IN THE SUPREME COURT OF TEXAS

NO. 04-0865

IN RE MERRILL LYNCH TRUST COMPANY FSB, MERRILL LYNCH LIFE INSURANCE COMPANY, AND HENRY MEDINA, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued March 23, 2005

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE GREEN, and JUSTICE WILLETT joined, and in which JUSTICE HECHT and JUSTICE MEDINA joined as to Parts I, III-A, and IV, JUSTICE O'NEILL joined as to Parts I, III, and IV, and JUSTICE WAINWRIGHT and JUSTICE JOHNSON joined as to Parts I, II, and IV.

JUSTICE HECHT filed an opinion concurring in part and dissenting in part, in which JUSTICE MEDINA joined, and in Part I of which JUSTICE O'NEILL joined.

JUSTICE JOHNSON filed an opinion concurring in part and dissenting in part, in which JUSTICE WAINWRIGHT joined.

In considering referral to arbitration, the question is not which forum is quicker, cheaper, or more convenient, but which one the parties picked.[1] Here, the plaintiffs agreed to arbitrate with Merrill Lynch, but not the employee or affiliates they have sued. Because their claims against the employee are in substance claims against Merrill Lynch, we hold those claims must be arbitrated. Because there is no contract theory that ties the affiliates to the same agreement, we hold those

[1] *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

claims do not. And to the extent these separate proceedings overlap, we hold the litigation must be stayed until the arbitration is completed.

I. Background

Juan Alaniz was severely injured in a refinery explosion. He and his wife filed suit and recovered a settlement of more than $2 million. To preserve this recovery, they engaged Merrill Lynch, Pierce, Fenner & Smith Inc. through its employee Henry Medina to provide financial and investment services. In September 1993, the Alanizes opened a series of cash and investment accounts with Merrill Lynch. For each account, the Alanizes agreed to arbitrate any disputes that might arise with Merrill Lynch:

> I agree that all controversies which may arise between us, including but not limited to those involving any transaction or the construction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

As a part of their financial plan, the Alanizes set up an irrevocable life insurance trust with Merrill Lynch Trust Company as trustee, which then purchased a variable life policy from Merrill Lynch Life Insurance Company. Both of these Merrill Lynch affiliates had their own contracts with the Alanizes, neither of which contained an arbitration clause. The Alanizes transferred more than $200,000 from their Merrill Lynch accounts to ML Trust to pay premiums to ML Life. ML Life paid a commission on the sale to Merrill Lynch, which then paid Medina, a licensed agent for ML Life and other insurers.

In April 2003, the Alanizes sued ML Trust, ML Life, and Medina — but not Merrill Lynch — alleging a dozen multifarious claims, all related to the insurance trust, and all asserted against the

defendants collectively without differentiating the actions of each. The defendants moved to stay the litigation and compel arbitration, which the trial court denied. The Thirteenth Court of Appeals denied mandamus relief.[2]

The parties agree that the Federal Arbitration Act applies.[3] Accordingly, mandamus relief is appropriate if the trial court abused its discretion in failing to stay the litigation and compel arbitration.[4]

II. Arbitration with Corporate Employees: Henry Medina

The claims against Merrill Lynch's employee, Henry Medina, must go to arbitration for two reasons.

First, "parties to an arbitration agreement may not evade arbitration through artful pleading, such as by naming individual agents of the party to the arbitration clause and suing them in their individual capacity."[5] Corporations can act only through human agents, and many business-related torts can be brought against either a corporation or its employees.[6] If a plaintiff's choice between

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[2] 159 S.W.3d 162, 165.

[3] *See* 9 U.S.C. §§ 1-16.

[4] *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005).

[5] *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1318 (11th Cir. 2002) (internal quotations omitted); *accord, Pritzker v. Merrill Lynch, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762-63 (Tex. 2006).

