

15-813
No. _____

Supreme Court, U.S.
FILED

DEC 18 2015

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IN THE
Supreme Court of the United States

THE MUECKE COMPANY, INCORPORATED, ET AL.,
Petitioners,

v.

CVS CAREMARK CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 21, 2015

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in failing to apply Arizona's law of equitable estoppel applicable to contracts generally as required by *Arthur Andersen v. Carlisle*, 556 U.S. 624 (2009) in order to determine whether the non-signatories to an arbitration agreement could compel arbitration.

2. Whether the Fifth Circuit erred in failing to honor the terms of an arbitration agreement that specifically prohibited third parties such as Respondents from enforcing its terms.

PARTIES TO THE PROCEEDING

Petitioners are The Muecke Company, Incorporated; Bruce Rogers, Individually and doing business as Rogers Pharmacy; Brookshire Brothers Pharmacy of Kirbyville, Texas; De la Rosa Pharmacy, Incorporated; Hometown Pharmacy, LC; and Robert Kinsey Investments, Incorporated, doing business as Kinsey's Pharmacy.

Respondents are CVS Caremark Corporation; CVS Pharmacy, Incorporated; and Caremark Rx, L.L.C.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Muecke Company, Incorporated is a privately held company. It has no parent corporation, and no publicly held corporation owns ten percent or more of The Muecke Company, Incorporated.

Petitioner Bruce Rogers is an individual doing business as Rogers Pharmacy.

Petitioner Brookshire Brothers Pharmacy of Kirbyville, Texas is a privately held company. It is owned by Kanak, Inc. and Kirbyville H & J, Inc., and no publicly held corporation owns ten percent or more of Brookshire Brothers Pharmacy of Kirbyville, Texas.

Petitioner De la Rosa Pharmacy, Incorporated is a privately held company. It has no parent corporation, and no publicly held corporation owns ten percent or more of De la Rosa Pharmacy, Incorporated.

Petitioner Hometown Pharmacy, LC is a privately held company. It has no parent corporation, and no publicly held corporation owns ten percent or more of Hometown Pharmacy, LC.

Petitioner Robert Kinsey Investments, Incorporated, doing business as Kinsey's Pharmacy is a privately held company. It has no parent corporation, and no publicly held corporation owns ten percent or more of Robert Kinsey Investments, Incorporated, doing business as Kinsey's Pharmacy.

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PETITION FOR WRIT OF CERTIORARI

Petitioners The Muecke Company, Incorporated; Bruce Rogers, Individually and doing business as Rogers Pharmacy; Brookshire Brothers Pharmacy of Kirbyville, Texas; De la Rosa Pharmacy, Incorporated; Hometown Pharmacy, LC; and Robert Kinsey Investments, Incorporated, doing business as Kinsey's Pharmacy respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

◆

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* 1–11) is reported at 615 F. App'x. 837 (5th Cir. 2015). The district court's order of dismissal (App., *infra* 30–32) is unreported.

◆

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 25, 2015. Petitioners' motion for rehearing en banc was denied on September 22, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

◆

STATUTORY PROVISIONS INVOLVED

Sections 2 and 3 of the Federal Arbitration Act ("FAA") provide in relevant part:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

STATEMENT OF THE CASE

A. Background

Petitioners are each independent pharmacies operating across Texas. Respondents CVS Caremark

Corporation; CVS Pharmacy, Incorporated; and Caremark Rx, L.L.C. operate CVS pharmacies, a national retail pharmacy chain and are direct competitors of Petitioners. The Petitioners claim that Respondents each acted to improperly access and utilize the Petitioners' customer records by illegally accessing the data warehouse established for records accumulated by Respondents and their pharmacy benefit manager subsidiary, Caremark LLC.¹

Petitioners and Caremark LLC each executed separate provider agreements that define the disputes that must be submitted to arbitration and the parties that may invoke the right to arbitrate:

Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement. The award of the arbitrator will be final and binding on the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. Any such arbitration must be conducted in Scottsdale, Arizona, and Provider agrees to such jurisdiction,

¹ A pharmacy benefits manager ("PBM") acts as the intermediary between health plans and pharmacies, establishes networks of providers for the health plans, and processes prescription drug claims for provider-pharmacies.

unless otherwise agreed to by the parties in writing. The expenses of arbitration, including reasonable attorney's fees, will be paid for by the party against whom the award of the arbitrator is rendered. Except as may be required by Law, neither a party nor an arbitrator may disclose the existence, content or results of any dispute or arbitration hereunder without the prior written consent of both parties. Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law.

