Nos. 22-8063 and 22-8050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiff-Appellees,

v.

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC,

Defendant-Appellants.

On appeal from the U.S. District Court for the District of Wyoming
Honorable Nancy D. Freudenthal
No. 21-CV-223-F

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PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(3), Appellants state that there are no prior or related appeals other than the two that have been consolidated in this matter.

GLOSSARY

Pursuant to 10th Cir. R. 28.2(C)(4), Appellants provide the following Glossary:

	Description and Appendix Reference
Arbitration agreements	Provisions committing parties to arbitration included in: AVG notes (App'x Vol. VI, p. 1397 § 20.2); AVG trust deed (App'x Vol. V, p. 1353 § 29.1); ULF notes (App'x Vol. VI, p. 1544–1545 § 19.2.1); ULF trust deed (App'x Vol. VI, p. 1483 § 23.2.1)
AVG	Avangardco IPL, a Ukrainian company that produces eggs and egg products
AVG notes	Unsecured debt instrument notes issued by AVG in 2010 on London Stock Exchange, included in AVG trust deed
AVG prospectus	AVG prospectus dated October 27, 2010 (App'x Vol. IV, p. 878–Vol. V p. 1311)
AVG subscription agreement	AVG subscription agreement dated October 27, 2010 (App'x Vol. II, p. 290–322)
AVG trust deed	AVG trust deed dated October 29, 2010 (App'x Vol. V, p. 1321–Vol VI, p. 1434)
LCIA	London Court of International Arbitration
Noteholders	Holders of AVG notes or ULF notes
Notes	The AVG notes and the ULF notes
Relationship agreement	Relationship agreement between AVG and Oleg Bakhmatyuk dated April 30, 2010 (App'x Vol. XIII, pp. 3229–3240)
TNA	TNA Corporate Solutions, LLC, a Wyoming limited liability company
ULF	UkrLandFarming PLC, a Ukrainian company that produces grain, eggs, milk, and meat for human and animal consumption

ULF notes	Unsecured debt instrument notes issued by ULF in 2013 on Irish Stock Exchange, included in ULF trust deed
ULF prospectus	ULF prospectus dated June 28, 2013 (App'x Vol. II, pp. 359–Vol. IV, p. 846)
ULF subscription agreement	ULF subscription agreement dated May 16, 2013 (App'x Vol. I, pp. 213–282)
ULF trust deed	ULF trust deed dated March 26, 2013 (App'x Vol. VI, pp. 1451–1592)
Piazza Motion	MOTION to Dismiss Case, filed by Defendants Nicholas Piazza, SP Capital Management LLC, TNA Corporate Solutions LLC, Oleksandr Yaremenko and MEMORANDUM in Support of Motion to Dismiss Case filed by Defendants Nicholas Piazza, SP Capital Management LLC, TNA Corporate Solutions LLC, Oleksandr Yaremenko dated February 7, 2022 (App'x Vol. I, pp. 130 – 195)
Piazza Order	ORDER by the Senior District Judge Nancy D. Freudenthal granting in part and denying in part Motion to Dismiss Case dated July 7, 2022 (App'x Vol. XIII, pp. 3149– 3189)
Bakhmatyuk Motion	MOTION to Dismiss Plaintiffs' Complaint filed by Defendant Oleg Bakhmatyuk and MEMORANDUM in Support of Motion to Dismiss filed by Defendant Oleg Bakhmatyuk dated July 15, 2022 (App'x Vol. XIII, pp. 3190–3226)
Bakhmatyuk Order	ORDER by the Senior District Judge Nancy D. Freudenthal denying Motion to Dismiss dated September 15, 2022 (App'x Vol. XIV, pp. 3513–3564)

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1332 because the action exceeds the value of $75,000 and is between citizens of different States and of a foreign state. The district court also had original jurisdiction under 28 U.S.C. § 1331 because the action arises under the Constitution, laws, or treaties of the United States—namely, 18 U.S.C. § 1962.

This Court has jurisdiction under 9 U.S.C. § 16. Under the Federal Arbitration Act ("FAA"), a party may take an interlocutory appeal from "an order . . . refusing a stay of any action under section 3 of this title . . . ." 9 U.S.C. § 16(a)(1)(A). The FAA's mandate is clear: "[A]ny litigant who asks for a stay under § 3 is entitled to an immediate appeal from the denial of that motion . . . ." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009). The district court agreed, holding that Appellants "expressly argued for a stay under section 3 of the FAA." *See* App'x Vol. XIV, p. 3514.

