable. *Seifert*, 750 So. 2d at 638. The Court held that "the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to'" the agreement. *Id*. *Accord*, *Jackson*, 108 So. 3d at 593. That same holding has application here: the mere fact that a dispute would not have arisen but for the existence of a contract with the Allscripts Subsidiary cannot be determinative whether Plaintiffs' claims rely on the language of the Master Agreements.

(3) The equities favor Plaintiffs.

Plaintiffs agree with the Allscripts Parent that "the linchpin for equitable estoppel is equity-fairness" and that equitable estoppel prevents a signatory from relying on some terms of a contract to formulate its claims while simultaneously repudiating an arbitration clause in the same contract. *See* Initial Brief at 9-10 (citations omitted). But that unexceptional proposition has no bearing on this

appeal as the Plaintiffs in no way rely on the terms of the Master Agreement to formulate their claims. *See* Point II(A)(1), *supra*.

The equities here favor Plaintiffs, not the Allscripts Parent. The Allscripts Parent represented to the trial court that it intended to move to dismiss Plaintiffs' claims, whether in court or in arbitration, on the basis that it has no relationship to the Master Agreements. Initial Brief Appendix at 253. The Allscripts Parent reiterated its intention to this Court. *See* Initial Brief at 12 n.6. Following through with its stated intention, during the pendency of this appeal, the Allscripts Parent has sought dismissal of Plaintiffs' Second Amended Complaint on the ground, among others, that it has no connection to the Master Agreements. Answer Brief Appendix at 44-45. Thus, it is the Allscripts Parent that seeks to wrap itself in the Master Agreements' arbitration provisions, while simultaneously repudiating any connection to the Master Agreements. Equity does not permit such gamesmanship. *Holzer v. Mondadori*, 2013 WL 1104269, *15 (S.D.N.Y. Mar. 14, 2013).

In *Holzer*, the defendant sought to compel arbitration of a dispute relating to the purchase of condominium units. 2013 WL at *1. Defendant had marketed the units to the plaintiff and negotiated the price, but did not sign the purchase agreements, which agreements were signed only by the plaintiff and a commercial real estate broker. *Id*. at *1-2. The plaintiff's claims against the defendant were grounded upon fraudulent misrepresentation, and the defendant sought to compel arbitration based upon equitable estoppel. *Id*. at *12-13. Finding that the claims were not interrelated with the contract, the court noted that "[t]his result accords with our sense of equity as well." *Id*. at *15.

> [The defendant] deliberately avoided signing a written contract with plaintiffs for the sale of condo units in the KPM tower. There would be no equity in permitting [the defendant] to deny a connection to [the real estate broker with whom the plaintiff contracted], contest the existence of any contract, written or otherwise, with plaintiffs and simultaneously stand in [the real estate broker's] shoes with respect to the arbitration clauses contained in the Purchase Agreements.

Id.

Here, the Allscripts Parent deliberately determined not to sign a contract with the Plaintiffs. Beyond that, the contract contains an arbitration provision that explicitly limits its reach solely to Plaintiffs and the Allscripts Subsidiary. Initial Brief Appendix at 170. Nevertheless, the Allscripts Parent now seeks to stand in the Allscripts Subsidiary's shoes with regard to the Master Agreements' arbitration provisions, while simultaneously taking the position that it has no connection to the Master Agreements. *Id.* at 253; Initial Brief at 12 n.6; Answer Brief Appendix at 44-45. Indeed, the Allscripts Parent has stated its intention to repudiate any connection to these contracts even if the Plaintiffs' claims are sent to arbitration. Initial Brief Appendix at 253; Initial Brief at 12 n.6. Equity should not permit a defendant-non-signatory to take conflicting positions anymore that it does a plaintiff-signatory. *Holzer*, 2013 WL at *15.

B. The Allscripts Parent May Not Compel Arbitration of Plaintiffs' Claims Based Upon An Alter Ego Theory.

The Allscripts Parent has argued that reversal is additionally warranted because Plaintiffs may only pursue their claims on an alter ego theory. *See* Initial Brief at 15-16. That is so, says the Allscripts Parent, because Plaintiffs are limited to contract-based claims and the Master Agreements are between Plaintiffs and the

Allscripts Subsidiary. *Id*. at 16. The Allscripts Parent provides no support for its contention that a contract for the retail sale of a product with a non-manufacturing supplier somehow extinguishes a direct claim against the manufacturer for producing a defective product. *Id*. at 15-16.