...

Except for the indemnification provisions, no term or provision in the Provider Agreement is for the benefit of any person who is not a party to the Provider Agreement and no such party shall have any right or cause of action under the Provider Agreement.²

The provider agreements also stated that they are to be governed by Arizona law.

² This clause is referred to hereinafter as the "*no non-party rights provision*."

It is undisputed that Respondents are not parties to the provider agreements.

B. Proceedings Below

In September 2010, Petitioners filed their class action complaint against Respondents and Caremark LLC for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (“RICO”) and Texas trade secret law. Petitioners also sought an injunction to permanently bar the Respondents’ misconduct.

Caremark LLC moved to compel arbitration. Though acknowledging that they were not parties to the provider agreements, the Respondents nevertheless also sought to enforce the arbitration clause under a theory of equitable estoppel. Adopting the recommendations of the magistrate, the district court initially granted Caremark LLC’s motion to compel arbitration and denied the Respondents’ motion. The Respondents filed an interlocutory appeal complaining of the denial of their motion to compel arbitration. On March 15, 2013 the Fifth Circuit affirmed the district court’s order denying Respondents’ motion to compel arbitration. On remand, the Petitioners dismissed their claim against Caremark LLC and the magistrate lifted the stay to permit the case to proceed against Respondents on the merits.

On April 4, 2014, a separate panel of the Fifth Circuit issued its opinion in *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014). The Respondents sought reconsideration of the district court’s prior denial of

their motion to compel arbitration in light of *Crawford*. The district court adopted the magistrate's recommendation to grant Respondents' motion for reconsideration, ordered the claims against Respondents to arbitration and dismissed the case.

Petitioners appealed to the Fifth Circuit. The Fifth Circuit, following *Crawford*, affirmed the district court's order compelling the claims against Respondents to arbitration. Specifically, the Fifth Circuit utilized the arbitration-specific test set forth in *Goldman v. KPMG LLP*, 92 Cal.Rptr.3d 534, 541 (Cal. Ct. App. 2009)³ to hold that the Respondents could avail themselves of the doctrine of equitable estoppel to enforce the arbitration clause in the provider agreement. *Muecke Co., Inc. v. CVS Caremark Corp.*, 615 F. App'x. 837, 839–40, 842 (5th Cir. 2015). The Fifth Circuit also held that the *no non-party rights provision* did not preclude the application of equitable estoppel because:

[e]quitable estoppel is based on the premise that “[o]ne should not be permitted to rely on an agreement containing an arbitration clause for its claims, while at the same time repudiating the arbitration provision contained in the same contract.” Equitable estoppel, therefore, overrides a *no non-party rights provision* in the same way that

³ The equitable estoppel test utilized by the California Court of Appeal in *Goldman* is a test that is derived in large part from the Eleventh Circuit's *MS Dealer* test. *Goldman*, 92 Cal.Rptr.3d at 541 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

it overrides an arbitration provision stating that it only applies to disputes between parties.

Id. at 842 (quoting *Crawford*, 748 F.3d at 260).

On September 22, 2015, the Fifth Circuit denied Petitioners' timely request for rehearing en banc. This petition follows.



REASONS FOR GRANTING THE PETITION

A. ***Carlisle's* Mandate That Only State Law Applicable to Contracts Generally Be Utilized In Determining Who May Enforce Arbitration Clauses Is Not Being Followed In Circuits Across the United States Including the Fifth Circuit.**

1. **The Pre-*Carlisle* Equitable Estoppel Analysis Relied on Arbitration-Specific Federal Common Law.**

Prior to this Court's 2009 decision in *Arthur Andersen v. Carlisle*, 556 U.S. 624 (2009) federal courts analyzed whether persons who were not parties to an arbitration agreement could nevertheless compel arbitration by utilizing a body of arbitration-specific federal common law of "equitable estoppel." That body of federal common law varied from circuit to circuit but, for the most part, turned on an analysis of whether a plaintiff's claim against a non-signatory defendant was dependent upon or intertwined with the contract containing the

arbitration clause. *See, e.g., Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046–47 (9th Cir.2009); *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000); *MS Dealer*, 177 F.3d at 947. The equitable estoppel doctrine invoked in these lines of cases did not apply generally to questions regarding the enforcement of other types of contract provisions. The doctrine was derived solely from and applied to disputes over the enforceability of an arbitration provision.

