No. 08-146

In The
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, *et al.*,

Petitioners,

v.

WAYNE CARLISLE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

When none of the defendants/appellants signed the contract containing the subject arbitration clause and all of them based their arguments in favor of arbitration solely on equitable estoppel, does a United States court of appeals have jurisdiction under Section 16(a)(1)(A) or Section 16(a)(1)(B) of the Federal Arbitration Act to entertain an interlocutory appeal from the district court's order rejecting that equitable estoppel argument?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no respondents are subsidiaries of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

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STATEMENT OF THE CASE

A. Procedural Background

On March 25, 2005, plaintiffs Wayne Carlisle, James E. Bushman, and Gary L. Strassel and their various business entities[1] filed suit against nine defendants, including their long-time accountant, auditor, and tax advisor, Arthur Andersen LLP ("Andersen"); their attorneys, Curtis, Mallet-Prevost, Colt & Mosle, LLP ("Curtis"), and one of its partners, William Bricker, Jr. ("Bricker"); their investment account manager, Bricolage Capital, LLC ("Bricolage") and two of its principals; and three entities that sold plaintiffs, or were implicated in the sale of, what turned out to be virtually worthless warrants, Integrated Capital Associates, Inc. ("ICA"), Intercontinental Pacific Group, Inc. ("IPG"), and Prism Connectivity Ventures ("Prism"). The complaint alleged claims for fraud against all defendants, civil conspiracy against all defendants, professional (*i.e.*, legal) malpractice against Curtis, professional malpractice against Andersen, breach of fiduciary duty against Andersen, Curtis and Bricker, and Bricolage and its two principals, and negligence against Andersen, Curtis, and Bricolage.

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[1] The business entities included WJG Strategic Investments, LLC; WC Thomas, LLC; WC Venture Corp.; the Ohio 1999 Irrevocable Trust of Wayne Carlisle; JB Cinoh, LLC; JEB Venture Corp.; the JEB Revocable ESBT, Wayne Carlisle, Trustee; and GS Noky, LLC.

The only defendant that actually signed the agreement containing the arbitration clause was Bricolage. Due to the automatic bankruptcy stay, Bricolage is not taking part in the district court proceedings. Prior to filing its bankruptcy petition, Bricolage moved to compel plaintiffs to arbitrate their claims against it and its two principals. Due to the bankruptcy stay, however, the district court denied Bricolage's motion as moot.

On June 10, 2005, before any appreciable discovery, Andersen filed – and all defendants other than Bricolage joined in – a motion "to stay these proceedings . . . pending the completion of all necessary and related arbitration proceedings." They argued that equitable estoppel prevented plaintiffs from avoiding arbitration of all claims against the nonsignatory defendants. They also argued that, even if the district court would not allow them as nonsignatories to invoke the arbitration clause under equitable estoppel principles, the court still should stay the claims against them, pending the arbitration they anticipated between plaintiffs and Bricolage, the lone signatory defendant. In denying their motion, the district court rejected both arguments.

The nonsignatory defendants filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. After full briefing on the merits, the Sixth Circuit held that it had no jurisdiction to entertain defendants' interlocutory appeal under Section 16(a)(1). Appendix A, p. 10a (relying on the "statutory analysis" in *DSMC Inc. v. Convera Corp.*, 349 F.3d

679, 683-85 (D.C. Cir. 2003) (dismissing interlocutory appeal) and *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005)).

B. Relevant Facts

In June 1999, Carlisle, Bushman, and Strassel sold their heavy construction equipment business. Prior to the sale, Andersen had served as the company's accountant, auditor, and tax advisor for more than twenty years. After the sale, Carlisle, Bushman, and Strassel began exploring methods of legally minimizing taxes on gains realized from the sale. They consulted with Andersen, which introduced them to Bricolage. Bricolage held itself out as "a financial boutique that developed complex structured transactions for high net worth individuals and private corporations."