[6] *See, e.g.*, *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (noting "Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts"); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 486 (Tex. 1998) (holding both insurer and its employees may be liable for Insurance Code violations); *Weitzel v. Barnes*, 691 S.W.2d 598, 601 (Tex. 1985) (holding both corporation and its individual agents may be liable under DTPA); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (holding both corporation and

suing the corporation or suing the employees determines whether an arbitration agreement is binding, then such agreements have been rendered illusory on one side.[7] As we recently noted, this would not place arbitration agreements on equal footing with other contracts:

> When contracting parties agree to arbitrate all disputes "under or with respect to" a contract (as they did here), they generally intend to include disputes about their agents' actions because "[a]s a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." If arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or be listed as a third-party beneficiary. This would not place such clauses on an equal footing with all other parts of a corporate contract.[8]

Second, the substance of the plaintiffs' suit here is against Merrill Lynch, even though it has not been named as a party. While the plaintiffs allege they are suing Medina only for his actions while wearing "the hat of the insurance agent," brokers do not change employers every time they sell someone else's product. The commission on this insurance transaction was paid directly to Merrill Lynch, not Medina; if the latter was acting as an agent for ML Life or ML Trust, then so was the former. As there is no question Medina was acting in the course and scope of his employment, if he is liable for the torts alleged against him, then Merrill Lynch is too.[9]

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its agents may be liable for defamation).

[7] *See In re Dillard Dep't Stores, Inc*., 198 S.W.3d 778, 782 (Tex. 2006); *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002).

[8] *In re Vesta*, 192 S.W.3d at 762 (quoting *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995) (citation omitted)).

[9] *See Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002) ("The general rule is that an employer is liable for its employee's tort only when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business and for the accomplishment of the object for which the employee was hired."); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 617–18 (Tex. 1999) ("Generally, a master is vicariously liable for the torts of its servants committed in the course and scope of their employment. This is true even though the employee's tort is intentional when the act, although not specifically authorized by the employer, is closely connected with the

While the plaintiffs have not sued Merrill Lynch yet, they have not "disavowed" such claims (as Justice Hecht asserts). They have never so stipulated under oath or in their pleadings, and their appellate brief says only that *the defendants* have not shown that Merrill Lynch has any potential liability, thus carefully leaving the door open for *the plaintiffs* to pursue precisely that option.[10] Nor do the plaintiffs' trial court pleadings "focus solely" on the insurance sale (again per Justice Hecht); to the contrary, they focus entirely on the alleged misrepresentations, omissions, and fiduciary breaches leading up to it. While only ML Trust might be liable for the transaction itself, Medina and his employer would both be liable for the preliminary tort and statutory claims the plaintiffs have actually alleged.[11]

Finally, the plaintiffs also assert their arbitration agreements were illusory as Merrill Lynch could modify or rescind those agreements at any time. As this defense relates to the parties' entire contract rather than the arbitration clause alone, it is a question for the arbitrators.[12] Additionally,

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servant's authorized duties.") (citations omitted).

[10] *See*, *e.g.*, *Hennigan v. I.P. Petroleum Co.,* 858 S.W.2d 371, 372 (Tex. 1993) (per curiam) (holding plaintiff did not abandon gender discrimination claim by testifying at her deposition that she did not believe she had been fired because of her gender). Accordingly, such a statement is neither a judicial admission ("a formal waiver of proof usually found in pleadings or the stipulations of the parties"), nor even a quasi-admission ("[a] party's testimonial declaration[]" that is evidentiary but "not conclusive"). *Id.*

[11] *See*, *e.g.*, *Liberty Mut. Ins. Co.*, 966 S.W.2d at 486 (holding both insurer and its employees may be liable for Insurance Code violations); *Weitzel*, 691 S.W.2d at 601 (holding both corporation and its individual agents may be liable under DTPA); *see also* TEX. REV. CIV. STAT. art. 581-33, §§ A(2), F(1) (holding one who offers securities and those who directly or indirectly control them liable for securities fraud).