2. *Carlisle* Mandates the Use of State Law Applicable to Contracts Generally When Deciding a Non-Signatory’s Right to Compel Arbitration.

In 2009, this Court in *Carlisle* made clear that only state law applicable generally to all contracts could be utilized to determine whether a party could enforce an arbitration clause. *Carlisle*, 556 U.S. at 630–631. This Court stated: “[Section 2 of the FAA] creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements upon the same footing as other contracts.” *Id.* at 630 (internal citations and quotation marks omitted). “Neither [Section 2 or Section 3 of the FAA] purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).” *Id.* “[S]tate law,” therefore, is applicable to determine which contracts are binding under § 2 and enforceable

under § 3 ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’” *Id.* at 630–631 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987)). If the law did *not* arise to govern the enforceability of contracts generally, then it was not the proper state law to apply.

In *Carlisle*, therefore, this Court did more than simply hold that state law should be applied. This Court went further and mandated that only that state law that had application to any type of contract was to be used, whether an arbitration provision was involved or not. Otherwise, arbitration contracts would not be on an equal footing with other contracts. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967) (the FAA was designed “to make arbitration agreements as enforceable as other contracts, but not more so”). After *Carlisle*, federal common law could not be utilized in examining who could enforce an arbitration provision; nor could state law applicable only to arbitration agreements. Only generally applicable state law could be utilized to answer such a question.

In coming to this conclusion, the *Carlisle* Court was following its prior precedent expressed in *Perry*. There, this Court recognized that it was important to examine ordinary contract law – the kind applicable to any contract and any contract term, not just arbitration clauses.

Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the

validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Perry, 482 U.S. at 492 n.9 (internal citations omitted).

This Court has very recently reaffirmed the principle that the only state law that matters is state law that would be used when analyzing any type of contract, not just one involving arbitration. *DIRECTV v. Imburgia*, No. 14-462, — S. Ct. —, 2015 WL 8546242, at *6 (Dec. 14, 2015). In *Imburgia*, DIRECTV entered into a service agreement with its customers, the plaintiffs. The service agreement provided that disputes between them would be settled by binding arbitration and included a provision waiving class arbitration. The central dispositive issue in the case was whether the California law applied to decide the enforceability of the class action waiver could be applied in any context, or whether the California law only applied when an arbitration provision was at issue. In setting up its analysis, this Court noted that it must decide “whether the decision of the California court places arbitration contracts ‘on *equal* footing with *all* other contracts.’” *Id.* (citing *Buckeye Check Cashing*,

Inc. v. Cardegna, 546 U.S. 440, 443 (2006)) (emphasis added). This Court found that “California courts would not interpret contracts other than arbitration contracts the same way” and that such a unique interpretation limited to the field of arbitration failed to place arbitration agreements on equal footing with other contracts. *Id.* at *6, 8.

Thus, this Court has consistently held that generally applicable state law is the only law that may be utilized in analyzing the validity, formation and enforceability of arbitration agreements.

3. Since It Was Decided, *Carlisle* Has Been Misconstrued and Ignored in Courts Across the Country.

There has been absolutely no uniformity in the application of *Carlisle*’s mandate in deciding whether a non-signatory may utilize equitable estoppel to enforce an arbitration clause.

Some, but not all, of the lower courts have recognized that *Carlisle* abrogated the federal common law lines of equitable estoppel cases in favor of state law. *See, e.g., Crawford*, 748 F.3d at 256; *Hergenreder v. Bickford Senior Living Group, LLC*, 656 F.3d 411, 416–17 (6th Cir. 2011); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App’x. 704, 708 (10th Cir. 2011); *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1170–71 (11th Cir. 2011).

