IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PETER HUMPHREY, et al. *Plaintiffs*	:	**OCTOBER TERM, 2018**
	:	**NO. 03237**
v.	:	
	:	**COMMERCE PROGRAM**
GLAXOSMITHKLINE PLC, et al. *Defendants*	:	**CONTROL NO. 19091495**

ORDER

AND NOW, this 12th day of February, 2020, upon consideration of the petition to compel arbitration filed by defendants, and any response thereto, it is hereby

ORDERED

that the petition is **DENIED**.

BY THE COURT:

GLAZER, J.

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GLAXOSMITHKLINE PLC, et al. *Defendants*	:	**CONTROL NO. 19091495**

GLAZER, J. February 12, 2020

OPINION

This lawsuit arises from an investigation commenced by plaintiffs' investigative firm at the request of a Chinese subsidiary of GlaxoSmithKline ("GSK"). A former employee was the subject of a whistleblower report of misconduct at a GSK China location. It is alleged by plaintiffs that following the investigation of the employee with supposed ties to unnamed but influential individuals in China, plaintiffs were arrested by the Chinese government and sent to prison for two years.

In this suit, individual plaintiffs Peter Humphrey ("Humphrey") and Yu Yingzeng ("Yu"), and corporate plaintiff ChinaWhys Company Ltd., seek damages resulting from defendants GlaxoSmithKline plc and GlaxoSmithKline LLC's ("defendants") allegedly tortious conduct against them. Pending before this court is defendants' petition to compel arbitration.

PROCEDURAL HISTORY

On November 15, 2016, plaintiffs Humphrey, Yu, and ChinaWhys initiated an action in the United States District Court for the Eastern District of Pennsylvania. The allegations in the federal matter were racketeering and conspiracy related racketeering, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. The federal

complaint was dismissed, and the United States Court of Appeals for the Third Circuit affirmed the jurisdictional dismissal on appeal.[1] Plaintiffs re-filed the action in this court on October 24, 2018. An amended complaint was filed on December 17, 2018. Defendants filed a notice of removal on January 25, 2019, and plaintiffs moved to remand the action to this court, which was granted by the federal district court on June 5, 2019.

Plaintiffs Humphrey, Yu, and ChinaWhys Company Ltd. filed this action in state court against defendants GlaxoSmithKline plc and GlaxoSmithKline LLC. The allegations of the state court action are fraud, intentional and negligent infliction of emotional distress, and civil conspiracy. The gravamen of this complaint is that GSK corporate mismanagement and fraudulent actions against plaintiffs led to their imprisonment in China. On September 10, 2019, defendants filed the instant preliminary objection in the form of a petition to compel arbitration, to which plaintiffs filed a reply on October 25, 2019. A hearing was held on the petition on January 24, 2019.

FACTUAL HISTORY

Plaintiffs Peter Humphrey and Yu Yingzeng are the founders and sole owners of plaintiff ChinaWhys Company Ltd. ("ChinaWhys"), a company that provided investigation and due diligence services to companies engaged in business in China. Defendant GlaxoSmithKline LLC ("GSK LLC") is a subsidiary of defendant GlaxoSmithKline plc ("GSK plc"), a global

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[1] These cases were brought to the attention of this court in the parties' briefing and oral argument, but are not persuasive in deciding the issue *sub judice*. The factual discussions in these cases were limited to narrow issues of federal law, namely the "domestic injury" requirement for standing to bring a RICO claim, which have no bearing on the action pending before this court. *Humphrey v. GlaxoSmithKline PLC*, 2017 WL 4347587 (E.D. Pa. Sept. 29, 2017), affirmed in *Humphrey v. GlaxoSmithKline PLC*, 905 F.3d 634 (3d Cir. 2018). The federal courts did not address the issue of the applicability of the arbitration provision in the contract between ChinaWhys (Shanghai) Consulting Co. Ltd. and GlaxoSmithKline (China) Investment Co., Ltd., the sole issue before this court.

pharmaceutical company. GlaxoSmithKline (China) Investment Co., Ltd. ("GSK China") is a subsidiary of GSK plc, and is not a party to this litigation.