[12] *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("We reaffirm today that . . . a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).

the plaintiffs' testimony that they failed to read the arbitration provisions until this dispute arose is not a valid ground for setting aside their signed agreements.[13]

We do not hold today that employees can always invoke an employer's arbitration agreement. When actions outside the course of employment cannot be attributed to an employer, the latter would have no need to invoke its arbitration protections.[14] But under both Texas and federal law, arbitrability turns on the substance of a claim, not artful pleading.[15] Because the plaintiffs' claims against Medina are in substance claims against Merrill Lynch, they must abide by their agreement to arbitrate those claims.[16]

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[13] *See In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) ("Gonzalez' failure to read the agreement does not excuse him from arbitration. We presume a party, like Gonzalez, who has the opportunity to read an arbitration agreement and signs it, knows its contents.").

[14] *See*, *e.g.*, *McCarthy v. Azure*, 22 F.3d 351, 362-63 (1st Cir. 1994) (refusing to allow nonsignatory owner acting in his own interest from invoking arbitration clause signed by his wholly owned corporation).

[15] *See Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 626-28 (4th Cir. 2006); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250 (5th Cir. 1998); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757–58 (11th Cir. 1993); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1188 n.4 (9th Cir. 1986); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131–32 (Tex. 2005).

[16] We disagree with the plaintiffs' alternative argument that if New York law applies, this result would be any different. *Compare Hirschfeld Prods. v. Mirvish*, 630 N.Y.S.2d 726, 728 (N.Y. App. Div. 1995) ("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 this State . . . . If it were otherwise, it would be too easy to circumvent the agreement by naming individuals as defendants instead of the entity Agents themselves.") (quotations and citations omitted), *with In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006) ("When contracting parties agree to arbitrate all disputes . . . they generally intend to include disputes about their agents' actions because 'as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts.' If arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or be listed as a third-party beneficiary. This would not place such clauses on an equal footing with all other parts of a corporate contract.") (citation omitted).

III. Arbitration with Affiliates: ML Life and ML Trust

A. The Agreements

Merrill Lynch's cash management agreements referred to some affiliates and third parties, but not ML Trust or ML Life. Those affiliates signed their own contracts with the plaintiffs, which had no arbitration clauses. As allowing these affiliates to compel arbitration would effectively rewrite their contracts, we hold they cannot.

"A corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement."[17] Unlike a corporation and its employees, corporate affiliates are generally created to separate the businesses, liabilities, and contracts of each. Thus, a contract with one corporation — including a contract to arbitrate disputes — is generally not a contract with any other corporate affiliates.[18]

Of course, if two corporations are actually operated as one, many courts recognize an alter-ego exception that will bind one to the arbitration agreements of the other.[19] But there are no such allegations here, and the exception itself illustrates that arbitration agreements generally do not apply to all corporate affiliates. Thus, we hold ML Trust and ML Life are not covered by the plaintiffs' arbitration agreements with Merrill Lynch.

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[17] *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005).

[18] *See*, *e.g.*, *S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 86 (Tex. 2003) (holding franchise tax agreement inapplicable to corporate affiliate under single-business-enterprise theory); *Bell Oil & Gas Co. v. Allied Chem. Corp.*, 431 S.W.2d 336, 341 (Tex. 1968) (holding corporation not liable for affiliate's debts).

[19] *See*, *e.g.*, *Am. Bankers*, 453 F.3d at 627 n.3; *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006).

B. Concerted-Misconduct Equitable Estoppel

ML Life and ML Trust also assert that they can invoke Merrill Lynch's arbitration agreements through an estoppel theory based on substantially interdependent and concerted misconduct.

Estoppel is one of five or six instances in which the federal circuit courts require arbitration with nonsignatories.[20] We too have applied estoppel when nonsignatories seek a direct benefit from a contract with an arbitration clause.[21] But we have never compelled arbitration based solely on substantially interdependent and concerted misconduct,[22] and for several reasons we decline to do so here.