However, many lower courts that recognized the need to apply state law to decide a non-signatory’s rights to enforce an arbitration clause failed to

recognize *Carlisle's* mandate that only *generally applicable* state law (as opposed to arbitration-specific state law) could be used to decide the question. As a result, lower courts have been both abolishing the federal common law of equitable estoppel while erroneously utilizing a state's arbitration-specific test. Perhaps the clearest example of this is the Eleventh Circuit's decision in *Lawson*.

In *Lawson*, the Eleventh Circuit properly recognized that its arbitration-specific federal common law test utilized in *MS Dealer* had been abrogated by *Carlisle*. *Lawson*, 648 F.3d at 1170–71. Yet, rather than turning to generally applicable Georgia law, the Eleventh Circuit turned to a Georgia decision that had adopted the very same arbitration-specific *MS Dealer* test which had just been discarded. *Lawson*, 648 F.3d at 1172 (applying *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 100 (Ga. Ct. App. 2003)).

Like the Eleventh Circuit in *Lawson*, other courts have recognized the need to apply state law, yet have similarly failed to recognize that only state law applicable to contracts generally should be utilized to decide whether a non-signatory can enforce an arbitration agreement. *See, e.g., Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014) (purporting to apply traditional state law principles, but instead applying Georgia and Pennsylvania law adopting the arbitration-specific *MS Dealer* test); *Crawford*, 748 F.3d at 255, 260 (recognizing abrogation of the Fifth Circuit *Grigson* test, but applying a California state court decision

utilizing abrogated arbitration-specific federal common law equitable estoppel test); *Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 732–36 (8th Cir. 2009) (applying Mississippi case law adopting arbitration-specific *MS Dealer/Grigson* test); *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128–29 (9th Cir. 2013) (applying arbitration-specific California test).

To this day, other courts still continue to apply the arbitration-specific federal common law of equitable estoppel that *Carlisle* had abrogated six years ago. *See, e.g., Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 373 (4th Cir. 2012) (applying arbitration-specific Fourth Circuit *Brantley* test); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126–28 (2d Cir. 2010) (applying arbitration-specific Second Circuit *Sokol* test).

The proper applications of *Carlisle* are few and far between. The First Circuit in *Awuah v. Coverall North America, Inc.*, 703 F.3d 36 (1st Cir. 2012) correctly utilized generally applicable Massachusetts law concerning the doctrine of “incorporation by reference” to determine whether a non-signatory could compel arbitration. *Awuah*, 703 F.3d at 42–43 (citing *NSTAR Elec. Co. v. Dep’t of Pub. Utils.*, 968 N.E.2d 895, 905 (Mass. 2012)). A Maryland district court applied *Carlisle* to look at generally applicable Maryland law of estoppel and, failing to find detrimental reliance by the non-signatory, denied the defendants’ motion to compel arbitration. *Kennedy v. ADF MidAtlantic, LLC*, Civ. No. JKB–15–0346, 2015 WL 6596918, at *5 (D. Md. Oct. 27, 2015). In a similar case, the Third Circuit utilized

generally applicable Delaware law concerning the ability of a signatory to compel a non-signatory to arbitration. *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 223 (3d Cir. 2014).

In another case reflecting the confusion that persists amongst lower courts, the Arizona district court could not determine whether *Carlisle* permitted or forbade the application of the pre-existing federal common law of equitable estoppel over Kentucky's own generally applicable estoppel law. *Kingsley Cap. Mgmt., LLC v. Sly*, 820 F.Supp.2d 1011, 1022 (D. Ariz. 2011). As a result, the *Kingsley* court utilized both in its analysis. In addition to the *MS Dealer* test, the *Kingsley* court examined generally applicable Kentucky law and found that neither test was satisfied. *Id.* at 1025.

In short, the lower courts' implementation of the mandates of *Carlisle* have been chaotic and in desperate need of clarification and correction by this Court.

4. The Fifth Circuit Failed to Apply Arizona's Generally Applicable Equitable Estoppel Doctrine.

The Fifth Circuit in this case, like many other courts, failed to properly apply *Carlisle*. As established by this Court in *Carlisle*, traditional principles of Arizona law⁴ that arose to govern

⁴ Arizona law applied because that is the law set forth in the respective provider agreements. *Overstreet v. Contigroup Co., Inc.*, 462 F.3d 409, 411 (5th Cir. 2006).

contracts generally control (as opposed to law that applies only to arbitration agreements).