In April of 2013, following an anonymous tip from a whistleblower, GSK officials met with Humphrey and Yu who were told by a GSK official that a former GSK government affairs director, Vivian Shi, orchestrated certain allegations as part of a smear campaign against GSK. That same month, GSK China, a non-party in this action, retained ChinaWhys (Shanghai), also a non-party in this action, to conduct an investigation into the GSK employee. Humphrey signed a formal retention agreement on behalf of ChinaWhys (Shanghai), titled the Consultancy Agreement. The Agreement contains an arbitration provision that reads as follows:

> This Agreement shall be governed in all respects by the laws of the People's Republic of China. All disputes arising out of or in connection with this Agreement shall be settled through friendly consultation between both parties. In case no settlement can be reached, either Party may submit the dispute to the China International Economic and Trade Arbitration Commission ("CIETAC") in Beijing for arbitration in accordance with the CIETAC rules of arbitration then in effect. The arbitration award shall be final and binding on the Parties.

(Consultancy Agreement § 11).

The Consultancy Agreement consists of two parts, the cover agreement and a project proposal drafted by Humphrey. On the signature page of the cover agreement, the language before the signature line includes the following: "[f]or and on behalf of GLAXOSMITHKLINE (CHINA) INVESTMENT CO., LIMITED" and "I agree to the above terms For ChinaWhys (Shanghai) Consulting Co Ltd". Mr. Humphrey's signature appears directly below the aforementioned language. It is clear from the signature page of this agreement that ChinaWhys (Shanghai) and GSK China are the parties to be bound to the agreement.

Plaintiffs further allege that they began investigative work on the assumption that the whistleblower's allegations were unfounded. On June 6, 2013, ChinaWhys (Shanghai)

transmitted a report to GSK China with the investigative findings. On July 10, 2013, police raided ChinaWhys' office and Humphrey and Yu's home in Beijing. Humphrey and Yu were detained and imprisoned in China for two years in harsh conditions.

Prior to Humphrey and Yu's release, plaintiffs further allege GSK released a series of piecemeal and allegedly false statements regarding the scope and purpose of the investigation. Plaintiffs allege that as a result, diplomats seeking to intervene were hindered by a lack of accurate information regarding the arrest and imprisonment. Following their release from prison, Humphrey was deported from China and banned from the country for a period of 10 years, and Yu was denied a visa to return.

DISCUSSION

To determine whether the petition to compel arbitration may be granted in this matter, this court must address the narrow issue of first impression in this court of whether a non-signatory to an agreement may be bound by an arbitration provision found therein. Based upon a review of the applicable law and the facts presented, this court believes plaintiffs cannot be compelled to arbitrate under the Consultancy Agreement.

As a threshold matter, to determine whether to grant a petition to compel arbitration, courts apply a two-part test. First, the court must determine whether a valid agreement to arbitrate exists and second, whether the dispute is within the scope of the agreement. *Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266. 1270 (Pa.Super.2004). However, before addressing the threshold matter here, the court must first decide if plaintiffs and defendants, non-signatories to the agreement, are bound by that agreement.

Generally, only parties to an arbitration agreement are subject to arbitration. *Provenzano v. Ohio Valley Gen. Hosp.*, 121 A.3d 1085, 1097 (Pa.Super.Ct. 2015). The usual presumption in favor of arbitration does not extend to non-signatories to an agreement. Rather, the parties opposing arbitration—here, plaintiffs—are given the benefit of all reasonable doubts and inferences that may arise. *Griswold v. Coventry First LLC*, 762 F.3d 264, 270 (3d Cir. 2014). The Superior Court has held that arbitration is a matter of contract, and parties to a contract cannot be compelled to arbitrate a given issue absent an agreement between them to arbitrate that issue. *Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa. Super. 2012). Arbitration agreements are to be strictly construed and such agreements are not to be extended by implication. *Id.*

None of the parties to this suit are signatories to the agreement under which defendants seek to compel arbitration. The signatories to this agreement are GSK China and ChinaWhys (Shanghai), signed by Humphrey as an officer of ChinaWhys (Shanghai). Yu did not sign the Consultancy Agreement in any capacity. Though Humphrey signed his name to the agreement, he did so not in his personal capacity, but "For ChinaWhys (Shanghai) Consulting Co. Ltd."