Plaintiffs have not pled an alter ego theory, nor have they sought to hold the Allscripts Parent accountable under such a theory. Initial Brief Appendix at 14-27; Point II(A)(1), *supra*. To be sure, where a plaintiff seeks to hold a parent corporation liable for claims centered on a contract, an alter ego theory may be available to compel arbitration. *E.g.*, *Bolamos v. Globe Airport Sec. Servs., Inc.*, 2002 WL 1839210, *2 (S.D. Fla. May 21, 2002) (holding that under a broadly framed agreement, a parent corporation could invoke arbitration clause in plaintiff's employment contract with subsidiary because plaintiff agreed to arbitrate all matters related to employment and claims were for unpaid overtime). This is not the case, however, where a plaintiff has agreed to arbitrate specific claims with a subsidiary corporation, as in *Bolamos*, and sues a parent corporation on the very same grounds. Instead, as set forth at Point II(A)(1), *supra*; Plaintiffs' claims are completely unmoored from the Master Agreements and go to the Allscripts Parent's wholly independent conduct.

At bottom, as with the equitable estoppel argument, the Allscripts Parent rests on its insistence that, although Plaintiffs have not pled an alter ego theory, such a theory is the only viable claim and therefore such theory should be presumed and read into the First Amended Complaint as the theory Plaintiffs have pled. *See* Initial Brief at 12 n.6. But whether an un-pled alter ego theory is the

"only conceivable basis on which to hold [the Allscripts Parent] liable," *id.*, is an argument to be tested on a motion to dismiss for failure to state a claim. That motion is currently pending in the trial court. Answer Brief Appendix at 44-47.

As with equitable estoppel, the Court should decline the Allscripts Parent's invitation to re-write the First Amended Complaint to assert different causes of action, and then find that such causes of action must be resolved in arbitration. If it is true, arguendo, that Plaintiffs cannot state a cause of action against the Allscripts Parent based on anything other than an alter ego theory, then Plaintiffs' action will be dismissed. But the Allscripts Parent cannot insist at this stage that Plaintiffs' causes of action are not viable, re-write them, and then seek to compel arbitration of entirely un-pled claims.

III. NON-CONTRACTUAL BASES TO COMPEL ARBITRATION MAY NOT BE USED TO VARY THE EXPRESS TERMS OF AN ARBITRATION AGREEMENT EXPLICITLY LIMITED TO ITS IDENTIFIED SIGNATORIES.

The arbitration provision at issue explicitly limits itself to Plaintiffs and the Allscripts Subsidiary. Initial Brief Appendix at 170. The provision does so *not* by limiting itself to the generic term "parties," which term courts have found to include non-signatories that incur rights and obligations under a contract. *See, e.g.*, *Koechli*, 870 So. 2d at 943-44; *Ocwen Fin. Corp. v. Holman*, 769 So. 2d 481, 482-84 (Fla. 4th DCA 2000). Rather, this arbitration provision, in sharp contrast, and leaving no doubt about its scope, specifically named its signatories: the signatory Plaintiff (defined in the Master Agreements as "Client") and the Allscripts

Subsidiary (defined in the Master Agreements as "Allscripts"). Initial Brief Appendix at 164.

The arbitration provision is explicitly limited in scope: "*Except for Client and Allscripts, no other party may sue or be sued under this Agreement*." Initial Brief Appendix at 170 (emphasis added). Such provisions are rarely addressed in the decisional authority, because "if the language of the arbitration provision is party specific and the description of the parties does not include the nonsignatory," the "inquiry is at an end, and [courts] will not permit arbitration of claims against the nonsignatory." *Corp. Am. Credit Union v. Herbst,* 397 Fed. Appx. 540, 542 (11th Cir. 2010), *quoting Smith v. Mark Dodge, Inc.*, 934 So. 2d 375, 381 (Ala. 2006).

Not surprisingly, those courts squarely to have addressed the issue in the context of a claim for equitable estoppel have found that party-specific language trumps any claim for equitable estoppel. In *Smith*, relied on by the Eleventh Circuit in *Corporate America Credit Union*, 397 Fed. Appx. at 542, the Alabama Supreme Court stated that where an arbitration clause is party specific, a "nonsignatory lacks 'standing' to enforce the arbitration agreement" on equitable estoppel grounds. 934 So. 2d at 380-81.