The appeal is timely. As to Case No. 22-8050, the district court entered the order being appealed on July 7, 2022. Appellants' notice of appeal was filed on August 2, 2022. Vol. XIV, pp. 3513–3564. As to

Case No. 22-8063, the district court entered the order being appealed on September 15, 2022. Appellants' notice of appeal was filed on September 23, 2022. *Id*. at pp. 3565–3567.

STATEMENT OF THE ISSUES

i. Whether the Appellants are parties to the notes and trust deeds and can enforce their arbitration provisions against Appellees, who are parties to the notes and trust deeds, on that basis.

ii. Whether Appellees are equitably estopped from avoiding the arbitration provisions in the notes or trust deeds.

INTRODUCTION

Appellees are unsecured creditors hoping to cut the line ahead of secured creditors to recover on debt notes for two major Ukrainian agricultural companies, Avangardco IPL ("AVG") and UkrLandFarming PLC ("ULF"), that they purchased at an extreme discount. To do so, Appellees, sophisticated "vulture" investors, cast a claim that the companies breached their contractual obligations to all noteholders as a RICO case in an effort to avoid the arbitration agreements[1] in the investment terms. Unfortunately, the district court went along with their attempt, committing reversible errors in denying Appellants' motions to dismiss or stay the action based on the arbitration agreements.

AVG and ULF issued the unsecured notes that are the subject of this dispute on the London and Irish Stock Exchanges to raise capital in 2010 and 2013, respectively. Following Russia's 2014 invasion of Eastern Ukraine and devaluation of Ukrainian currency, AVG and ULF

[1] Arbitration agreements as used herein refers to the provisions committing parties to arbitration included in the AVG notes (App'x Vol. VI, p. 1397 § 20.2); AVG trust deed (App'x Vol. V, p. 1353 § 29.1); ULF notes (App'x Vol. VI, pp. 1544–1545 § 19.2.1); ULF trust deed (App'x Vol. VI, p. 1483 § 23.2.1).

lost almost half of their business assets and value. Appellees purchased unsecured notes in AVG and ULF both before and after this international crisis. As alleged in the complaint, Appellees have been negotiating with AVG and ULF to restructure the notes since 2015 due to the changed circumstances. The restructuring attempts have been unsuccessful.

The AVG notes and the ULF notes explicitly state that noteholders are bound by the terms of the notes—each of which contains a broad arbitration clause and incorporates the rules of the London Court of International Arbitration ("LCIA"), which provide that the arbitrator will decide issues about the scope of arbitrability. App'x Vol. VI, p. 1512; App'x Vol. V, p. 1363; App'x Vol. VI, pp. 1544–1545 § 19.2.1 (ULF notes arbitration clause stating "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions . . . shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules[.]"); App'x Vol. VI, p. 1397 § 20 (AVG notes arbitration clause stating similar). The notes also explicitly bind noteholders to associated trust deeds, which are lengthy contractual documents that set out the terms and conditions of the

notes in more detail. Each of the AVG and ULF trust deeds also contains a broad arbitration clause and delegation provision through the incorporation of LCIA rules. App'x Vol. VI, p. 1397 § 20.2; *id.* at pp. 1544–1545 § 19.2.1.

Now, Appellees have chosen to pursue RICO litigation against the companies' majority shareholder, Oleg Bahkmatyuk, and other investors in the AVG and ULF in Wyoming for treble damages rather than arbitrate as required at the LCIA. Appellees' 105-page complaint offers a complex story of international transactions, multinational companies, and actors in various jurisdictions all over the world—all to distract from the plain reality that Appellees' claim is that AVG and ULF breached the trust deeds. While Appellants deny the allegations, the critical point in this posture is that this dispute belongs in arbitration, not federal district court in Wyoming.