The court in *Gallagher v. Hearthside Realty, Inc.*, 2019 WL 4273792 (Pa. Super. Ct. 2019) faced a similar situation in which a petition to compel arbitration was filed pursuant to a partnership agreement signed by plaintiff and Mr. Mancuso, a non-party to the suit. Plaintiff alleged claims of fraud, tortious interference with an existing contract, and conversion. Defendants sought to compel arbitration, though they were non-signatories. The Superior Court affirmed and declined to compel arbitration because the underlying dispute was "not confined to the conduct" of plaintiff and Mr. Mancuso, but related to a "concert of activity involving parties uncontemplated at the time the partnership agreement was executed". *Id. at* 3. The Superior Court concluded that no valid arbitration agreement existed between the parties to the suit, and

made special note that Mr. Mancuso, the person with whom plaintiff agreed to go to arbitration, *was absent from the suit* (emphasis added). *Id.* The court further noted that plaintiff alleged no breach of contract by defendants—they could not breach a partnership agreement they never entered. *Id.*

As in *Gallagher*, the facts alleged by plaintiff in the amended complaint are "completely extrinsic" to the activities governed by the agreement. Plaintiff in the amended complaint brought the following claims: fraud, intentional and negligent infliction of emotional distress, and civil conspiracy. (Am. Compl. ¶¶ 21-24, 55-58, 89-91). Here, plaintiffs seek no relief under the contract. Rather, they seek relief for tortious conduct against parties not part of the contract. Notably, plaintiffs neither brought a breach of contract action, nor included GSK China in the suit.[2] The Consultancy Agreement is not mentioned in the amended complaint, and the claims brought are not based upon the agreement. Moreover, as in *Gallagher*, the parties who agreed to go to arbitration, ChinaWhys (Shanghai) and GSK China, are absent from the suit.

Humphrey in his individual capacity and Yu never agreed to arbitrate any matter against the defendants. Notwithstanding the fact that Humphrey and Yu are founders of ChinaWhys (Shanghai), the causes of action in the complaint were brought by plaintiffs in their individual capacities and do not relate to the Consultancy Agreement. As previously stated, plaintiffs are not seeking relief by way of a breach of contract action. Rather, they seek relief for tortious and fraudulent behavior, some of which allegedly occurred before the Consultancy Agreement's

[2] Should defendants wish to join GSK China in this matter, they may do so. It is plaintiffs' prerogative, when initiating an action, to shape the nature of the suit by selecting the parties, the claims brought, and the forum in which the action shall take place.

existence. Ultimately, the Consultancy Agreement is between non-parties in this litigation. If a party has not agreed to arbitrate, the courts have no authority to mandate him or her to do so.

Defendants rely significantly on the holdings in *Dodds v. Pulte Home Corp.*, 909 A.2d 348 (Pa. Super. Ct. 2006) and *Provenzano v. Ohio Valley Gen. Hosp.*, 121 A.3d 1085 to support their argument that, as non-signatories, the parties in this matter should be bound to the Consultancy Agreement even though they did not sign it. In *Dodds*, the Superior Court agreed with defendants that non-signatories to an arbitration agreement can enforce the agreement when there is an "obvious and close nexus" between the non-signatories and either the contract or the contracting party.[3] *Dodds* is distinguishable from this matter. Defendants' reliance on the "obvious and close nexus" language is misplaced. Defendants argue that plaintiffs "cannot attempt to defeat an arbitration clause simply by adding fraud allegations to what is essentially a contract claim or by adding a principal as a defendant who was not party to the agreement." *Id.* at 350. In this case, individual plaintiffs, non-signatories, have sued defendants, also non-signatories, for various claims including fraud, intentional inflectional of emotional distress, negligent infliction of emotional distress, and civil conspiracy. Here, unlike in *Dodds*, the injuries suffered by plaintiff are not contractual injuries. Though individual plaintiffs owned a business that contracted with GSK China, the relief sought does not arise from or rely on the

[3] There, the plaintiffs, as signatories to the agreement, were seeking to avoid arbitration which was requested by non-signatory defendants. The plaintiffs sought to defeat the application of an arbitration clause contained in their contract with a subsidiary (a signatory) by adding the subsidiary's parent (a non-signatory). In rejecting plaintiffs' argument and binding them to arbitration, the Superior Court observed, "an arbitration agreement would be of little value if a party could obviate the effect of an agreement merely by finding a way to join another party." Id. at 352.