Andersen, Bricolage, and Curtis recommended a tax shelter, a leveraged option strategy involving foreign currency exchange options (the "Leveraged Option Strategy"). The Leveraged Option Strategy used a series of steps, involving interests in partnerships, to generate tax losses to offset income from other transactions. In one Leveraged Option Strategy variation,

> a taxpayer purchases and writes options and purports to create a substantial positive basis in a partnership interest by transferring those option positions to a partnership. For

> example, a taxpayer might purchase call options for a cost of $1,000X and simultaneously write offsetting call options, with a slightly higher strike price but the same expiration date, for a premium of slightly less than $1,000X. Those option positions are then transferred to a partnership which, using additional amounts contributed to the partnership, may engage in investment activities. Under the position advanced by the promoters of this arrangement, the taxpayer claims that the basis in the taxpayer's partnership interest is increased by the cost of the purchased call options but is not reduced under [Internal Revenue Code] § 752 as a result of the partnership's assumption of the taxpayer's obligation with respect to the written call options. Therefore, disregarding additional amounts contributed to the partnership, transaction costs, and any income realized and expenses incurred at the partnership level, the taxpayer purports to have a basis in the partnership interest equal to the cost of the purchased call options ($1000X in this example), even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are nominal or zero. On the disposition of the partnership interest, the taxpayer claims a tax loss ($1,000X in this example), even though the taxpayer has incurred no corresponding economic loss.

Curtis held itself out to plaintiffs as independent legal counsel, promising to provide a reliable legal

opinion substantiating the legality and validity of the Leveraged Option Strategy as a viable tax shelter.

Carlisle, Bushman, and Strassel each engaged, through their separate business entities, in Leveraged Option Strategy transactions. Specifically, Carlisle established WC Thomas, LLC, a single-member limited liability company ("WC Thomas"); WC Venture Corp., a corporation; and the Ohio 1999 Irrevocable ESBT of Wayne Carlisle, a trust. Carlisle used these entities to engage in Leveraged Option Strategy transactions. Bushman established JB Cinoh, LLC, a single-member limited liability company ("JB Cinoh"); JEB Venture Corp., a corporation; and the JEB Revocable ESBT, Wayne Carlisle, Trustee, a trust. Bushman used these entities to engage in Leveraged Option Strategy transactions. Strassel established GS Noky, LLC, a single-member limited liability company ("GS Noky"), and utilized it to engage in Leveraged Option Strategy transactions. Carlisle, Bushman, and Strassel also collectively established WJG Strategic Investments, LLC, a limited liability company, as their investment company.

WC Thomas, JB Cinoh, and GS Noky, all plaintiffs in this action, each entered into an Investment Management Agreement ("IMA") with Bricolage. No other plaintiff, nor any defendant before the Court on appeal, was a party to the IMAs, although Carlisle, Bushman, and Strassel signed them in their capacity as managers of WC Thomas, JB Cinoh, and GS Noky, respectively. The IMAs between Bricolage (defined as

"the Manager") and WC Thomas, JB Cinoh, and GS Noky (defined individually as "the Client") recited that "the Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account ('Account')" established by each Client. Each IMA stated that

> the Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client's investments generally and in respect of the Account from persons other than the Manager.

The IMAs further stated:

> Neither the Manager nor any of its officers, directors, employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the [bank acting as] Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith.

Finally, each of the three IMAs contained the following arbitration clause:

> Any controversy arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration conducted in New York, New York in accordance with the

> Commercial Arbitration Rules of the American Arbitration Association. . . .

The IMAs contained no language mentioning or imposing responsibilities on any defendant other than Bricolage and its principals. In other words, none of the defendants before this Court had any responsibilities under the IMA.

In June 2000, Curtis sent plaintiffs individual letters purportedly containing the firm's independent opinion as to the propriety of the Leveraged Option Strategy as a tax shelter. In reliance upon these letters and the tax advice provided by Andersen, plaintiffs filed their 1999 income tax returns, on which they claimed capital and ordinary losses from their Leveraged Option Strategy transactions. Unbeknownst to plaintiffs, these were "canned, deceptive prefabricated" form letters, prepared well in advance of Curtis' introduction to plaintiffs and disseminated cookie-cutter style.