The obvious and foundational element of arbitration is that it is rooted in consent to arbitrate. Here, the language of the arbitration agreements and underlying circumstances leave no doubt that the intent was a broad consent to arbitrate any and all disputes relating to the notes. The district court erred in its analysis in two ways: first, by

failing to recognize that all parties are bound to the arbitration agreements and, second, by improperly diverting to English law in order to avoid compelling arbitration through the principle of equitable estoppel. The district court's first error directly contradicts allegations within the complaint that leave no doubt that Appellants are noteholders and thus parties to, and bound by, the arbitration agreements. Moreover, Bakhmatyuk is a party to the trust deeds by way of being defined as a "Related Party" and several other direct references throughout the governing documents. Notwithstanding this error, the district court still should have compelled arbitration under federal or Wyoming law of equitable estoppel. Instead, the district court inexplicably turned to English law and interpreted it wrongly by adopting the out-of-court testimony of Appellee's expert. In doing so, the district court frustrated recent Supreme Court precedent, the federal policy in favor of arbitration, and need for uniform standards in United States treaty obligations.

The district court's contract interpretation and legal analysis are incorrect and its decisions must be reversed.

STATEMENT OF THE CASE

I. Background of the Parties, Notes, and Governing Documents

Appellees Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., Gramercy Funds Management LLC, Gramercy EM Credit Total Return Fund, and Roehampton Partners, LLC (collectively, "Gramercy" or "Appellees") are investment funds organized in the Cayman Islands that specialize in distressed assets in emerging markets. App'x Vol. I, p. 35 ¶ 14.

The Piazza Appellants, or Piazza Defendants as they were referred to below, are two business associates, Nicholas Piazza and Oleksandr Yaremenko, and two corporate entities, SP Capital Management and TNA Corporate Solutions, LLC, with shared ownership or management.

Appellant Piazza is a Wyoming resident and businessman who offers financial and consulting services to Ukrainian and Eastern European businesses. *Id.* at pp. 30, 36 ¶¶ 8, 17. Piazza and Appellant Yaremenko together "operate[] a number of companies … under the umbrella of [Appellant] SP Capital [Management LLC]" ("SP Capital").

Id. at p. 36 ¶ 17. While the complaint names only SP Capital, it refers throughout to SP Advisors, which it defines as "[]SP Capital[] . . . together with its subsidiaries." *Id.* at p. 28. Additionally, the complaint alleges that SP Advisors is "the registered trade name of SP Capital [that] also refers to the group of SP Capital subsidiaries through which it operates." *Id.* at pp. 36–37 ¶ 17. Specifically, Appellees allege that Piazza and Yaremenko formed at least seven "SP entities under the umbrella of SP Capital, which registered the trade name SP Advisors." *Id.* at pp. 37–38 ¶ 19. Throughout the complaint, Appellees make allegations as to "SP Advisors." Based on the varying definitions offered in the complaint, these allegations either refer to SP Capital or include SP Capital and any subsidiaries.

Appellees also allege that Piazza owns and manages Appellant TNA Corporate Solutions, LLC ("TNA"),a Wyoming LLC, with Yaremenko. *Id.* at p. 38 ¶ 20.

Appellees and Piazza Appellants are investors in assets of two Ukrainian companies, AVG and ULF. Appellant Oleg Bakhmatyuk founded AVG and ULF in the 2000s. *Id.* at pp. 38–39 ¶¶ 21–22. AVG produces eggs and egg products, and ULF produces grain, eggs, milk,

and meat for human and animal consumption. *Id.* at pp. 38–39 ¶¶ 21–22. AVG and ULF both sought capital in international financial markets through notes issued in London in 2010 for AVG and in Ireland in 2013 for ULF. *Id.* at pp. 44–49 ¶¶ 45–50. Appellees purchased AVG and ULF notes in the open market starting in 2011. *Id.* at p. 45, 47 ¶¶ 46, 48. Appellees received prospectuses associated with their purchases disclosing, among other things, various risks associated with these investments, including the existence of senior debt secured by company assets, App'x Vol. II, p. 423; App'x Vol. III, p. 608; App'x Vol. IV, pp. 860, 899, 930, 1092; that Ukrainian courts do not enforce foreign court judgments but do enforce arbitration decisions, App'x Vol. II, pp. 364–65; App'x Vol. IV, pp. 885–86; other risks inherent in investing in the notes, App'x Vol. II, pp. 414–19; App'x Vol. IV, pp. 921, 923–24; and risks associated with doing business in Ukraine in light of the potential threat of Russian aggression. App'x Vol. IV, p. 923; App'x Vol. II, p. 414. Indeed, these latter risks materialized when Russia invaded Crimea and other regions of Ukraine in 2014, causing AVG and ULF to experience collapsing commodity prices and disrupted operations. App'x Vol. I, pp. 28, 49–51 ¶¶ 2, 51, 53–54. In the face of such risks,

Appellees continued to purchase AVG and ULF notes well beyond 2014 and through 2017. *Id.* at pp. 45–49 ¶¶ 46–49.