Reviewing Alabama and Eleventh Circuit case law, the court noted that equitable estoppel is an exception to the rule that only signatories may enforce an arbitration provision, but that the "exception to *that* exception" arises where "the language of the arbitration provisions limited arbitration to the signing parties." *Smith*, 934 So. 2d at 380-81 (original emphasis, citations omitted). The court

explained that, "if an arbitration agreement is written in broad language," "this Court will … determine whether arbitration may be compelled under the doctrine of equitable estoppel." *Id.* at 381. "Conversely, if the language of the arbitration provision is party specific, and the description of the parties does not include the nonsignatory, this Court's inquiry is at an end, and we will not permit arbitration of claims against the nonsignatory." *Id.*

The arbitration provision at issue in *Smith* was broad – stating that it was binding upon "[Smith] and [Mark Dodge] and the officers, employees and *affiliated entities* of each of them" – and so a Mark Dodge affiliate was permitted to compel arbitration. *Id.* at 381 (brackets in original, emphasis added). But the Court noted the numerous occasions it had rejected equitable estoppel claims where the arbitration clause was limited to identified signatories:

> *See Jim Burke Auto., Inc. v. McGrue*, 826 So. 2d 122, 131 (Ala. 2002) (affirming the trial court's order denying a nonsignatory's motion to compel arbitration where the arbitration agreement was between "you [a signatory plaintiff] and us [a signatory defendant] or our employees, agents, successors or assigns") (bracketed language added); *Ex parte Lovejoy*, 790 So. 2d 933, 938 (Ala. 2000) (issuing a writ of mandamus directing a trial court to enter an order denying a nonsignatory's motion to compel arbitration where the arbitration provision was limited to "all disputes or controversies between you [Lovejoy] and us [Allen Motor Company and its assignees]") (bracketed language and emphasis in original); *First Family Fin. Servs. v. Rogers*, 736 So. 2d 553, 560 (Ala. 1999) (reversing a trial court's order granting a nonsignatory's motion to compel arbitration where "you [the plaintiffs] and we [First Family]" agreed to arbitrate and the arbitration provision elsewhere stated that it applied to "all claims and disputes between you [the plaintiffs] and us [First Family]," and furthermore stated that it applied to "any claim or dispute ... between you [the plaintiff] and any of our [First Family's]

> employees or agents, any of our affiliate corporations, and any of their employees or agents") (bracketed language and emphasis in original); and *Med Center Cars*, 727 So. 2d at 19 (affirming a trial court's order denying nonsignatories' motions to compel arbitration where the arbitration provisions were limited to disputes and controversies "BETWEEN BUYER AND SELLER") (capitalization in original).

Smith, 934 So. 2d at 381 (original emphasis and brackets).

Further to the case law cited by the Alabama Supreme Court in *Smith*, in *Parkway Dodge, Inc. v. Yarbrough*, 779 So. 2d 1205, 1209 (Ala. 2000), that court provided an instructive explication of the basis for the exception to the exception:

> In most of the cases that have come before this Court on an equitable-estoppel claim, we have not allowed the claims to be arbitrated, because the language of the arbitration provisions limited arbitration to the signing parties, so that there had been no assent on the part of the resisting parties to arbitrate claims against nonsignatories. In other words, within these arbitration provisions references to the parties specifically limited the claims that would be arbitrable under those provisions.

Id. (citations omitted).

The Allscripts Parent appears to acknowledge the exception to the exception by is reliance on *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents Inc.*, 517 F.3d 1240, 1247-48 & n.6 (11th Cir. 2008). Initial Brief at 19. The Allscripts Parent requests the Court to infer from that opinion that "an arbitration agreement limited to immediate parties may still bind a nonsignatory under those [sic] where agency, alter-ego theory, and estoppel so required." Initial Brief at 19. The *World Rental & Sales* court, however, said no such thing. 517 F.3d at 1247-48 & n.6.