Arizona's generally applicable law of equitable estoppel is easy to discern and was briefed to the Fifth Circuit. Under traditional principles of Arizona's generally applicable contract law, the doctrine of equitable estoppel requires three elements: (1) the party to be estopped [must] commit acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 399–400 (Ariz. 1984) (en banc); *Flying Diamond Airpark, LLC v. Meienberg*, 156 P.3d 1149, 1155 (Ariz. Ct. App. 2007).

It is, of course, elementary that the defendant cannot claim the benefit of estoppel without clear and satisfactory proof that he changed his position to his detriment as a direct result of the conduct of the adverse party. . . . [I]t must be shown that the defendant while relying on the conduct of the plaintiff was induced to change his position to his detriment or disadvantage; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect.

Knight v. Rice, 321 P.2d 1037, 1038–39 (Ariz. 1958).

The reliance requirement “demands both that *the party claiming estoppel* actually relied on the

[other party's] act and that such reliance was reasonable under the circumstances. Actual reliance means that *the party seeking estoppel* has the burden to demonstrate that it prospectively relied on the [other party's] action." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 959 P.2d 1256, 1268 (Ariz. 1998) (en banc) (emphasis added). The Respondents entirely failed to present any evidence of the elements of equitable estoppel, including detrimental reliance.

In light of the *no non-party rights provision*, the Respondents could never justifiably rely on an expectation that they would be entitled to invoke the arbitration provision. Consequently, Respondents are not entitled to compel arbitration via equitable estoppel. The Fifth Circuit erroneously failed to acknowledge or apply Arizona's generally applicable law of equitable estoppel. If it had, it would have concluded that Respondents could not invoke the arbitration provisions in the provider agreements.

5. The Fifth Circuit Erroneously Relied Upon the California Court of Appeal Decision in *Goldman*.

In this case, the Fifth Circuit applied the California Court of Appeal decision in *Goldman* to conduct its equitable estoppel analysis. *Muecke*, 615 F. App'x. at 839–40, 842.⁵ The *Goldman* decision

⁵ Arizona courts look to California law *only* when Arizona courts have not addressed the issue. *State v. Vallejos*, 358 P.2d 178, 182 (Ariz. 1960) ("*In the absence of a case in this jurisdiction* construing this section, we will follow the California cases in so far as their reasoning is sound.") (emphasis added);

perfectly encapsulates the dissonant state of equitable estoppel jurisprudence post-*Carlisle*.

In *Goldman*, two defendants asserted a right to invoke arbitration provisions in agreement to which they were not parties under the doctrine of equitable estoppel. The California Court of Appeal decided *Goldman* on April 22, 2009, less than two weeks *before* the *Carlisle* decision was issued by this Court. As a result, the *Goldman* decision rested on the erroneous premise that “federal law governs the interpretation of the agreements” and so looked to “governing federal law” to decide the issue. *Goldman*, 92 Cal. Rptr. 3d at 542. The *Goldman* court did not examine generally applicable California law of equitable estoppel. So the *Goldman* court spent the bulk of its analysis dissecting the full panoply of arbitration-specific federal common law equitable estoppel cases such as *MS Dealer, Grigson*, and others. *See Goldman*, 92 Cal. Rptr. 3d at 543–50.

In other words, *Goldman* does not even purport to be a statement of California law. Instead it is a California court’s interpretation of arbitration–

Cooper v. QC Fin. Servs., Inc., 503 F. Supp. 2d 1266, 1285 (D. Ariz. 2007) (“[I]f Arizona law has not addressed an issue, we look approvingly to the laws of California.”) (emphasis added). The Fifth Circuit failed to recognize that “[t]he doctrine of estoppel is well established in Arizona.” *Heltzel v. Mechem Pontiac*, 730 P.2d 235, 237 (Ariz. 1986) (en banc). Arizona courts, including *Darner*, and *Flying Diamond*, have addressed the doctrine of equitable estoppel as discussed above. Since Arizona law already addresses equitable estoppel, it was erroneous to look to California’s equitable estoppel law.

specific federal common law; a federal common law that became defunct less than two weeks later when this Court issued its decision in *Carlisle*. The Fifth Circuit's utilization of *Goldman* in this case, over six years after *Carlisle*, demonstrates just how convoluted equitable estoppel jurisprudence has become in the Fifth Circuit and elsewhere.