In purchasing the notes, Appellees agreed to the terms set forth in the notes, the trust deeds, and various other documents governing the transactions, including: an agency agreement, relationship agreement, subscription agreement, and surety deeds. The notes themselves specifically state that noteholders are "entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed and the Surety Deed and are deemed to have notice of those provisions of the Agency Agreement applicable to them." App'x Vol. VI, p. 1512. All of these governing documents contain arbitration clauses.

In particular, the AVG note contains an arbitration clause stating that "[a]ny dispute arising out of or connected with the Notes, the Trust Deed or the Surety Agreement, … shall be resolved" by LCIA arbitration. App'x Vol. VI, p. 1397 § 20.2.[2] The AVG trust deed commits the parties to arbitration before the LCIA for "[a]ny dispute arising out of or connected with these presents[.]" App'x Vol. V, p. 1353

[2] The AVG trust deed reproduces the full form language of the AVG notes at Schedule 2.

§ 29.1.[3]

Similarly, the ULF note states that "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions (including a dispute regarding the existence, validity or termination hereof or thereof and a dispute relating to non-contractual obligations arising out of or in connection herewith or therewith)" shall be referred to arbitration before the LCIA. App'x Vol. VI, p. 1544 § 19.2.1.[4] The ULF trust deed's arbitration clause requires arbitration before the LCIA for "any dispute arising out of or in connection with this Trust Deed … and a dispute relating to non-contractual obligations arising out of or in connection with this Trust Deed." *Id.* at p. 1483 § 23.2.1.[5] These arbitration agreements explicitly apply to non-contractual claims. In addition, the ULF trust deed

[3] The arbitration clause in the AVG trust deed differs from the clause in the note only in referring to "these presents" (in the trust deed) or "the Notes, the Trust Deed or the Surety Agreement" (in the note at Schedule 2).

[4] The ULF trust deed reproduces the full form language of the ULF notes at Schedule 5.

[5] The arbitration clause in the ULF trust deed differs from the clause in the ULF note only in referring to "the Trust Deed" (in the ULF trust deed) or "the Notes, the Trust Deed or the Surety Agreement" (in the ULF note at Schedule 5).

provides no alternative forums, necessarily requiring arbitration.

In addition to the notes and trust deeds, Appellees are also parties to subscription agreements for the AVG and ULF notes that also provide for LCIA arbitration of disputes "arising out of or connected with" the agreements. App'x Vol. II, p. 313 §18.2; *see also* App'x Vol. I, p. 246 § 22.2(a). Bakhmatyuk is also party to a relationship agreement with AVG. App'x Vol XIII, p. 3229–40. The relationship agreement is explicitly referenced and incorporated into both the AVG and ULF prospectuses. App'x Vol. III, p. 582–85; App'x Vol. IV, pp. 896, 1073–77. Among other things, the relationship agreement serves to ensure to investors that Bakhmatyuk does not improperly deal with AVG, including by restricting the terms on which Bakhmatyuk can transact with AVG and affiliates. App'x Vol. XIII, pp. 3236–37 § 2.1. Like the subscription agreements and trust deeds, the relationship agreement has a provision requiring arbitration before the LCIA. App'x Vol. XIII, p. 3239 § 7.

In sum, *all* of the governance documents—the notes, the trust deed, the subscription agreements, and the relationship agreement—provide for arbitration.

II. Procedural History

A. Appellees' complaint

Appellees filed this case on December 7, 2021 in the District of Wyoming alleging violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act and state law claims for tortious interference with contract, civil conspiracy, and aiding and abetting (against different combinations of Appellants). The complaint, which totals 226 paragraphs and 102 pages, is replete with salacious language, including describing Bakhmatyuk as an "oligarch," "agriculture tycoon[]," and "'former' billionaire." App'x Vol. I, pp. 28–29, 36 ¶¶ 1, 3, 16.

