

**STATE OF MICHIGAN**  
**SAGINAW COUNTY CIRCUIT COURT**

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SAGINAW PRODUCTS CORPORATION,  
d/b/a CIGNYS, ELAINE RAPANOS,  
CHRISTINE RAPANOS, and JASON  
RAPANOS,

Plaintiffs/Counter-Defendants,

v.

CHARLES LANGE, TODD GENSHEIMER,  
JEFF LANGE, and JPSC IV, INC.,

Defendants/Counter-Plaintiffs,

and JOHN HUTCHINSON,

Defendant.

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Case No. 2014-024807-CB

Judge: M. Randall Jurens (P27637)

**OPINION and ORDER GRANTING  
JPS DEFENDANTS' RENEWED  
MOTION FOR SUMMARY  
DISPOSITION**

Mantese Honigman PC  
By: Ian M. Williamson (P65056)  
Attorneys for Plaintiffs  
1361 E. Big Beaver Road  
Troy, Michigan 48083  
Telephone: (248) 457-9200  
[iwilliamson@manteselaw.com](mailto:iwilliamson@manteselaw.com)

Mahlberg Brandt Gilbert & Thompson  
By: Donald A. Gilbert (P37421)  
Attorneys for Defendant Charles Lange  
715 Court Street  
Saginaw, Michigan 48602  
Telephone: (989) 799-2111  
[gilbert@lawyersbuilding.org](mailto:gilbert@lawyersbuilding.org)

Wiener & Gould, PC  
By: S. Thomas Wiener (P29233)  
Attorneys for Defendant Todd Gensheimer,  
Jeff Lange, and JPSC VI, Inc.  
950 W. University Drive, Suite 350  
Rochester, Michigan 48307  
Telephone: (248) 841-9400  
[twiener@wiennergould.com](mailto:twiener@wiennergould.com)

Smith Bovill PC  
By: Robert A. Jarema (P31537)  
Attorneys for John Hutchinson  
200 St. Andrews Road  
Saginaw, Michigan 48638  
Telephone: (989) 792-9641  
[rjarema@smithbovill.com](mailto:rjarema@smithbovill.com)

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Plaintiffs' amended complaint states fourteen causes of action, eleven of which involve one or more of defendants Todd Gensheimer, Jeff Lange, and JPSC VI, Inc. ("JPS") (collectively the "JPS defendants").

In turn, JPS has counterclaimed with three claims against corporate plaintiff ("CIGNYS"), including one cause of action that joins the individual plaintiffs (the "Rapanos Family").

In the preliminary stages of this case, the JPS defendants moved for summary disposition because of an agreement to arbitrate contained in a sales representative agreement between CIGNYS and JPS. Concluding that more evidence was necessary to determine the enforceability of the arbitration agreement, the court denied the motion and allowed the parties to engage in discovery.

With significant discovery now completed, the JPS defendants have renewed their request for summary disposition, asserting that all claims, both against and by them, must be resolved through arbitration.

For the reasons stated in this opinion, the court concludes that the JPS defendants are entitled to the requested relief.

### *The Allegations and Claims*

Plaintiffs' amended complaint alleges CIGNYS is in the precision manufacturing business (§ 22); in 1984 defendant Charles Lange became president and CEO of CIGNYS and "exercised complete control over CIGNYS's day to day operation" (§ 22); the Rapanos Family owns 100% of CIGNYS stock (§§ 3, 23); Todd Gensheimer is the President of JPS, and its Vice President is Jeff Lange (who is Charles Lange's son) (§ 2); in 2009, Charles Lange began entering into a series of sales contracts with JPS that "purported to appoint JP[S] as CIGNYS's exclusive outside sales agent with total control over all inside sales efforts" (the "Sales Contract(s)") (§ 50); Charles Lange and Gensheimer held Gensheimer out as a vice president of CIGNYS (§§ 153, 155, 156); the Sales Contracts paid commissions based on total revenue, regardless of procuring cause, determined commissions earned upon order rather than upon payment, required payment of post-termination commissions that JPS Sales has "reasonable expectations" of receiving, recognized a right to commissions on business JPS Sales has "reasonable expectation" of receiving for six months after termination, and a right to collect post-termination commissions for up to two years depending on type of order (§ 51); in 2011 Charles Lange executed another Sales Contract with JPS, that doubled the commission rate, precluded termination of the Sales Contract for any reason before December 2013, and incorporated a "change in control" provision allowing JPS to terminate the Sales Contract at its discretion if CIGNYS was sold (§ 67); Charles Lange executed a duplicate Sales Contract in 2013 (§ 72); Charles Lange did not disclose any of the Sales Contracts to CIGNYS's board (§§ 56, 68, 75, 78, 185(e), 194, 203); had plaintiffs known about the Sales Contracts at the outset, they would have instructed Lange to not sign (§§ 197, 206); the Sales Contracts were created through Charles Lange's breach of fiduciary duties (§ 279); Charles Lange was eventually

discharged September 15, 2014 (¶¶ 5, 30, 32, 128); and the Sales Contracts are “void or at the very least voidable at CIGNYS’s option” (¶ 82) and/or “void and unenforceable” (¶¶ 279, 281).