6. This Court Has Consistently Held That Questions of Arbitration Contract Formation and Enforceability Must Be Decided According to Generally Applicable State Contract Law.

This Court has consistently made the distinction between state laws of general applicability and state laws applicable only to arbitration provisions, requiring the application of the former but not the latter. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

As arbitration is a matter of consent, ordinary state-law principles that govern general questions of contract formation and enforceability control. *See id.; First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (when interpreting arbitration agreements, courts "should apply ordinary state-law principles that govern the formation of contracts"). It would be wholly inconsistent with this Court's longstanding jurisprudence to hold that questions of non-signatory enforcement of arbitration provisions can be decided by arbitration-specific state law while all other questions of formation and enforcement must be decided only by "ordinary" "traditional" and "generally applicable" state contract law. However, that is just what is occurring across the country in

the many circuits that have held that arbitration-specific state law may be applied to test whether a non-signatory may enforce an arbitration provision.

This petition should be granted so that this Court can settle the confusion reigning in the lower courts and bring the oft-cited doctrine of equitable estoppel in line with its consistently held principle that generally applicable state law governs questions of contract formation and enforceability.

B. The Fifth Circuit Erroneously Failed to Enforce the *No Non-Party Rights Provision* in Contravention of This Court's Clear Jurisprudence Requiring the Enforcement of the Parties' Wishes Expressed in the Contract.

1. The *No Non-Party Rights Provision* Is Clear and Unambiguous and Must Be Enforced.

The contract on which the Respondents rely expressly prohibits them from claiming or obtaining a right to assert the arbitration clause and so bars the application of the doctrine of equitable estoppel.

In this case, each of the contracts offered includes the *no non-party rights provision* that unambiguously prohibits anyone but a party to the contract from claiming any right to arbitration thereunder:

Except for the indemnification provisions, no term or provision in the Provider Agreement is for the benefit of any person who is not a party to the Provider

Agreement and no such party shall have any right or cause of action under the Provider Agreement.

It is undisputed that the Respondents are not parties to the provider agreements. Therefore, they are prohibited from invoking its terms, including the arbitration clause.

2. The Fifth Circuit Failed to Give Effect to the Intent of the Parties as Expressed in the Provider Agreements In Deciding Whether the Respondents Could Invoke the Arbitration Clause.

Under this Court's longstanding precedent, a court must give effect to the *no non-party rights provision*, which expresses the unambiguous intent of the contracting parties to prohibit non-parties from invoking the Provider Agreements' terms, including the arbitration clause.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual

rights and expectations of the parties.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt*, 489 U.S. at 479, 109 S. Ct. 1248). In conducting that analysis, as with any other contract, the parties’ intentions control. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

This Court has consistently recognized that contracting parties are free to include or exclude any party they wish. Courts are forbidden from overriding the parameters the contracting parties have set for themselves.

The FAA was designed ... to place such [arbitration] agreements “upon the same footing as other contracts,” *Scherk v. Alberto-Culver Co.*, 417 U.S., at 511, 94 S. Ct., at 2453 (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage “was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.” *Byrd*, 470 U.S., at 220, 105 S. Ct., at 1242. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, see *id.*, at 219, 105 S. Ct., at 1241 (the Act “does not mandate the arbitration of all claims”), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement,

see Mitsubishi, 473 U.S., at 628 (citing *Prima Paint*, 388 U.S. at 406). It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *See Prima Paint, supra*, at 404, n. 12, 87 S. Ct., at 1806 n. 12 (the Act was designed “to make arbitration agreements as enforceable as other contracts, but not more so”).

Volt, 489 U.S. at 478 (holding that the FAA required the enforcement of the agreement of the parties to arbitrate according to state arbitration rules and procedures even where such rules would have required a stay of the arbitration proceeding).

We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S. Ct. 754, 151 L.Ed.2d 755 (2002) (“[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement” (emphasis added)); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983) (“[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration

agreement”); *Steelworkers, supra*, at 581, 80 S. Ct. 1358 (an arbitrator “has no general charter to administer justice for a community which transcends the parties” (internal quotation marks omitted)); accord, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995) (“[A]rbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes—but only those disputes—that the *parties* have agreed to submit to arbitration” (emphasis added)). It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties. *Volt*, 489 U.S., at 479, 109 S. Ct. 1248.