The complaint tells the story of an unrelated Ukrainian company, Mriya, as a "cautionary tale" that spurred Appellants, including Bakhmatyuk, to engage in an intricate, multi-year scheme—all to avoid engaging in a debt restructuring process with Appellees. *Id.* at pp. 51–52 ¶ 56; *see also, e.g.*, *id.* at pp. 28–29, 56–57, 59 ¶¶ 2–3, 71, 76. Appellees allege "on information and belief," that Piazza convinced former colleagues at Concorde Capital, a Ukrainian investment company providing brokerage and investment banking services, to falsely disseminate negative information about AVG and ULF's

performance. *Id.* at pp. 39, 57, 103, 104 ¶¶ 23, 72, 178(1), 178(3). Appellees claim that Bakhmatyuk directed Piazza and others to purchase AVG and ULF notes for Bakhmatyuk to either reacquire or control through the purchasers. *Id.* at pp. 32–33 ¶ 10(b).

Specifically, Appellants allege that Piazza purchased AVG and ULF debt, including from Ashmore and Ukrsibank. *Id.* at pp. 32–33, 65, 71–72, 118–19, 121 ¶¶ 10(b), 93, 109, 112, 208(3), 208(5), 209(3). Ultimately, Appellees' core allegation is that Appellants violated the terms of the AVG and ULF notes and trust deeds by purportedly transferring AVG and ULF assets to the Cypriot entity Maltofex and to Appellant TNA, "fail[ing] to follow the terms of the asset sale restrictions ***in the Trust Deeds***" and without "giv[ing] notice to the Trustee of [these] affiliate transactions, ***as required under the Trust Deeds***." *Id.* at p. 79–80 ¶ 127; *see also id.* at p. 50 ¶ 124. This is the central theme of the complaint. *See, e.g.*, *id.* at p. 86 ¶ 145 ("[T]he Company did not disclose the change to the Trustee under the Notes or the Noteholders, ***despite being required to do so by the Trust Deeds***"); *id.* p. 86 ¶ 146 ("***[T]he terms of the Trust Deeds require*** the Company to report material dispositions or restructurings promptly and

to give notice of affiliate transactions over $5 million, but ULF never provided such a report about either the Maltofex or TNA Transfers") (emphases added to all). The complaint also alleges that Piazza purchased senior, secured debt for which the allegedly transferred assets are security. *Id.* at pp. 66, 87–88 ¶¶ 96, 150 (alleging that PS Capital and Piazza purchased Sberbank's debt).

Based on these allegations, Appellees assert three claims under RICO, including two claims against all Appellants under sections 1962(c) and (d) and one against Bakhmatyuk under section 1962(b). Appellees additionally assert common law claims for fraud against Bakhmatyuk and Piazza, tortious interference with contract against all Appellants except Yaremenko, and civil conspiracy and aiding and abetting against all Appellants.

B. Piazza Appellants' Motions to Dismiss

Appellants Piazza, Yaremenko, SP Capital, and TNA (the "Piazza Appellants") filed a motion to dismiss or alternatively stay the case pending arbitration (the "Piazza Motion") under the AVG and ULF notes and trust deeds. App'x Vol. I, p. 193. The Piazza Appellants asked that the district court permit them to enforce the arbitration

clauses by virtue of their status as noteholders or because Appellees are equitably estopped from avoiding their arbitration obligation.

First, the Piazza Appellants noted that Appellees argued in their complaint and opposition that certain Piazza Appellees were in fact AVG and ULF noteholders. App'x Vol. XII, p. 3007. As Piazza Appellants stated, accepting these allegations as true, SP Advisors, which, by the complaint's definitions, is either the same thing as or includes the Appellant SP Capital, "has the same rights and obligations under the Trust Deeds as Gramercy regarding the arbitration provisions." *Id.* at p. 3007.

Second, the Piazza Appellants argued that equitable estoppel prevents Appellees from avoiding the arbitration clauses because their claims are "so intertwined" with the terms of the AVG and ULF trust deeds "predicated upon the[ir] existence and validity." App'x Vol. I, p. 159.

In addition to the arbitration arguments, the Piazza Appellants also argued that (1) Appellees had not complied with the no-action clauses of the trust deeds requiring noteholders to petition the Trustee to bring an action on behalf of all noteholders before asserting claims

individually; (2) AVG and ULF were indispensable parties that could not be joined and their absence could subject them or the Appellants to inconsistent obligations; and (3) the district court should dismiss under *forum non conveniens*, since virtually all of the alleged facts relate to matters in Europe, the United Kingdom, and Ukraine; all of the witnesses and relevant documents are located in Ukraine and London; English law governs the trust deeds; Ukraine will *not enforce* judgments by a U.S. court but *will* enforce arbitral awards; and the LCIA is an adequate alternative forum. *See generally id.* at pp. 135–39.