Although containing some similarities, JPS’ counterclaim alleges it is engaged in business development, management, and strategic planning (¶ 11); JPS and CIGNYS entered into the first of the Sales Contracts in 2005 (¶ 13); additional Sales Contracts were executed in 2007, 2009, 2011, 2012, and 2013 (¶ 14); JPS assisted CIGNYS grow and diversify its business (¶¶ 15-17); the 2013 Sales Contract continued JPS’s and CIGNYS’s exclusive account representative (¶ 19); JPS was appointed to supervise CIGNYS’s internal sales staff activities (¶ 20); CIGNYS agreed to pay JPS commissions based on a percentage of “net invoice price” of CIGNYS’s products and services shipped or provided, regardless of how procured (¶ 21); commissions were due and payable within the month following invoice (¶ 29); the commission rate was 3% on the first \$20,000,000, and 3.5% thereafter (¶ 30); the initial term of the 2013 sales agreement expires December 31, 2016 (¶ 35); the 2013 Sales Contract provides that either party may terminate upon at least 30 days’ prior written notice (¶ 36); the 2013 Sales Contract also permitted JPS to terminate upon a change of control, with a 90-day notice period (¶ 37); upon termination, CIGNYS was to pay JPS commission on all orders dated/communicated to CIGNYS before effective date of termination and the following six months regardless when such orders are shipped or fulfilled, and on all renewable business for a period of two years after termination (¶ 39); Charles Lange was fired September 15, 2014 and CIGNYS installed an new interim president and CEO (¶ 53); CIGNYS asked JPS to continue managing sales (¶ 54); declining to continue in light of the change of control, JPS elected to terminate the sales agreement and issued a 90-day notice on September 26, 2014, effectively ending the business relationship with CIGNYS effective December 31, 2014 (¶¶ 55-58); and, in the meantime, CIGNYS has prevented JPS from performing the Sales Contract (¶ 60).

Based on its allegations, plaintiffs’ amended complaint states fourteen causes of action:

| <b>Count</b> | <b>Plaintiff(s)</b> | <b>Defendant(s)</b>                | <b>Claim</b>  |
|--------------|---------------------|------------------------------------|---|
| 1            | CIGNYS              | all                                | breach of fiduciary duty  |
| 2            | CIGNYS              | all                                | tortious interference with contractual relations                            |
| 3            | all                 | C. Lange and Gensheimer            | violation of MCL 450.1489   |
| 4            | all                 | C. Lange and Gensheimer            | fraud, fraudulent omission and silent fraud                                 |
| 5            | all                 | C. Lange and Gensheimer            | constructive fraud  |
| 6            | CIGNYS              | C. Lange and Hutchinson            | breach of fiduciary duties  |
| 7            | CIGNYS              | C. Lange and Hutchinson            | fraud, fraudulent omission, and silent fraud                                |
| 8            | CIGNYS              | C. Lange, J. Lange, and Gensheimer | aiding and abetting breaches of fiduciary duties                            |
| 9            | all                 | all                                | civil conspiracy  |
| 10           | CIGNYS              | C. Lange, Hutchinson, and JPSC     | recovery of wrongfully detained goods and papers                            |
| 11           | CIGNYS              | C. Lange and Hutchinson            | statutory and common law conversion   |
| 12           | CIGNYS              | JPS                                | unjust enrichment   |
| 13           | CIGNYS              | all                                | misappropriation of trade secrets   |
| 14           | CIGNYS              | JPS                                | declaratory relief re: Sales Representative Agreement is void/unenforceable |

Among their prayers for relief, plaintiffs request “[e]ntry of a Declaratory Judgment ordering that [all] the [ ] Sales Contracts are void and/or rescinded and thereby unenforceable by Defendants”.