As a condition of participating in the Leveraged Option Strategy transaction, Carlisle, Bushman, and Strassel also were required to invest $4,350,000 in certain warrants to purchase stock of unidentified small, high-tech companies. After their Leveraged Option Strategy transactions were complete, Carlisle, Bushman, and Strassel formed the entity WJG Strategic Investments and funded it with $4,350,000. These funds were used to purchase warrants in TelEvoke, Inc. and eCryption Technologies, Inc. from Prism, which warrants previously had been owned by

ICA, an investment banking firm with the same principals as IPG.

Shortly after paying Prism for the virtually worthless warrants, Carlisle, Bushman, and Strassel each signed an individual retainer agreement with Curtis, which billed each of them $100,000 as a retainer for professional services to be rendered. Curtis subsequently instructed them to pay the $100,000 each to IPG, ostensibly to reimburse ICA for its payment of their retainers. Unbeknownst to plaintiffs, ICA and IPG not only were represented by Curtis, but ICA was paying Curtis for tax shelter-related services to be performed for at least five other ICA-related clients.

The Internal Revenue Service later deemed the Leveraged Option Strategy an abusive tax shelter. The IRS offered taxpayers using the Leveraged Option Strategy amnesty, stating that it would waive the accuracy-related penalty for any underpayment of tax attributable to use of a disclosed tax shelter. Despite receiving notice of the IRS's determination regarding the Leveraged Option Strategy and its amnesty offer, Curtis failed to retract, modify, or qualify what it knew or should have known was flawed tax advice. Plaintiffs were forced to enroll in an IRS settlement program, pursuant to which all of their outstanding issues with the IRS were resolved. Under the terms of those agreements, they paid all taxes, penalties and interest due to federal tax authorities, exceeding $25 million in the aggregate.

They also filed amended state tax returns and paid any state taxes and interest owed.

REASONS WHY THE WRIT SHOULD BE DENIED

CONTRARY TO THE DIRE APPEARANCE OF CIRCUIT CONFUSION THAT DEFENDANTS' PETITION STRAINS TO CREATE, THERE IS NO COMPELLING NEED FOR THIS COURT TO ADDRESS WHETHER THE FEDERAL ARBITRATION ACT PERMITS INTERLOCUTORY APPEALS BY DEFENDANTS WHO, AS NONSIGNATORIES TO ARBITRATION AGREEMENTS, UNSUCCESSFULLY INVOKED EQUITABLE ESTOPPEL PRINCIPLES IN SEEKING A STAY PENDING ARBITRATION.

Defendants' prolix petition warns of continued "chaos over appellate jurisdiction" unless the Court accepts this case. It speaks of "sharply" and "intractably divided" circuits "ridden" with "widespread and entrenched" conflicts that have left the federal appellate system in "utter disarray." It asserts that "jurisprudential anarchy . . . reigns" across the land. To create this dire appearance, the petition unfortunately resorts to artifice.

It poses a question – whether nonsignatories in general are entitled to appeal the denial of a stay pending arbitration under Section 3 of the Federal

Arbitration Act ("FAA")[2] – that is far broader than the narrow appealability issue that the parties actually briefed and the Sixth Circuit actually decided. The matter actually briefed and decided below is whether Section 16(a)(1) of the FAA permits ***interlocutory*** appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked ***equitable estoppel*** in seeking stays pending arbitration.[3]

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[2] *See* Petition, p. i ("Whether Section 16(a)(1)(A) of the FAA provides appellate jurisdiction over an appeal from an order denying an application made under Section 3 to stay claims involving nonsignatories to the arbitration agreement."). Note that this formulation of the issue does not mention interlocutory appeals.

[3] *See* Defendants' FRAP 28(j) Letter dated Oct. 11, 2007 ("in this case, the writing requirement of [Section 3 of] the FAA is satisfied because the claims against Appellants fall within the scope of a written agreement that Appellants are invoking pursuant to the principles of equitable estoppel"); Plaintiffs' FRAP 28(j) Response dated October 29, 2007 ("Section 16(a)(1) permits interlocutory appeals from orders refusing to stay 'any action under section 3'. . . . " Section 3's reach is limited to issues 'referable to arbitration under an agreement in writing'. . . . Nonsignatories lack what §§ 3 and 4 both require – a written agreement – precisely the reason nonsignatories invoke equitable principles instead. . . . [B]ecause § 16(a)(1) permits interlocutory appeals from orders rejecting stays or arbitration 'under' § 3 or 4, orders instead rejecting nonsignatories' 'equitable estoppel' arguments cannot trigger interlocutory appeals."); Sixth Circuit Opinion, Appendix A, 2a-3a ("To establish jurisdiction, [defendants] rely on Section 16(a)(1) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1), which permits interlocutory review of orders denying motions to stay under Section 3 of the Act. *See* 9 U.S.C. § 3. However, none of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. Instead, they based their effort to compel arbitration on a theory