In a footnote, the court did indicate that it could imagine scenarios in which a clause limited to the parties but conferring obligations on a non-signatory could

be utilized to compel arbitration. *Id*. at 1247 n.6. And the court did address equitable estoppel, finding that the argument had no merit, even though it had already ruled that it would not re-write the arbitration clause to compel arbitration of claims against a non-party. *Id*. at 1247-48. But the court gave no indication as to why it addressed estoppel under such circumstances. *Id*. at 1247-48. *Accord*, *Corp. Am. Credit Union*, 397 Fed. Appx. at 542 (holding that because the arbitration clause at issue was "party specific" that its "inquiry is at an end"; but going on to address and reject an equitable estoppel argument).

Without any Florida law addressing the issue, and no definitive pronouncement from the Federal Courts, this Court should find the Alabama Supreme Court's holdings to be persuasive because such holdings comport with Florida law. Ordinarily, Florida's courts will not permit a parent to invoke an arbitration clause found in its subsidiary's contracts. *E.g.*, *Am. Int'l Group, Inc. v. Cornerstone Bus., Inc.*, 872 So. 2d 333, 336-37 (Fla. 2d DCA 2004); *Coastal Health Care Group, Inc. v. Schlosser*, 673 So. 2d 62, 65 (Fla. 4th DCA 1996); *Federated Title Ins., Inc. v. Ward*, 538 So. 2d 890, 891 (Fla. 4th DCA 1989); *J.P. Stevens & Co., Inc. v. Harrell Int'l, Inc.*, 299 So. 2d 69, 70 (Fla. 1st DCA 1974).

There are, to be sure, non-contractual exceptions, such as those the Allscripts Parent seeks to invoke. *See Liberty Cmmc'ns, Inc.*, 733 So. 2d at 574. But this Court has held that "[i]t is hornbook law that, to be bound, one must be a party to a contract," and "[t]here is no 'arbitration' exception to this principle of law." *Prudential-Bache Sec., Inc. v. U.S. Optical Frame Co., U.S.*, 534 So. 2d 793, 795 (Fla. 3d DCA 1988). "While it does not follow that an obligation to

arbitrate attaches only to the signatories …" courts "are without authority 'to go ahead and make a new contract' out of an arbitration clause which by its clear language refers to … and … binds only" specifically identified signatories. *Id.*

Re-writing the contract is exactly what the Allscripts Parent requests. The arbitration provision contained within the Master Agreements indisputably limits its reach to Plaintiffs and the Allscripts Subsidiary. Initial Brief Appendix at 164. And because the bound parties are expressly named, there is no room for contract interpretation. *Prudential-Bache Sec.*, 534 So. 2d at 796.

That the Allscripts Parent seeks to vary the language of the Master Agreements based upon a non-contractual doctrine is of no moment. Under Florida law, estoppel may not be invoked to vary explicit terms of a contract. *E.g.*, *Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897, 902 (Fla. 3d DCA 2010) (holding that promissory estoppel, "an equitable doctrine for the enforcement of agreements," could not be used to "nullify an expressly-agreed written contractual term"); *Advanced Mktg. Sys. v. ZK Yacht Sales*, 830 So. 2d 924, 928 (Fla. 4th DCA 2002) (same).[9] Application of estoppel in this action would require the Court to write out of the clause its explicit limiting language.

[9] To be sure, this case law arises in the context of promissory estoppel which is invoked between signatories, whereas equitable estoppel is invoked by non-signatories against signatories. That is a distinction without a difference. This Court's holding in *Coral Reef Drive*, 45 So. 3d at 902, was grounded in the principle that an equitable doctrine may not override an express contractual term. That same principle applies whether the party seeking to vary the contract's terms signed the agreement or is seeking to stand in the signatory's shoes.

Critically, the Allscripts Parent does not provide a single citation for the proposition that arbitration provisions limited to expressly identified signatories may be undone by equitable estoppel. Initial Brief at 18-19. The Allscripts Parent cites *Bel-Ray Co. v. Chemrite (pty), Ltd.*, 181 F.3d 435, 446 (3d Cir. 1999), stating that it held "a non-signatory was bound to an arbitration agreement based on agency and alter-ego theory, even though the arbitration agreement was strictly limited to those who signed the agreement." Initial Brief at 19. But the Third Circuit held "that the District Court erred in compelling the Individual Appellants to arbitrate Bel-Ray's claims against them," upon holdings that agency, alter ego, and estoppel theories are "inapposite here." *Bel-Ray Co.*, 181 F.3d at 446. There is no indication anywhere in the opinion as to the scope or language of the arbitration clause at issue. *Id*. at 437-446. *Bel-Ray Co.* does not speak to the issue on this appeal.