Based on its allegations, JPS’s counterclaim asserts three causes of action against plaintiffs:

| <b>Count</b> | <b>Counter-Plaintiff</b> | <b>Counter-Defendant(s)</b> | <b>Claim</b>  |
|--------------|--------------------------|-----------------------------|---|
| 1            | JPS                      | CIGNYS                      | breach of contract  |
| 2            | JPS                      | all                         | tortious interference w/ contract/business relations/expectations         |
| 3            | JPS                      | CIGNYS                      | declaratory judgment that Sales Representative Agreement is valid/binding |

Among its prayers for relief, “JPS requests a declaratory judgment that the [September 1, 2013 Sales Contract] is valid and binding.”

### ***The Arbitration Agreement***

According to documentary evidence submitted by the parties, each of the several Sales Contracts (JPS defendants’ Brief, Exs B-G) contains an identical arbitration provision:

17. DISPUTES AND MEDIATION. Any controversies or claims relating to any aspect of this Agreement or to its breach, or to the relationship created shall be settled by arbitration under the commercial rules of the American Arbitration Association. The laws of Michigan shall be deemed controlling as to all matters arising under this Agreement or relationship. The parties agree to abide by the arbitrator’s award and also agree that a judgment may be entered upon the award as a final judgment in any court of record. The arbitrator shall have the power to grant injunctions and mandatory injunctions as well as render any other type of award. The arbitrator shall also have authority to determine all issues involving arbitration. The award of the arbitrator shall be final, binding and non-appealable.

### ***Summary Disposition Standards***

The JPS defendants’ motion for summary disposition is brought pursuant to MCR 2.117(C)(7) (i.e. seeking dismissal of the action because of an agreement to arbitrate).

When reviewing a request to dismiss on the basis that a claim is barred under MCR 2.116(C)(7), a court must accept all well pleaded allegations as true, unless contradicted by other evidence, and construe them in favor of the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119 (1999); 597 NW2d 817 (1999). The court must consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact. MCR 2.116(G)(5); *Id.* If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is an issue of law. *Id.*

***Federal Arbitration Act  
and the Doctrine of Severability***

To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (“FAA”), 9 USC 1 *et seq.*, to make it national policy that arbitration clauses in contracts involving interstate commerce<sup>1</sup> “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”, 9 USC 2.

To enforce this dictate, the FAA provides for a stay of litigation that involves an issue covered by an arbitration agreement, 9 USC 3, and also authorizes courts to compel arbitration when one party fails or refuses to comply with an arbitration agreement, 9 USC 4.

When challenges arise regarding the validity of an arbitration agreement, the question becomes *who* – the court or the arbitrator – decides.

In the seminal case of *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967)<sup>2</sup>, the Supreme Court established three principles: (1) as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract, (2) unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance, and (3) these principles apply to state as well as federal courts. This is commonly characterized as the “doctrine of severability”, and is applicable regardless whether the challenge at issue would render the contract voidable or void *ab initio*. *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440 (2006)<sup>3</sup>.

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<sup>1</sup> The parties agree that they are engaged in interstate commerce and, accordingly, this case is controlled by federal law governing arbitration rather than Michigan’s Uniform Arbitration Act, *MCL 691.1681 et seq.*

<sup>2</sup> In *Prima Paint*, antecedent to the parties entering into a consulting agreement, the defendant represented that it was solvent and able to perform its contractual obligations, when it was in fact insolvent and intended to file for bankruptcy. When subsequently confronted by plaintiff, defendant responded with a notice of intention to arbitrate pursuant to an arbitration clause in the consulting agreement. Plaintiff then filed suit seeking rescission of the consulting agreement on the basis of fraudulent inducement and petitioned for an order enjoining arbitration. The defendant cross-moved to stay the court action pending arbitration, contending that whether there was fraud in the inducement of the consulting agreement was a question for the arbitrators, not the court. In establishing what has become known as the “doctrine of severability” the Supreme Court held:

[A]rbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. [*Id.* at 402]

Under § 4 [of the FAA, 9 USC 4],. . . the federal court is instructed to order arbitration to proceed once it is satisfied that “the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.” Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the “making” of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. [*Id.* at 403-404]

<sup>3</sup> In *Buckeye*, borrowers entered into various deferred-payment transactions in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each transaction borrowers signed an

Importantly, however, the Supreme Court distinguishes treatment of the arbitral question whether a contract containing an arbitration clause is valid and enforceable from the generally nonarbitral question whether a contract was ever formed at all. *Id.*, at n 1, p 444; *Granite Rock Co v Int'l Brotherhood of Teamsters*, 561 US 287, 296-297 (2010).<sup>4</sup>

### *Authority to Bind*

Here, plaintiffs argue it is a question of contract formation for the court to decide in the first instance whether Charles Lange, as president/CEO, had authority to bind CIGNYS when he signed the Sales Contract(s) containing an agreement to arbitrate.