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Having disingenuously posed a broader issue than this case truly involves, the petition rattles off a litany of circuit decisions that have no bearing on the specific statutory interpretation issue that the parties actually briefed and the Sixth Circuit actually decided. It is as if defendants consciously set out to assemble an apparently confusing menagerie of cases with criss-crossing fact patterns and varying results, and then proceeded to frame a question broad enough to encompass all of them. Voilà, instant "chaos" and "anarchy" in the federal appellate system!

Never mind that defendants waste words expounding on court of appeals decisions that could not possibly reflect any relevant circuit split, because they lack the key features of this case – nonsignatory defendants filing interlocutory appeals from denials of stay/arbitration motions that had been based on equitable estoppel.[4] This is true, for example, of the

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of equitable estoppel, a claim that the district court considered and rejected. In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action and, consequently, that we are without jurisdiction to hear this appeal on an interlocutory basis. We agree.").

[4] *See, e.g., Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001) (dispute between two signatories as to the arbitrability of a claim, so defendant did not invoke equitable estoppel); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235 (11th Cir. 2008) (dispute between two signatories as to the interpretation of their arbitration clause, so defendant did not invoke equitable estoppel); *Omni Tech Corp. v. MPC Solutions Sales LLC*, 432 F.3d 797 (7th Cir. 2005) (dispute between two signatories as to the definition of "arbitration" in their agreement, so defendant did not invoke

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Third Circuit decision that defendants loudly tout as on "the other side of the divide" from this Sixth Circuit decision. Petition, pp. 13-14. In *Elheiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the defendant did not invoke equitable estoppel, but instead asserted the specified contractual right to invoke an arbitration clause covering "affiliated companies," one of which the defendant claimed to be. *Elheiter* is not even close to the Sixth Circuit decision, whether in its fact pattern or in the legal principles it addresses. The most recent Fifth Circuit decision applying Sections 3 and 16(a)(1), which defendants similarly characterize as irreconcilable with this Sixth Circuit decision, also did not address whether Section 16(a)(1) permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel in seeking stays pending arbitration. *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004).

In sum, the petition has fabricated "widespread and entrenched" confusion among the circuits by inflating the question presented to make it appear that recent decisions by the Third and Fifth Circuits are incompatible with the Sixth Circuit opinion. For proof that even defendants recognize these decisions

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equitable estoppel); *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743 (2d Cir. 1991) (district court entered a discretionary stay; nonsignatory defendant did not invoke equitable estoppel); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (nonsignatories did not invoke equitable estoppel).

are inapposite, the Court need look no further than defendants' briefing below, in which these cases were never mentioned. That a petitioner coming before this Court would distort the question presented for review in order to create the appearance of widespread circuit confusion perhaps should come as no surprise. It doubtless is why Rule 10 emphasizes that petitions claiming a circuit split should focus on how the decision is "in conflict with the decision of another United States court of appeals *on the same important matter*." Sup. Ct. R. 10 (emphasis added).

When the inquiry in this case is limited to decisions that actually have addressed "the same important matter," it becomes apparent that this Sixth Circuit decision is only one of four. That is, including the Sixth Circuit opinion, only *four* of the dozens of opinions discussed in defendants' petition actually have addressed the specific matter at issue, namely whether Section 16(a)(1) of the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration. Although the Sixth Circuit opinion characterizes the four circuits as "split" on this issue, plaintiffs submit it is no more than a superficial disagreement that will dissipate in time on its own.