Consultancy Agreement governing their relationship. At its heart, this litigation seeks relief for allegedly fraudulent and misleading behavior, not a breach of contractual responsibilities.

In *Provenzano*, *supra*, the Superior Court, in applying the traditional rules of agency, held that a non-signatory employer's board of directors was entitled to invoke an arbitration agreement where the plaintiff employee (a signatory) brought claims against the employer (also a signatory). The Superior Court noted that "one 'obvious and close nexus' between non-signatories and the contract or contracting parties", in applying the language set out in *Dodds*, arises from the relationship between a signatory principal and a non-signatory agent. *Id.* at 1097. Moreover, if the principal is bound by the arbitration agreement, the agents, employees and representatives are likewise bound, even if they are non-signatories to the agreement. *Id.*[4]

Here, the interest of non-signatory parties, Humphrey, Yu, and ChinaWhys, may be tangentially related to the interest of signatory entity ChinaWhys (Shanghai), but certainly are not congruent with or directly related to that interest. Significantly, plaintiffs' claims and injuries are individual and personal, and thus seek individual and personal relief, rather than relief pursuant to a contractual, business relationship.[5]

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[4] Both *Provenzano* and *Dodds* are further distinguishable from the matter pending before this court. In both cases, signatories to the arbitration were parties on both sides of the lawsuit. Here, signatories are on neither side of the lawsuit. Neither *Provenzano* nor *Dodds* can be applied to the facts here where a non-signatory to an arbitration agreement seeks to enforce that agreement against another non-signatory. *See also Porter v. Toll Brothers, Inc.*, 217 A.3d 337 (2019).

[5] Though not binding on this court, *American Personality Photos, LLC v. John Y. Mason*, 589 F.Supp. 2d 1325 (2008) is persuasive. There, a non-signatory sought to compel another non-signatory to arbitration through agency and estoppel theories. The court reasoned that just because a tort was allegedly committed during the time that a party was performing its duties under the contract did not automatically bring the claims giving rise to the suit under the umbrella of the contractual agreement. *Id.* at 1335.

While defendants acknowledge that plaintiffs and defendants here are not signatories to the Consultancy Agreement, they nonetheless seek to compel this matter to arbitration and seek to enforce the arbitration provision against non-signatory plaintiffs using various legal theories, including agency, estoppel, alter ego, and assumption of contract rights. For the reasons discussed below these legal theories do not apply to this case.

Defendants rely upon the agency and estoppel theories seeking to enforce the arbitration agreement against the individual plaintiffs. These theories fail to bind plaintiffs to the arbitration provision. This court finds no case—and none were cited by the parties—holding that non-signatory plaintiffs may be compelled to arbitrate under an agency theory. To bind a principal by its agent's acts, the party must show that the agent was acting on behalf of the principal and that the cause of action arises out of that relationship. *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187, 198 (3d Cir. 2001). Courts have applied agency principles to permit non-signatories to enforce agreements where there is either a parent/subsidiary relationship, ownership, or some other significant relationship between the signatory and the non-signatory defendant. *White v. Sunoco Inc.*, 189 F.Supp. 486, 494 (E.D.Pa. 2016).

The Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) addressed whether a signatory to an arbitration agreement could be compelled to arbitrate claims it had against the agents of the other party to the agreement. Therein, the Third Circuit bound a non-signatory corporate sister to an arbitration agreement on the principle of agency. The Third Circuit emphasized that the result turned on the construction of the arbitration clause, namely, whether it was broad enough to encompass claims against agents of the firm arising out of the relationship between the firm and the trustees. *Id.* The court concluded that the

language "all controversies which may arise between us" included both the firm and its agents. Since the brokerage firm could only act through agents and employees, "an arbitration agreement would be of little value if it did not extend to [them]." *Id.* at 1122. The agreement would be upheld against non-parties where the interests of such parties are directly related to, if not congruent with, those of a signatory. *Id at* 1121. (quoting *Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.*, 998 F.2d 145 (3d Cir.1993)).