First, the United States Supreme Court has never construed the Federal Arbitration Act to go this far. It has repeatedly emphasized that arbitration "is a matter of consent, not coercion,"[23] that the Act "does not require parties to arbitrate when they have not agreed to do so,"[24] and its purpose

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[20] *See Bridas*, 447 F.3d at 415; *Comer*, 436 F.3d at 1101; *Zurich Am.*, 417 F.3d at 687; *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 71 (2d Cir. 2005); *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005); *InterGen N.V. v. Grina*, 344 F.3d 134, 145-46 (1st Cir. 2003); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003); *Employers Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000); *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).

[21] *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131–32 (Tex. 2005); *Kellogg*, 166 S.W.3d at 741.

[22] We noted allegations of concerted misconduct in *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 306–07 (Tex. 2006), but compelled arbitration because the plaintiff's claims depended on the underlying agreement, and thus were governed by principles of direct-benefits estoppel.

[23] *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

[24] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (quoting *Volt,* 489 U.S. at 478).

is to make arbitration agreements "as enforceable as other contracts, but not more so."[25] Thus, arbitration is not required merely because two claims arise from the same transaction, as the Court made clear in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[26] In that case, a hospital sued a contractor (with whom it had an arbitration agreement) and an architect (with whom it did not) alleging the two had improperly agreed to waive the deadline for claiming extra construction costs without the hospital's consent. Despite these allegations of substantially interdependent and joint misconduct, the court held that the nonsignatory architect could not be forced into arbitration:

> The Hospital points out that it has two substantive disputes here — one with Mercury, concerning Mercury's claim for delay and impact costs, and the other with the Architect, concerning the Hospital's claim for indemnity for any liability it may have to Mercury. The latter dispute cannot be sent to arbitration without the Architect's consent, since there is no arbitration agreement between the Hospital and the Architect.[27]

Recognizing the "misfortune" inherent in resolving these related issues in two different places, the Court nevertheless held that considerations of efficiency and convenience cannot override either a signatory's arbitration agreement or a nonsignatory's right to a jury trial:

> It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons

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[25] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

[26] 460 U.S. 1 (1983).

[27] *Id*. at 19-20.

> who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between Mercury and the Hospital is arbitrable under the Act, then the Hospital's two disputes will be resolved separately – one in arbitration, and the other (if at all) in state-court litigation.[28]

While the Fifth Circuit has recognized concerted-misconduct estoppel, the theory is far from well-settled in the federal courts. Despite hundreds of federal appeals involving arbitration,[29] it appears in only 10 reported opinions. In the two leading cases, *Grigson v. Creative Artists Agency L.L.C.*[30] and *MS Dealer Service Corp. v. Franklin*,[31] the Fifth and Eleventh Circuits held that *both* direct-benefits *and* concerted-misconduct estoppel were present, so it is unclear what the latter theory added to the result.[32] Of the remainder, the theory was found inapplicable in 4,[33] and it was not

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[28] *Id*. at 20 (emphasis in original).

[29] "The federal courts of appeal are currently publishing more than one hundred cases per year substantially dealing with arbitration." Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225, 225 (2005).

[30] 210 F.3d 524, 528-31 (5th Cir. 2000).

[31] 177 F.3d 942, 947 (11th Cir. 1999).

[32] Though the *Grigson* court stated that equitable estoppel "is much more readily applicable when the case presents both independent bases," 210 F.3d at 527, if the two bases are independent and each alone is sufficient, it is hard to see why either is made "more applicable" by having both. *See also In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002) ("The plaintiff's actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.").

[33] *See Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005)*; Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 360-61 (5th Cir. 2003); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002); *Humana*, 285 F.3d at 976.

reached in 2 more.[34] In only 2 cases did the result hinge on the exception — and in those the Fifth Circuit compelled arbitration in one *and refused to do so in the other*.[35]

In the latter case, *Hill v. G E Power Systems, Inc*., the Fifth Circuit found that "*Grigson*'s second prong is met" (direct-benefits being the first estoppel prong and concerted-misconduct the second), and at the same time that "the district court did not abuse its discretion" in refusing to compel arbitration because "the district court is better equipped to make the call than this court, and we do not lightly override that discretion."[36] But the right to a jury trial is not discretionary. Nor is the right to have an arbitration contract enforced. If the parties have not agreed to arbitration, no trial court has discretion to make them go; if they have agreed to arbitration, no trial court has discretion to let one wriggle out.[37] This Court has already rejected the argument that equitable estoppel allows trial judges to send cases to arbitration or litigation depending on which they think would be fair.[38]

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[34] *See Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 n.3 (4th Cir. 2006); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 706 (5th Cir. 2002) (noting that exception was applied by district court but that appeal addressed other issues).