Three of the four circuit decisions addressing this point – including one written by the Chief Justice while still a Circuit Judge, a Tenth Circuit decision, and now this Sixth Circuit decision – contain simple,

straightforward textual interpretations of Section 16(a)(1) and Sections 3 and 4 of the FAA. *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683-85 (D.C. Cir. 2003) (dismissing interlocutory appeal); *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005) (following *DSMC* and dismissing interlocutory appeal); Appendix A. All three interpret these sections as limiting ***interlocutory*** appellate jurisdiction to those cases where the movant could invoke a written agreement compelling arbitration, which nonsignatories who unsuccessfully asserted equitable estoppel by definition could not do – precisely the reason they resorted to equitable estoppel in the first place.

In his *DSMC* opinion, then-Judge Roberts, writing for the United States Court of Appeals for the District of Columbia Circuit, discussed at length why Sections 3 and 4 – and thus also Section 16(a)(1) – cannot be applied to a nonsignatory's attempt to compel a signatory to arbitrate based on equitable estoppel:

> Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here – the one between DSMC and NGTL. The motion is instead based on an effort to expand DSMC's obligation *beyond* the terms of that written

> agreement pursuant to principles of equitable estoppel.

Id. at 683 (emphasis original). Noting the circuit decisions addressing equitable estoppel in the arbitration context, some of which defendants' petition repeats, Judge Roberts observed:

> Those cases typically did not address jurisdiction under Section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with nonsignatories. We need not and do not decide whether such an effort can ever succeed. What we do decide is that an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA. Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties *not* under a written agreement to arbitrate.
>
> In doing so we are mindful that "Section 16 is a limited grant of jurisdiction," that "[i]n general, statutes authorizing appeals should be narrowly construed," and that this is particularly true with respect to statutes allowing interlocutory appeals. . . . We are also cognizant that jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. . . . Asking whether the parties are signatories to a written

> agreement to arbitrate satisfies these criteria. On the other hand, the application of equitable estoppel – if permitted in this context – requires a multifactor factual and legal inquiry to determine whether the issues to be litigated by the nonsignatory and signatory are sufficiently intertwined with the issues subject to arbitration. That type of analysis, in turn, would require this court to delve deeply into the merits of a case before even deciding whether we had interlocutory appellate jurisdiction – an unattractive prospect.

Id. at 683-84 (citations omitted; emphasis original). The opinion in *DSMC* went on to hold that Section 3 also does not apply when a nonsignatory to an arbitration clause invokes equitable estoppel in an effort to stay a signatory's suit pending arbitration. *Id.* at 684-85. Thus, a court of appeals has no jurisdiction under Section 16(a)(1)(A) over an interlocutory appeal from an order rejecting such an equitable estoppel argument.

The relevant decision of the Tenth Circuit, *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005), reached the same conclusion on the jurisdictional issue. Quoting extensively from *DSMC*, the Tenth Circuit observed that the defendants' citations to circuit decisions – which, again, are repeated here[5] – that

[5] All three opinions – *DSMC*, *Universal*, and the Sixth Circuit decision – correctly refuse to give any weight to opinions that dispose of interlocutory appeals on their merits without

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merely addressed equitable estoppel in this context "miss the point," adding:

> The issue in this appeal is not whether they have a right to compel arbitration, but whether they have a right to an interlocutory appeal from the denial of a motion seeking to compel arbitration. Given that statutes allowing interlocutory appeals should be narrowly construed, Defendants stand the scope of appellate jurisdiction on its head. . . .
>
> We also agree with the *DSMC* court that dismissing this appeal does not mean equitable estoppel cannot be employed to compel arbitration. Indeed, our holding is limited to whether Defendants can invoke interlocutory

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addressing the jurisdictional issue under discussion here. *See DSMC*, 349 F.3d at 683 (quoted above); *Universal*, 428 F.3d at 944 ("Defendants maintain '[c]ourts repeatedly have accepted appellate jurisdiction where the district court had denied arbitration motions by litigants that were not signatories to the relevant arbitration agreement.' They support this contention with a number of cases which simply are not apposite, however, because none of them rule upon the jurisdictional basis for their holdings. Indeed, none of them consider the issue before us."); Appendix A, p. 11a ("[I]n none of those cases does it appear that the appellees raised the issue of appellate jurisdiction to review the question on an interlocutory basis."). For reasons unknown to plaintiffs, defendants' petition devotes page after page to discussing cases that do not address this jurisdictional issue and the supposed impact of what defendants evidently consider *sub silentio* validation of interlocutory appellate jurisdiction. Just as these decisions add nothing to the weight of authority on this point, they also cannot comprise part of any alleged circuit conflict.