In this regard, officers of corporations potentially possess various types of authority: actual, implied, and apparent.

“An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.” Restatement (Third) of Agency, § 2.01 (2006).<sup>5</sup>

Here, Michigan’s business corporation act, *MCL 450.1101 et seq.*, provides:

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agreement that included an arbitration clause. Borrowers brought a class action lawsuit alleging violations of state usury laws. The lender filed a motion to compel arbitration and to stay proceedings. The trial court denied lender’s motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio*. Following appeals through state courts, the Supreme Court concluded that “because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder to the contract” and “[t]he challenge should therefore be considered by an arbitrator, not a court.” [*Id.* at 446].

Moreover, displacing appellate court analyses that had developed following *Prima Paint*, *Buckeye* declared irrelevant whether validity challenges would render the contract void or voidable.

*Prima Paint* makes this [distinction] irrelevant. That case rejected application of state severability rules to the arbitration agreement without discussing whether the challenge at issue would have rendered the contract void or voidable. Indeed, the opinion expressly disclaimed any need to decide what state law remedy was available. Likewise in *Southland [Corp v Keating*, 465 US 1 (1984)] which arose in state court, we did not ask whether the several challenges made there – fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the California Franchise Investment Law – would render the contract void or voidable. We simply rejected the proposition that the enforceability of the arbitration agreement turned on [state law] . . .” [*Buckeye*, at 446]

<sup>4</sup> Distinguishing between contract validity and contract formation as a means of determining who is to resolve arbitration disputes has not been universally embraced. For example, one leading arbitration scholar questions the “abstract distinction between ‘invalidity’ and ‘nonexistence’ ”, characterizing them as “nothing but word balloons.” Alan Scott Rau, “*Separability*” in the United States Supreme Court, 2006 Stockholm Int’l Arb Rev 1, 17. See also, Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc v Cardegna*, 8 Nev LJ 107, 117 et seq (2007).

<sup>5</sup> As a corollary, agents exceed their actual authority if they enter into transactions knowing their principal would not approve. *BJ Services SRL v Great American Ins Co*, 539 Fed Appx 545, 550-551 (2013).

An officer, as between himself and other officers and the corporation, has such authority and shall perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board not inconsistent with the bylaws. [MCL 450.1531(4)]

In turn, CIGNYS's bylaws (JPS defendants' Brief, Ex H) affirmatively clothe its president with broad authority:

SEC. 1. PRESIDENT. The President shall be the chief executive officer of the Company, and in the recess of the Board of Directors shall have the general control and management of its business and affairs, subject, however, to the right of the Board of Directors to delegate any specific power except such as may be by statute exclusively conferred upon the President, to any other officer or officers of the company \* \* \*.

Additionally, supplementing authority derived from statute, articles of incorporation, bylaws, or board action, the president of a corporation enjoys such implied powers as are requisite to the transaction of business committed to his or her charge. *Jacob v Gratiot Central Market Co*, 267 Mich 262; 255 NW 331 (1934). The breadth of this authority is only enhanced where a president is given powers as a general manager with full direction and charge of the business. *Mich Civ Jur*, Corporations § 127. Particularly, in a small corporation whose board of directors meets irregularly and infrequently, implied powers will be ascribed to the president that are necessary for the transaction of the business committed to his or her charge. *WF Sheetz & Co v Commonwealth Commercial State Bank*, 282 Mich 96; 275 NW 781 (1937). Particularly, the president of a corporation has presumptive authority to agree to arbitration. *Fitch v Constantine Hydraulic Co*, 44 Mich 74; 6 NW 91 (1880).<sup>6</sup>

Finally, principals may be held liable for their agents' acts under the concept of apparent authority. As observed in *Michael v Kircher*, 335 Mich 566, 572; 56 NW2d 269 (1953) (quoting 21 RCL, p 856):

[T]he responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or has held out to the public, or to the other party, as having competent authority, although, in fact, he has, in the particular instance, exceeded or violated his instructions and acted without authority. For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who mislead the other into the contract, by holding out the agent as competent to act, and as enjoying his confidence.

Parties dealing with an agent have a right to presume that the agency is general, and not limited. And the presumption is that one known to be an agent is acting within the scope of authority.

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<sup>6</sup> Of course, as with any form of actual authority, the agent's authority is limited to "acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act." Restatement (Third) of Agency, § 2.02 (2006).