The motion also argued that Gramercy's claims fail for a host of reasons, including that the RICO statute does not apply extraterritorially to the alleged conduct, and securities-related claims, like the allegations here, do not give rise to RICO claims, among others. *Id.* at pp. 177–89.

C. The District Court's Order on the Piazza Motion

The district court issued an order denying the motion (the "Piazza Order"), holding that Appellees were not signatories to the trust deeds and distinguishing the Piazza Appellants' equitable estoppel case law on that basis. App'x Vol. XIII, p. 3166. The court concluded that there

was no support for the argument that equitable estoppel would allow enforcement of the arbitration clause against a non-signatory plaintiff. *Id*. at pp. 3164–66. Based on that conclusion, the district court declined to address whether English, state, or federal law governed whether Appellees were equitably estopped from avoiding the agreement to arbitrate all disputes relating to the notes. *Id*. ("It is unnecessary for the Court to decide whether English or domestic law applies to [the issue of equitable estoppel] . . . . Nor does the present motion give any reason for the Court to conclude that English or Wyoming (or other domestic) law would extend equitable estoppel to compel a nonsignatory plaintiff to arbitrate in this case.").

Notably, the district court declined to consider the subscription agreements and prospectuses. *Id*. at pp. 3158–59 n.4. Although Appellees never objected to the district court's consideration of these documents, the district court ignored the fact that the notes, trust deeds, subscription agreements, and prospectuses, taken together, comprise the deal between the noteholders and AVG and ULF. *Id*. ("Defendants also argue that subscription agreements and Prospectuses govern the AVG and ULF Notes . . . Gramercy does not directly address

this point. The complaint does not appear to mention subscription agreements or Prospectuses.")

D. Appellant Bakhmatyuk's Motion to Dismiss

Bakhmatyuk, a Ukrainian citizen[6] residing in Austria, was served via the Hague Convention on June 17, 2022. App'x Vol. XII, p. 3136–39. A week after the district court's Piazza Order, Bakhmatyuk filed a separate motion to dismiss or request to stay pending arbitration (the "Bakhmatyuk Motion") on similar and additional grounds. App'x Vol. XIII, pp. 3190–92. For example, in addition to the complaint's allegations that he is a noteholder, Bakhmatyuk asserted his status as parties to the trust deeds and notes based on the express language of the trust deeds, which reference Bakhmatyuk as a "Related Party" and "Permitted Holder." App'x Vol. VI, p. 1409; *id.* at p. 1562 (defining related parties as Bakhmatyuk and his spouse or immediate family, or entities owned only by them); *id.* at p. 1406; *id.* at, p. 1558 (defining permitted holders as Bakhmatyuk and related parties). Bakhmatyuk

[6] Appellees characterize Bakhmatyuk as a Ukrainian "oligarch" in the Complaint, and the district court unfortunately adopted this pejorative term in its order. Bakhmatyuk is not an oligarch, and AVG and ULF were not built from Ukrainian state-owned assets, but from the efforts of Bakhmatyuk and his team.

also signed the Directors Certificate to the ULF trust deed. *Id.* at p. 1579. The motion also cited the relationship agreement between Bakhmatyuk and AVG, which has a provision requiring arbitration in London and is incorporated in the prospectuses, as evidence that he is a party to the arbitration agreement across all the documents. App'x Vol. XIII, pp. 3206–07.

E. The District Court's Order on the Bakhmatyuk Motion

In its order denying the Bakhmatyuk Motion (the "Bakhmatyuk Order"), the district court reversed course to find that "Plaintiffs are contract parties" even though not signatories (App'x Vol. XIV, p. 3532), but then erroneously held that Bakhmatyuk was not a party to the arbitration agreement and applied English law, rather than domestic equitable estoppel principles, to determine that Appellants could not enforce the arbitration provisions.