The Allscripts Parent relies on *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. 3d DCA 2010), and asserts this Court held "non-signatories could compel member to arbitrate its claims." Initial Brief at 19. The Court did so hold, *Kolsky*, 28 So. 3d at 969, but upon a ruling that the "complaint alleges a conspiracy among the signatory appellant, D. Kolsky, and the non-signatory appellants." *Id.* at 970. That holding has no application here because no such conspiracy has been alleged and the Allscripts Parent did not seek arbitration on this basis. *See* Point II(A)(1), *supra*; *Bailey*, 705 F.3d at 1321. And of course, *Kolsky* has nothing to say whatsoever about an arbitration clause that strictly limits its reach to the explicitly named parties. 28 So. 3d at 969-70.

The Allscripts Parent's citation to the dissenting opinion in *Marshall, Amaya & Anton v. Arnold-Dobal, D.O*, 76 So. 3d 998, 1004 (Fla. 3d DCA 2011) (Lagoa, J. dissenting), Initial Brief at 19, is equally puzzling. The Allscripts Parent cites to *Marshall* for the proposition that "[e]ven assuming arguendo that the arbitration clause limits the obligation to arbitrate to the parties, the doctrine of equitable estoppel applies here because the Plaintiffs rely on the terms of the written agreement in asserting their claims against [the Allscripts Parent]." Initial Brief at 19. First, the majority and concurring opinions do not address equitable estoppel at all. *Marshall*, 76 So. 3d at 998-1001. Second, the arbitration provision at issue was *not* limited to the immediate parties. *Marshall*, 76 So. 3d at 999 n.2 (Emas, J., concurring). Third, the dissent to which the Allscripts Parent cites, found equitable estoppel *inapplicable* because "resolution [of Dobal's claims] does not require reference to or construction of some portion of the employment agreement." *Id*. at 1004 (Lagoa, J., dissenting). Nothing in *Marshall* addresses the issue on appeal.

Finally, *E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001), is cited by the Allscripts Parent to support its contention that the trial court's ruling on the immediate party limitation "contradicts established Florida and federal law that applies the equitable estoppel theory to find non-signatories are 'akin to [the] signatory of the underlying agreement.'" Initial Brief at 18-19. The full quote from the Third Circuit's opinion, which quote cites *Bel Ray Co.*, is: "Similarly, there is no dispute that a non-signatory cannot be bound to arbitrate unless it is bound 'under

traditional principles of contract and agency law' to be akin to a signatory of the underlying agreement." *E.I. Dupont De Nemours & Co.*, 269 F.3d at 194.

First, *E.I. Dupont De Nemours & Co,* arose in the context of a signatory seeking to compel a non-signatory to arbitrate, an entirely distinct posture from the one before this Court, and which posture is guided by entirely separate legal analysis. 269 F.3d at 201-02. Second, the arbitration clause at issue expressly stated that it was "for the benefit of [the signatories] *and* their respective lawful successors and assignees …." *Id*. at 192 (emphasis added). Thus, that opinion stands only for the unexceptional proposition that there exist situations where a non-signatory may be found "akin to a signatory." *Id*. at 194. But it says nothing about an arbitration clause expressly limited to its signatories or whether equitable estoppel could be applicable in that situation. *Id*. at 190-204.

CONCLUSION

The question presented on this appeal is not whether equitable estoppel can ever compel a signatory to arbitrate its claims against a non-signatory – it can – but rather the questions are: (i) whether the Plaintiffs' claims require reference to or construction of the Master Agreements – they do not (*see* Point II, *supra*); and (ii) whether equitable estoppel can be applied by a non-signatory where the underlying arbitration agreement expressly limits its reach to identified signatories – (*see* Point III, *supra*). The only court the Plaintiffs have found to reach this second issue directly, as stated above, is the Alabama Supreme Court. Critically, that court's reasoning is unassailable, applicable under Florida law, and should be

persuasive to this Court: equitable estoppel should not be used to vary the express terms of an agreement and force signatories to arbitrate claims they expressly did not agree to arbitrate. *E.g.*, *Parkway Dodge*, 779 So. 2d at 1209-10.

Based on the foregoing, Plaintiffs respectfully request the Court to affirm the trial court's order denying the Allscripts Parent's motion to compel arbitration.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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