*Austrian v Springer*, 94 Mich 343, 348; 54 NW 34 (1892) (citations omitted). Accordingly, an officer in full charge of a corporation has apparent authority to execute contracts on its behalf and any contract executed by him or her on behalf of the corporation is binding on it, provided that no showing is made of an express limitation of those apparent powers. *Gronholz v Saginaw Sav & Loan Ass'n*, 41 Mich App 735; 201 NW2d 98 (1972).<sup>7</sup>

### *Application*

Here, plaintiffs do not dispute Charles Lange's capacity as president of CIGNYS or, in that capacity, Lange's authority to manage CIGNYS's business and affairs, including entering into contracts generally<sup>8</sup>. Rather, plaintiffs allege the Sales Contract(s) uniquely, containing terms now found objectionable<sup>9</sup>, are the product of Lange's breach of fiduciary duties (Complaint ¶ 279).

However, with due respect, this is not the equivalent of saying the Sales Contracts were never concluded, made, or extant.

This is not a case of a putative party not signing a contract, *First Options of Chicago, Inc v Kaplan*, 115 St Ct 1920 (1995)<sup>10</sup>, or a forged signature, *Chastain v Robinson-Humphrey Co, Inc*, 957 F2d 851 (CA 11, 1992)<sup>11</sup>, or a low level production manager signing a document outside his scope of authority, *Par-Knit Mills, Inc v Stockbridge Fabrics Co*, 636 F2d 51 (CA 3, 1980)<sup>12</sup>, or a purported agreement containing an express disclaimer of authority, *Sandvik AB v*

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<sup>7</sup> However, a principal is not bound where its agent lacks authority and the person dealing with the agent knows, or should know, that the agent lacks authority. *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 667; 66 NW2d 92 (1954).

<sup>8</sup> The court is not aware of any evidence of Lange's authority as president being delegated to any other officer, or otherwise being restricted or limited by CIGNYS's board of directors or stockholders.

<sup>9</sup> Importantly, plaintiffs do not challenge the arbitration clause itself.

<sup>10</sup> In *First Options*, a "workout agreement" purportedly governed repayment of debts the Kaplans and their wholly owned investment company, MKI, owed to First Options. However, the Kaplans did not personally sign the agreement. When the plaintiff sought arbitration, the Kaplans denied that their disagreement with First Options was arbitrable. The arbitrators nonetheless decided they had the power to rule on the merits and did so in favor of First Options. The Kaplans then asked the federal district court to vacate the arbitration award, and First Options requested confirmation. The trial court confirmed the award, The Third Court of Appeals reversed, agreeing with the Kaplans that their dispute was not arbitrable. The Supreme Court affirmed.

<sup>11</sup> In *Chastain*, it was undisputed that a securities trading account agreement containing an arbitration clause was not personally signed by the customer, but rather, by an unascertained author. With "the existence of a presumptively valid arbitration agreement contained within a contract signed by the parties . . . entirely absent", the appellate court side-stepped *Prima Paint* and directed the trial court, rather than arbitrators, to first determine the validity of the customer agreement before compelling the customer to submit to arbitration.

<sup>12</sup> In *Par-Knit*, the plaintiff entered into a series of oral contracts that occasionally were confirmed by written documents entitled "Contract", with a space designated for signature entitled "Buyer's Acceptance" and to immediately adjacent the statement to "See provisions on reverse side which are an integral part of this contract" that included an arbitration provision. The plaintiff's production manager signed the documents in the space labeled

*Advent Int'l Corp*, 220 F3d 99 (CA 3 2000)<sup>13</sup>, or a contract with an express limitation on authority, *Sphere Drake Ins Ltd v All American Ins Co*, 256 F3d 587 (CA 7 2001)<sup>14</sup>.

Rather, here, plaintiffs seek to avoid specific contracts (specifically, a succession of contracts extending over a period of several years) that outsourced CIGNYS's sales function<sup>15</sup>, executed by a person to whom they had broadly delegated authority to operate their corporation, but that included provisions plaintiffs find repugnant<sup>16</sup>. So although packaged as an attack on the existence of the Sales Contracts, plaintiffs really challenge the contracts' enforceability (i.e. each Sales Contract was "concluded", albeit now subject to challenge) by alleging Lange's imprudent exercise of authority.