In doing so, the court unquestioningly adopted the opinion of Appellees' English law practitioner over Appellants' contrary view of English law, without a hearing or further submissions on the differing

English legal interpretations.[7] The district court simply concluded English law does not allow "nonsignatories to enforce arbitration clauses when a contract party brings tort claims that do not regard the same subject as the contract." *Id.* at p. 3539. Yet, the district court acknowledged that Appellees' tortious interference claim, for example, "relies on the incorporated Trust Deed provisions that restrict the Company's ability to transfer assets." *Id.* at p. 3538. The district court reasoned that the subject of the tort claim is distinguishable because Appellee must not only show that Appellants breached the trust deeds, but that Appellants also "engaged in tortious conduct." *Id.*

Once again, the district court misinterpreted the standard. Simply put, the subject of Appellees' tortious interference claim cannot be separated from the subject of the contract. The same applies to Appellees' civil conspiracy, aiding and abetting, and RICO claims, all of which inextricably rely upon Appellees' theory that Appellant violated the applicable provisions of the trust deed with respect to the alleged transfers of company assets. Thus, even if the district court were

[7] The court held no hearings on the motions to dismiss or even a status conference in this action.

correct in its holding regarding whether Appellants are parties to the arbitration agreements in the notes and trust deeds (which it is not) the district court erred in applying English equitable estoppel law and in holding Appellees' claims are not inextricably intertwined with the notes.

F. Appellants Appealed Both District Court Decisions.

Appellants filed interlocutory appeals of both the Piazza Order and the Bakhmatyuk Order, as the FAA allows. Appellees moved to dismiss the Piazza Appellants' appeal, arguing a failure by Appellants to sufficiently invoke the FAA, thus depriving this Court of jurisdiction. Doc. No. 010110725549. In the Bakhmatyuk Order, the district court rejected this position by Appellees, noting Appellants' obvious right to interlocutory appeal of the order denying a stay pending arbitration. App'x Vol. XIV, p. 3514 ("Plaintiffs argue the appeal is frivolous . . . because the Piazza Defendants are not parties to the arbitration agreement. Regardless that the Court has found the Piazza Defendants are not parties to that agreement, they have the right to an interlocutory appeal from the Court's denial of the portion of their motion relating to arbitration.") This Court referred Appellees' motion

to dismiss the appeal and associated responses to the circuit panel that will consider the merits. Doc. No. 010110733252. The appeals were later consolidated. Doc. No. 010110755099.

SUMMARY OF THE ARGUMENT

The district court erred in failing to compel arbitration because: (1) Appellees and Appellants are parties to a valid arbitration agreement that delegates the scope of arbitrability to the arbitrator; and (2) equitable estoppel prevents Appellees from avoiding their arbitration agreements because their claims are so intertwined with the underlying contract.

The district court first erroneously held that none of the parties in the case were parties to the trust deeds issuing and governing the notes. In the Piazza Order, it decided that Gramercy was not a party because it did not actually sign the documents, an erroneous conclusion conflicting with the explicit language of the notes and governing law. App'x Vol. XIII, p. 3166. The district court reversed this finding in the Bakhmatyuk Order, but erroneously concluded in both orders that the Appellants are not noteholders (contrary to the allegations in the complaint) and that Bakhmatyuk is not a defined party under the trust

deeds and related documents. App'x Vol. XIV, p. 3532. The first conclusion conflicts directly with the allegations of the complaint that claim Appellant Piazza's purchase of the notes was part of the "scheme." App'x Vol. I, pp. 39, 57, 103–04 ¶¶ 23, 72, 178(1), 178(3). The second conclusion is inconsistent with the contract documents, which define Bakhmatyuk as a "Related Party," and the relationship agreement, which also contains an arbitration clause that investors may invoke against him. App'x Vol. XIII, p. 3239 § 7 ("The parties irrevocably agree that any dispute arising out of or connected with this Agreement . . . shall be resolved by arbitration in London, England."). Bakhmatyuk also signed the Directors Certificate to the ULF trust deed, which demonstrates his closeness to the transaction. App'x Vol. VI, p. 1579. In fact, the prospectuses and subscription agreements, which the district court declined to consider, state that directors are indemnified parties that the companies must defend in litigation. App'x Vol. II, pp. 240–41 § 11.2 ("If any proceeding (including a governmental investigation), claim or demand shall be instituted involving some or all of the Relevant Parties [defining directors as Relevant Parties] . . . it shall promptly notify the relevant party hereto against whom such

recovery is sought . . . in writing and the Indemnifying Party shall have the right to assume the defence thereof[.]"); *see also* App'x Vol. III, p. 580 ("Every director, managing director, agent, auditor, secretary or other person who holds office for the time being in the Issuer shall be indemnified out of the assets of the Issuer against any losses or liabilities which he may sustain or incur in or about the execution of his duties[.]") Further, the arbitration obligation is not limited to explicitly defined parties; it extends to any disputes (tort or contract) related to the notes. App'x Vol. VI, pp. 1544–45 § 19.2.1; *id.* at p. 1397 §§ 20.1, 20.2. This Court should correct this error and hold that all parties in this lawsuit agreed to the mandatory arbitration provision.