Stolt-Nielsen, 559 U.S. at 683–84; see also *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

3. The Provider Agreements Specify in the *No Non-Party Rights Provision* That Only the Contracting Parties May Invoke the Right to Arbitrate Disputes Between Them.

In the Provider Agreements, the contracting parties specified with whom they could arbitrate their disputes: only the contracting parties and no one else. The Fifth Circuit erred in failing to enforce this provision.

“[C]ourts must ‘rigorously enforce’ arbitration agreements according to their terms, including terms that ‘specify *with whom* [the parties] choose to arbitrate their disputes.’” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013) (internal citation omitted). The presumption of arbitrability cannot override the express intent of the parties to a contract. This Court is clear on this as well:

Accordingly, we have never held that [the presumption of arbitrability] overrides the principle that a court may submit to arbitration “only those disputes ... that the parties have agreed to submit.” *First Options*, 514 U.S., at 943, 115 S. Ct. 1920; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995) (“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contract parties”)... Nor have we held that courts may use policy considerations as a substitute for party agreement.

Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 302–303 (2010).

In similar circumstances, other courts have applied these same principles to hold that a contractual provision barring a non-signatory from enforcing terms of the contract prevented a third party from compelling arbitration under the terms of such contract. In one case, a contract (referred to as the “SPA”) explicitly prevented non-parties from relying on its terms. *Norcast, S.à.r.l. v. Castle*

Harlan, Inc., No. 12 Civ. 4973(PAC), 2014 WL 43492 at *9 (S.D.N.Y. Jan. 6, 2014). As a result, when the plaintiff, who was a party to the SPA, sued Castle Harlan, who was not a party to the SPA, Castle Harlan's efforts to claim a right to arbitrate under a theory of equitable estoppel were unavailing. The *Norcast* court reasoned as follows:

Indeed, the SPA carefully defined the identity of the "Parties" and carved out specific and narrow exceptions to its provision that "no person, other than the Parties, shall be entitled to rely on the provisions of this Agreement in any action, suit, proceeding, hearing or other forum." Castle Harlan does not assert that it falls within any of these exceptions, but contends that it is entitled to enforce the SPA's arbitration clause notwithstanding the SPA's terms to the contrary.

Given the SPA's clear language, the "relationship among the parties" does not "support[] the conclusion that [Norcast] had consented to extend its agreement to arbitrate to [Castle Harlan]." *See Sokol*, 542 F.3d at 361. Accordingly, the Court may not "override the clear intent of the parties," *Waffle House*, 534 U.S. at 294, but must instead "rigorously enforce" the SPA "according to [its] terms, including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes.'" *Italian Colors Rest.*, 133 S. Ct.

at 2309 (citations omitted). Therefore, Norcast is not estopped from denying an obligation to arbitrate with Castle Harlan under the SPA.

Norcast, 2014 WL 43492, at *9; *see also Ric-Man Constr. Inc. v. Neyer, Tiseo & Hindo Ltd.*, Docket No. 309217, 2013 WL 1223309, *3 (Mich. Ct. App. March 26, 2013) (where contract stated “Unless otherwise agreed by the parties in writing, the arbitration demand shall include only claims and disputes between OMID and Ric-Man,” holding that the defendant could not compel arbitration on theory it was the agent of OMID).

Since the agreements proffered by the Respondents expressly prohibit non-signatories from invoking their provisions, the Fifth Circuit erred in failing to enforce the *no non-party rights provision*.

◆

CONCLUSION

This Court has consistently held that questions surrounding an arbitration agreement’s formation and enforcement must be decided utilizing generally applicable state law and not arbitration-specific state law. The Fifth Circuit and many of its sister courts have misapplied this principle or have wholly ignored it when deciding whether non-signatories may enforce an agreement to arbitrate. A uniform and correct application of *Carlisle’s* dictates is required.

Further, this Court should reaffirm that parties may contract out of extra-contractual doctrines such as equitable estoppel, a holding that would be perfectly consistent with this Court's history of protecting the rights of contracting parties to structure their agreements to arbitrate as they see fit.

For the foregoing reasons, Petitioners respectfully request that this Court grant their petition.

December 21, 2015

Respectfully submitted,

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