That Lange may have breached his fiduciary duties in forming the Sales Contracts does not thereby render them nonexistent. Contracts that may be proven later to be void are still subject to arbitration in the first instance. *Buckeye*, at 448. Accordingly, under circumstances no less egregious than alleged here, courts have held that arbitrators are to determine disputes involving fraud, *Prima Paint, supra*, duress, *Serv Corp Int'l v Lopez*, 162 SW 3d 801 (Tex App 2005), unconscionability, *Bob Schultz Motors, Inc v Kawasaki Motors Corp, USA*, 334 F3d 721 (CA 8, 2003), and illegality (or "public policy"), *Buckeye, supra*. Moreover, "breach of fiduciary duty" – plaintiffs' primary basis for challenge here – has been specifically included in the types

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"Buyer's Acceptance" and then returned them to defendant. When a dispute arose, the defendant served a demand for arbitration. In turn, the plaintiff filed a complaint in federal court seeking a stay of arbitration, and the defendant responded with a motion to dismiss and a request to compel arbitration. The plaintiff contended that the documents were merely confirmations of delivery dates, as evidenced by the fact they were signed by only a production manager; thus, the plaintiff argued, there was no "meeting of the minds" to form a contract and, absent such agreement, there could be no duty to arbitrate. The Third Circuit Court of Appeals held that, before arbitration could be ordered, the trial court had to be certain that there was an agreement to arbitrate, a question that in turn implicated the validity of the underlying contract.

<sup>13</sup> In *Sandvik*, a Joint Venture Agreement that contained an arbitration clause was signed by the managing owner of defendant's German affiliate, as "an attorney-in-fact without power-of-attorney", a concept known in German law that describes an agent who has no authority to bind his or her principal and that such an agreement does not become valid until the principal ratifies it. When the defendant notified the plaintiff that it did not intend to honor the agreement because it was signed without proper authorization and therefore not binding, the plaintiff brought suit. The defendant then moved to compel arbitration under the FAA. The district court declined until it determined whether the parties entered into a binding agreement. The Third Circuit Court of Appeals affirmed.

<sup>14</sup> In *Sphere*, contracts apparently representing the agreement of the plaintiff to reinsure risks were in the defendant's files, but the plaintiff denied that it agreed to any such reinsurance. A broker wrote the reinsurance policies on the plaintiff's behalf. Although the broker had actual authority to represent the plaintiff, the authority was expressly limited up to an annual limit of risks. According to the plaintiff, the broker exceeded this limit when agreeing to reinsure the defendant's policies. Moreover, the plaintiff contends that the defendant knew the broker had gone over the top, so that the broker had neither actual nor apparent authority. The agreement contained an arbitration clause. The Seventh Circuit Court of Appeals concluded that the issue of whether the broker had authority to bind reinsurer to risks in question had to be decided by the court.

<sup>15</sup> The court understands that engaging independent sales representatives is not an uncommon business practice.

<sup>16</sup> Plaintiffs' grievances focus on the Sales Contracts' commission rate, the calculation of commissions, the timing of when commissions are earned, JPS's entitlement to post-termination commissions, CIGNYS's inability to terminate, and JPS's unilateral right to terminate upon a "change in control" (Complaint ¶¶ 51, 67).

of claims subject to the doctrine of severability. *Buckeye*, at 446, citing *Southland Corp v Keating*, 465 US 1 (1984).

And although generally supportive of their desire to disentangle from the Sales Contracts, the cases cited by plaintiffs do not compel a different conclusion. *Garlick v Lake Shore Lumber Co*, 220 Mich 179, 191; 189 NW 1009 (1922)<sup>17</sup>; *Kessler v Jefferson Storage Corp*, 125 F2d 108 (CA 6, 1941)<sup>18</sup>; *Great Lakes Transp Holding, LLC v Yellow Cab Serv Corp of Florida, Inc*, WL 799951 (ED Mich 2013)<sup>19</sup>; *Geller v Allied-Lyons PLC*, 42 Mass App Ct 120; 674 NE2d 1334 (1997)<sup>20</sup>.

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<sup>17</sup> In *Garlick*, concluding Sprague and associates occupied a fiduciary relation towards Garlick and, therefore, were bound to disclose to him all facts within their knowledge material to his interests, the Supreme Court affirmed the trial court's rescission of the subject contract.

It is well settled that a person may avoid a contract made by his agent as a result of fraud or collusion between the agent and the person with whom he makes the contract. It is also a well-settled rule that relief will be afforded in equity in all transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed.

Under the circumstances, the court held the contract was voidable at Garlick's option.