The estoppel theory also fails. Courts have held non-signatories to an arbitration agreement under estoppel when the non-signatory "knowingly exploits the agreement containing the arbitration clause." *E.I. DuPont de Nemours and Co*, 269 F.3d at 198. In *E.I. DuPont*, the Third Circuit held that a non-signatory would not be compelled to arbitrate under the theory of equitable estoppel where the claim did not seek recovery under the contract containing the arbitration clause. *See also Porter v. Toll Bros., Inc.*, 2019 WL 3942903 (Pa. Super. Ct. 2019).

Under the alternative estoppel theory, courts may require arbitration when a non-signatory seeking to enforce the agreement can show (1) a close relationship between the non-signatory and a signatory and (2) that the alleged wrongs are related to a non-signatory's contractual obligations and duties. *DuPont* 269 F.3d at 199. To satisfy the second prong, the party seeking to compel arbitration must demonstrate that the claims are "intimately founded in and intertwined with the underlying contract obligations." *White v. Sunoco* (quoting *Miron v. BDO Seidman, LLP*, 342 F.Supp.2d 324, 333 (E.D.Pa. 2004).

Plaintiffs are not bound to the arbitration provision under either estoppel theory as there is no evidence that plaintiffs are "exploiting" the agreement. Furthermore, there is no evidence to suggest that Humphrey and Yu embraced the Consultancy Agreement or received direct benefit therefrom, while avoiding the responsibilities the agreement implies. The existence of the

Consultancy Agreement as a contract exists only to define the business relationship between the parties, and is incidental at best to the claims giving rise to this litigation. The claims enumerated in the complaint brought by plaintiffs are neither "founded" nor "intertwined" with the underlying obligations set out in the Consultancy Agreement. Plaintiffs neither seek contract damages nor allege breach of contract.

Defendants also argue plaintiff ChinaWhys may be held to the arbitration agreement under the theories of alter ego, agency, and assumption of contract rights. Under the alter ego theory, one corporate entity may be bound by an arbitration clause in a contract signed by an affiliate company when the two entities have so comingled their operations that they function as a single enterprise. *E.I. DuPont de Nemours,* 269 F.3d at 198. Defendants suggest that the ChinaWhys entities acted "interchangeably and in disregard of their corporate separateness" and thus qualify alter egos of one another. *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1070 (3d Cir. 1979). Under principles of assumption, one entity may be bound by an arbitration clause if its "subsequent conduct indicates that it is assuming the obligation to arbitrate. *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 85 (3d Cir. 2010).

In essence, defendants argue that this court should disregard the corporate form of ChinaWhys so that they may invoke the arbitration agreement as agents or alter egos of GSK China.[6] There is no conduct by ChinaWhys that reflects an intent to be bound under the contract. Despite certain links between ChinaWhys and ChinaWhys (Shanghai) inherent in any parent-subsidiary corporate relationship, there is nothing in the record to indicate ChinaWhys is an alter ego or assumed the obligation to arbitrate.

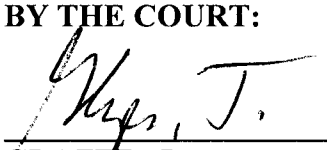
[6] Interestingly, defendants argue the opposite in the preliminary objection to dismiss for lack of personal jurisdiction.

CONCLUSION

Defendants are seeking to bind plaintiffs to an arbitration agreement that has little bearing on the claims brought in this matter. Plaintiffs' claims against defendants would exist independently, whether or not the Consultancy Agreement was valid.[7] Each of the alternative theories argued by defendants were presented as unique, individual bases to bind non-signatory parties to arbitration. Ultimately, defendants present a single argument for imposing arbitration on non-signatories: that the corporate form of ChinaWhys should be disregarded. The court disagrees.

Based upon a review of the applicable law and the facts presented, plaintiffs cannot be compelled to arbitrate. As such, defendants' petition is denied.

BY THE COURT:



GLAZER, J.

[7] Notwithstanding the foregoing, the arbitration provision does not apply because the dispute does not meet the second part of the two-part test; it is not within the scope of the arbitration provision. *Smay v. E.R. Stuebner, Inc.*, 864 A.2d at 1270. Here, the arbitration clause governs "all disputes arising out of or in connection *with this Agreement*" (emphasis added). It is clear that the clause only covers disputes between the parties to the agreement concerning matters arising out of that agreement. It does not follow that claims of fraudulent conduct by senior executives of GSK should be arbitrated pursuant to an agreement between ChinaWhys (Shanghai) and GSK China.