[35] *See Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 399 (5th Cir. 2006) (compelling arbitration); *Hill v. G E Power Sys., Inc*., 282 F.3d 343, 349 (5th Cir. 2002) (refusing to compel arbitration).

[36] *Hill*, 282 F.3d at 349.

[37] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (citation omitted) (noting that Federal Arbitration Act was specifically enacted to overcome "judicial hostility to arbitration agreements").

[38] *See Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 308 (Tex. 2006) ("WMCO also argues that the trial court had discretion not to apply equitable estoppel, even if it could be applied in the same circumstances. We disagree. A trial court has no 'discretion' in determining what the law is or applying the law to the facts.") (internal quotations omitted).

It is true that other federal circuit courts have estopped signatory plaintiffs from avoiding arbitration with nonsignatories using an "intertwined-claims" test. For example, the Second Circuit has compelled arbitration when a nonsignatory defendant has a "close relationship" with one of the signatories and the claims are "intimately founded in and intertwined with the underlying contract obligations."[39] But the "close relationship" requirement has generally limited this exception to instances of strategic pleading by a signatory who, in lieu of suing the other party for breach, instead sues that party's nonsignatory principals or agents for pulling the strings.[40] As discussed above with reference to employees, allowing litigation to proceed that is in substance against a signatory though in form against a nonsignatory would allow indirectly what cannot be done directly. By contrast, the

[39] *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (internal citations omitted); *accord, Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004); *Astra Oil Co., v. Rover Navigation, Ltd.*, 344 F.3d 276, 279 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97–98 (2d Cir. 1999).

[40] *See CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005) (allowing nonsignatory owners of signatory franchisor to invoke its arbitration clause); *JLM Indus.,* 387 F.3d at 177 (allowing nonsignatory owners of subsidiary to invoke its arbitration clauses); *Astra*, 344 F.3d at 279 (allowing nonsignatory affiliate that acted as agent for signatory corporation to invoke its arbitration clause); *Smith/Enron*, 198 F.3d at 97–98 (allowing nonsignatory affiliates and assignors of signatory corporations to invoke their arbitration clauses); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (allowing nonsignatory parent to invoke subsidiary's arbitration clause); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (same); *see also E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 201 (3d Cir. 2001) ("In essence, a non-signatory voluntarily pierces its own veil to arbitrate claims against a signatory that are derivative of its corporate-subsidiary's claims against the same signatory."); *cf. Choctaw Generation*, 271 F.3d at 406 (allowing nonsignatory surety to invoke debtor's arbitration clause); *but see Denney*, 412 F.3d at 70 (allowing unaffiliated nonsignatories to invoke arbitration by estoppel); *McCarthy v. Azure*, 22 F.3d 351, 362–63 (1st Cir. 1994) (refusing to allow nonsignatory owner of signatory corporation to invoke its arbitration clause).

concerted-misconduct test has no "close relationship" component, and would sweep independent entities and even complete strangers into arbitration agreements.[41]

Similarly, while Texas law has long recognized that nonparties may be bound to a contract under traditional contract rules like agency or alter ego,[42] there has never been such a rule for concerted misconduct. Conspiracy is a tort, not a rule of contract law.[43] And while conspirators consent to accomplish an unlawful act,[44] that does not mean they impliedly consent to each other's arbitration agreements. As other contracts do not become binding on nonparties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, contrary to the Arbitration Act's purpose.[45]

Until the United States Supreme Court clarifies whether concerted-misconduct estoppel correctly reflects federal law, or even whether federal or state law governs the issue,[46] today's decision must remain somewhat tentative. But we find nothing in Texas contract law, and no settled principles of federal arbitration law, that would require the plaintiffs to arbitrate with Merrill Lynch's affiliates.