<sup>18</sup> In *Kessler*, the president of Dant & Dant, a M C Ganelin, entered into a storage contract on behalf of the Dant with Jefferson Storage Corporation. At the same time, Jefferson executed a contract with Ganelin, providing for payment to him of certain profits which Jefferson was to realize from the storage contract with Dant. Dant was ignorant of the side-contract between Jefferson and Ganelin with regard to payment to him of a share of its profits. Being required only to decide whether the storage contract was valid, the court did not have to determine whether the profit contract was void or merely voidable, or to consider the severability of legal and illegal parts of a contract.

<sup>19</sup> In *Great Lakes*, Meathe and Eaton owned Metro Cars, which provided for-hire transportation services in Michigan. Daniel Ret was hired by Meathe and Eaton to run Metro Cars. Meathe decided to move to Florida and start a transportation business there. Meathe hired Ret as the CEO of the Florida company, although Ret continued as CEO in Michigan also. When Meathe became interested in acquiring a taxicab business in Florida and using the Metro Cars' name, Ret worked with a Michigan attorney to draw up a trademark agreement allowing Meathe's Florida companies to use "Metro Cars FL". Ret signed the agreement on behalf of Metro Cars, and a Florida attorney, Gary Wilson, signed on behalf of the Florida companies at Ret's direction. The terms of the agreement were not discussed with Eaton or Meathe, and they testified at trial that the first time they saw the agreement was during their pretrial depositions. Before the case was submitted to the jury, the court held as a matter of law that the written license agreement had no efficacy.

Although Ret had authority to bind Metro Cars and Wilson had, at a minimum, apparent authority to bind the Florida companies in the ordinary course of business, Ret and Wilson violated fiduciary responsibilities to the principles when they each acted on his own in a situation where the Michigan and Florida companies had conflicting interests. The failure to disclose the written agreement to Meathe and to Eaton in advance of signing it makes it inoperable as between the parties. In other words, the written agreement was never intended to govern the relationship between the parties.

<sup>20</sup> In *Geller*, the plaintiff, a senior vice president for Dunkin Donuts Inc., facilitated the sale of Dunkin to Allied-Lyons PLC. When Allied declined to pay a 1% finders fee its representative previously promised verbally if Geller would help, Geller sued. Finding the finders fee agreement unenforceable for reasons of public policy, the Massachusetts's Court of Appeals affirmed the trial court's summary dismissal of the action.

[O]fficers and directors owe a fiduciary duty to protect the interests of the corporation they serve. Senior executives are considered to be corporate fiduciaries and to owe their company a duty of

Accordingly, the court concludes that there is no genuine issue regarding the “existence” of the Sales Contract(s). Therefore, with CIGNYS and JPS agreeing to arbitrate their disputes (including disputes regarding the validity of each Sales Contract), it is, consistent with the doctrine of severability, for the arbitrator to decide in the first instance whether the Sales Contract(s) should be set aside or enforced. *Nitro-Lift Technologies, LLC v Howard*, 133 S St 500 (2012)<sup>21</sup>.

### ***Binding Nonsignatories***

In addition to seeking dismissal of claims by [and against] CIGNYS in favor of arbitration, the JPS defendants also request that claims by and against the Rapanos Family, be similarly subject to arbitration.

The FAA does not alter background principles of state contract law regarding the scope of agreements, including the question of who is bound by them. *Arthur Andersen LLP v Carlisle*, 556 US 624, 603 (2009).

Accordingly, nonsignatories may nonetheless be bound to an arbitration agreement under several recognized legal theories, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, (5) third-party beneficiary, and (6) estoppel. *Binding Nonsignatories to Arbitration – Beware of Foot in Door*, 127 Am Jur, Trials, 107.

Here, the JPS defendants argue that the Rapanos Family “should be required to arbitrate the claims asserted by and against them even though they did not sign the Sales Contract(s) because those claims are inseparable from the claims involving CIGNYS and are based on the same facts” (Defendants’ Brief in Support, p 17). In other words, the JPS defendants assert the

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loyalty. Corporate fiduciaries are required to be loyal to the corporation and to refrain from promoting their own interests in a manner injurious to the corporation. \* \* \* For that reason, a contract for personal gain which could cause a corporate fiduciary to breach his or her fiduciary duty of loyalty to the corporation is generally held to be unenforceable as against public policy.