> appellate jurisdiction to challenge the merits of the district court's order. In the absence of jurisdiction, any thoughts we might express on whether the doctrine of equitable estoppel can or should be recognized in the circumstances of this case would be without effect.

Id. at 945 (citations omitted).

The fact that a ruling from another circuit, *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007), glossed over the language of Sections 3 and 16(a)(1),[6] eschewing any real textual analysis, and refused to dismiss an appeal by nonsignatories does not warrant acceptance of the instant case, particularly given the salient features that distinguish *Ross* from the Sixth Circuit decision. The ruling in *Ross* was issued by a Second Circuit motion panel, which included a district court judge sitting by designation.

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[6] In concluding that equitable estoppel falls "under" Sections 3 and 4, *Ross* reasons that reading them otherwise would leave district courts without authority to employ equitable estoppel to stay proceedings or compel arbitration, and could result in "bifurcation of cases involving a single writing." *Id.* To the contrary, district courts can and do employ equitable estoppel in this context. *Toledano v. O'Connor*, 501 F.Supp.2d 127, 151-54 (D.D.C. 2007). Moreover, *Ross's* concern about parallel proceedings – one judicial, one arbitral – cannot justify reading into Sections 3, 4, and 16(a)(1) "equitable estoppel" references Congress did not include. It also is immaterial that a nonsignatory defendant's motion might have been labeled a "Section 3" motion. Appellate "jurisdiction is not controlled by the name that a claimant attaches to a motion or the name that a district court attaches to an order." *Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007).

The *Ross* case was later assigned to another panel for the merits, including only one of the motion panel members (as well as a different district judge sitting by designation). According to the Second Circuit's docket, *Ross* remains pending. The merits panel, therefore, is not bound to follow the motion panel's ruling and on further reflection may yet reach the same conclusion that the other three circuits did on the jurisdictional issue.

Thus, the ruling in *Ross* on which defendants must be predicating their claim of an "entrenched" circuit split may not even reflect the views of the Second Circuit panel that ultimately decides *Ross*. The inchoate nature of *Ross* belies any suggestion that there is a concrete circuit split and that the instant case should be the vehicle for resolving it. Once *Ross* is finally decided, there in fact may be unanimity among the circuits. Even if there is not, it would make more sense to use *Ross* itself as the vehicle for resolving any lingering disagreements. This is not the right case or the right time for that.

Other distinctly unusual features of this case militate against accepting it as the vehicle for deciding whether the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration. While both signatory and nonsignatory defendants are still before the district court in *Ross*, as they were in both *DSMC* and *Universal*, no signatory defendant is before the district court in this case. The only

defendant who signed an arbitration clause in this case, Bricolage, long ago filed bankruptcy. Plaintiffs' claims have been resolved and Bricolage's Plan of Liquidation has been confirmed. This is significant because it means there will be no arbitration between plaintiffs and Bricolage. So, in essence, the remaining defendants have been pursuing a stay pending an arbitration that everyone acknowledges ***will never happen*** and have been seeking to compel an arbitration of their own with plaintiffs, whose only commitment was to arbitrate with a party ***no longer before the district court***. These features make the instant case unique among the four circuit decisions cited. If the Court deems it necessary at some future time to address interlocutory appellate jurisdiction over denials of stays pending arbitration in this context, it would make logical sense to do so in a case where arbitration between signatory plaintiffs and signatory defendants is planned. Again, because of the unique circumstances, this is not such a case. For this additional reason, therefore, this is neither the right time nor the right case for addressing whether the FAA permits interlocutory appeals by defendants who, as nonsignatories to arbitration agreements, unsuccessfully invoked equitable estoppel principles in seeking stays pending arbitration.

CONCLUSION

Plaintiffs respectfully request that the petition be denied.

October 6, 2008

Respectfully submitted,

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