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[41] *Cf. In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) ("We agree with Cashion that he would not be required to arbitrate a tortious interference claim against a complete stranger to his contract and its arbitration clause.").

[42] *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005).

[43] *See Tilton v. Marshall*, 925 S.W.2d 672, 680–81 (Tex. 1996).

[44] *See Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995).

[45] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005).

[46] *See Weekley*, 180 S.W.3d at 130; *Kellogg*, 166 S.W.3d at 738–39.

IV. Stay of Litigation Pending Arbitration

In addition to moving to compel arbitration, ML Trust and ML Life moved to stay the plaintiffs' litigation against them. Assuming the same issues must be decided both in arbitration (against Medina) and in court (against the affiliates), we hold the latter must be stayed until the former is completed.

Trial judges cannot deny a party its day in court, but they have always had wide discretion to say when that day will be. Both the Federal and Texas Arbitration Acts require courts to stay litigation of issues that are subject to arbitration.[47] Without such a stay, arbitration would no longer be the "rapid, inexpensive alternative to traditional litigation"[48] it was intended to be, so long as one could find a trial judge willing to let the litigation proceed for awhile. The Federal Arbitration Act was passed precisely to overcome such judicial hostility.[49]

Thus, when an issue is pending in both arbitration and litigation, the Federal Arbitration Act generally requires the arbitration to go forward first; arbitration "should be given priority to the extent it is likely to resolve issues material to this lawsuit."[50] This has been the practice in all the federal courts.[51] As Judge Posner has noted:

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[47] 9 U.S.C. § 3; TEX. CIV. PRAC. & REM. CODE §§ 171.025, 172.174.

[48] *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992).

[49] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987).

[50] *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 783 (8th Cir. 2001).

[51] *See, e.g., Volkswagen Of Am., Inc. v. Sud's Of Peoria, Inc.,* 474 F.3d 966, 972 (7th Cir. 2007); *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 345 (5th Cir. 2004); *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 348 (5th Cir. 2002); *Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999); *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 76 (2d Cir. 1997); *IDS Life*

> [There] are cases in which a party to an arbitration agreement, trying to get around it, sues not only the other party to the agreement but some related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration. Such a maneuver should not be allowed to succeed . . . [and] would require the court to stay the proceedings before it and let the arbitration go forward unimpeded.[52]

We encountered the problem in different circumstances in *In re Kellogg Brown & Root, Inc*., in which a nonsignatory's litigation of a lien claim was abated while arbitrators decided who owned the equipment to which the lien claim attached.[53] Once arbitration was completed, we held the litigation could proceed.[54] The case illustrates one of many circumstances in which litigation must be abated to ensure that an issue two parties have agreed to arbitrate is not decided instead in collateral litigation. In this case, if the alleged misrepresentations and omissions by Medina must be arbitrated, that proceeding must be given priority so that it is not rendered moot by deciding the same issues in court. After the arbitration is completed, the plaintiffs' claims against ML Trust and ML Life can then be litigated (to the extent they survive) without infringing the arbitration agreement. In the interim, a stay of litigation ensures that the Alanizes do not "both have [their] contract and defeat it too."[55]

* * *

Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 530 (7th Cir. 1996); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

[52] *IDS Life Ins. Co.*, 103 F.3d at 530.

[53] 166 S.W.3d 732 (Tex. 2005).

[54] *Id*. at 742.

[55] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

Accordingly, we hold the trial court abused its discretion in failing to compel arbitration of the plaintiffs' claims against Henry Medina, and in failing to stay their litigation against ML Trust and ML Life until that arbitration was concluded. We conditionally grant the writ of mandamus and order the trial court to vacate its order and enter a new order in accordance with this opinion. We are confident the trial court will comply, and our writ will issue only if it does not.

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Scott Brister
Justice

OPINION DELIVERED: August 24, 2007