<sup>21</sup> In *Nitro-Lift*, the defendants, employees of Nitro-Lift, entered into a confidentially and noncompetition agreements that contained an arbitration clause. Subsequently, the defendants quit and began working for one of Nitro-Lift’s competitors. Nitro-Lift served them with a demand for arbitration. They then filed suit in state court seeking a declaration the noncompetition agreements were null and void. The court dismissed the complaint, finding the contract contained valid arbitration clauses under which an arbitrator, and not the court, must settle the parties’ disagreement. On appeal, the Oklahoma Supreme Court held that the “existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement”, applied a state statute which limited the enforceability of noncompetition agreements, and concluded the agreements were void and unenforceable”. Confirming disputes challenging the validity of contracts generally (as opposed to the arbitration clause itself) are for arbitrators to decide, the Supreme Court vacated the decision.

[I]t is a mainstay of the Act’s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court. For these purposes, an arbitration provision is severable from the remainder of the contract, and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide. [*Nitro-Lift*, at 503]

court should require arbitration of the Rapanos Family claims because they are “intertwined” with the claims of their wholly owned plaintiff corporation.

Some courts have recognized “intertwined claims” as a basis for applying equitable estoppel. For example,

under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them disclose that the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. (internal quotations and citations omitted). [*JLM Industries, Inc v Stolt-Nielsen SA*, 387 F3d 163, 177 (2004).

Here, however, it is not nonsignatories arguing that the JPS defendants are estopped from denying an obligation to arbitrate. The principle of equitable estoppel does not operate as a sword for a signatory. Rather, it only removes the shield a signatory might otherwise raise when a nonsignatory attempts to assert the arbitration agreement. Intertwined claims alone are insufficient to invoke equitable estoppel.

However, the JPS defendants’ written argument (Brief in Support, p 18) implicates another basis to require the Rapanos Family to arbitrate by suggesting their claims are derivative of their capacity as CIGNYS’ stockholders.

The Rapanos Family (all nonsignatories) have joined CIGNYS (a signatory, albeit a disgruntled one) is suing for violation of MCL 450.1489, shareholder oppression (Count 3), fraud (Count 4), constructive fraud (Count 5), and civil conspiracy (Count 9). The Rapanos Family owns 100% of CIGNYS’ stock (Complaint ¶¶ 3, 30). The only reason the Rapanos Family has to sue Gensheimer and Jeff Lange arises out of their relation with JPS, and the only reason to sue JPS is because of its relation with CIGNYS.

In turn, JPS has counterclaimed against the Rapanos Family (in addition to CIGNYS) for tortious interference with contractual and/or business relations (Count 2). The only reason JPS has to sue the Rapanos Family arises from their relation with CIGNYS.

Given the symmetry of interests and action, the court concludes it is reasonable to characterize the Rapanos Family as CIGNYS’ alter ego (or alternatively, CIGNYS’ principal under agency law), and Gensheimer and Jeff Lange as JPS’s alter ego, and, therefore, to require the Rapanos Family, and Gensheimer and Jeff Lange, although nonsignatories, to arbitrate their claims and defenses alongside their respective corporation.<sup>22</sup>

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<sup>22</sup> Moreover, on the record during the December 22, 2015 summary disposition hearing, counsel for defendants Gensheimer and Jeff Lange expressed their consent to submission of all claims and defenses to arbitration.

### *Conclusion*

The JPS defendants request dismissal of all claims against them in order to implement a pre-existing agreement to arbitrate controversies between CIGNYS and JPS. Plaintiffs object, arguing the arbitration agreement is “void or at least voidable” because the contract in which it is embedded is the product of CIGNYS’s former president’s breach of fiduciary duties and, additionally, they object to imposition of the arbitration agreement on the nonsignatory plaintiffs.

The court concludes that under the circumstances – where a broadly authorized president makes a succession of contracts on behalf of his corporation that contain a broadly worded agreement to arbitrate disputes with the other contracting party – applicable law directs the arbitrator to decide in the first instance whether the parties’ contract is enforceable. Additionally, the court concludes that, under the circumstances – where stockholders of a corporate signatory to an arbitration agreement join in claims against the other signatory – the nonsignatories can be compelled to arbitrate their claims under ordinary contract and agency principles.

Accordingly, the court is granting the JPS defendants’ renewed motion for summary disposition pursuant to MCR 2.116(C)(7), and, consistent with their request, dismissing the JPS defendants’ counterclaim.<sup>23</sup>

**IT IS SO ORDERED.**

Date: February 1, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
M. Randall Jurens, Circuit Judge (P27637)

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<sup>23</sup> This disposition is on the assumption that all claims and defenses involving plaintiffs and the JPS defendants will promptly proceed to arbitration “under the commercial rules of the American Arbitration Association” (Sales Contract(s) ¶ 17). In this regard, the court notes the rules of the AAA for commercial arbitration include:

**R-7. Jurisdiction**

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.