After reversing itself and concluding that Appellees are, in fact, parties to the notes and trust deeds (and thus negating the basis for distinguishing Appellants' equitable estoppel case law), the district court erred again in deciding which body of equitable estoppel law to apply: state contract law, federal common law, or English law based on the choice-of-law provision in the contract. The court chose English law—the option least consistent with precedent and least workable practically. The district court ignored Supreme Court precedent and

the growing trend among federal courts of applying federal common law on the issue. App'x Vol XIV, pp. 3543–44. It rejected Wyoming state contract law and federal common law in favor of selectively enforcing the contract's choice-of-law clause (but not the delegation provision or arbitration clause) against Appellants (whom the court erroneously characterized as non-parties). The district court then opined on English equitable estoppel law based solely on affidavits submitted by the parties. The court dismissed case law provided by Appellants' English law expert because he cited cases involving contract claims, ignoring that the arbitration provisions here encompass both tort and contract claims. *Id.* at p. 3538. This Court should find that federal common law applies to the issue of equitable estoppel and hold that Appellees are equitably estopped from avoiding the valid, enforceable arbitration agreements, which encompass all of Appellees' claims.

Nonetheless, if this Court holds that the choice-of-law provision in the contract should apply and English law should govern the question of equitable estoppel, it should also hold that the delegation provision in the contract leaves the question of whether equitable estoppel applies here to the arbitrator.

STANDARD OF REVIEW

The Court reviews *de novo* the district court's decision to deny a stay pending arbitration. *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021). There is a "liberal federal policy favoring arbitration agreements." *Reeves*, 17 F.4th at 1011 (*quoting Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (*quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983)). With respect to the equitable estoppel issue, the standard of review is likewise *de novo*. *Reeves*, 17 F.4th at 1011.

ARGUMENT

I. The District Court Erred Each Time It Held that Parties Here Are Not Parties to an Arbitration Agreement.

A. Appellees Are Bound by the Trust Deeds and Notes, including the Arbitration Clauses.

In the Piazza Order, the district court erred in holding that Appellees were not bound to the arbitration provisions because they did not physically sign the trust deeds. This holding is contrary to the Supreme Court's decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, which held that the New York

Convention does not require that a party actually sign an agreement to arbitrate their disputes in order to compel arbitration. 140 S. Ct. 1637 (2020) ("*GE Energy I*").

> And the trust deeds themselves state that:
>
> The Noteholders (as defined below) ***are entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed*** and the Surety Deed and are deemed to have notice of those provisions of the Agency Agreement applicable to them.

Vol. VI, p. 1512 (emphasis added); *see also* Vol. V, p. 1363. It is also contrary to the complaint allegations, in which Appellees admit they are parties to the trust deeds. App'x Vol. I, p. 124 ¶ 215 (claiming "Gramercy formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed").

In the Bakhmatyuk Order, the district court ultimately acknowledged that Appellees, as noteholders, are bound by the trust deeds. App'x Vol. XIV, p. 3522. The conclusion is therefore inescapable—Appellees are parties to, and bound by, the trust deeds and notes, including their arbitration clauses.

B. Piazza Appellants Are Parties to the Trust Deeds.

The district court also erred in finding that the Piazza Appellants are not noteholders and thus parties to the arbitration agreements in

the notes and trust deeds. App'x Vol. XIII, p. 3161. This holding is inconsistent with the plain language of the complaint and must be corrected on appeal.

The complaint is replete with allegations that the Piazza Appellants also purchased notes. App'x Vol. I, pp. 32–33 ¶ 10(b) (alleging the scheme "involved straw purchasers like Piazza, who posed as an independent third party but actually held the debt on behalf of Bakhmatyuk"); *id.* at pp. 65, 72 ¶¶ 93, 112 (alleging Piazza and SP Advisors, which Appellees describe as the registered trade name of SP Capital, purchased AVG and ULF debt); *id.* at pp. 68, 118–21¶¶ 102, 208(3), 208(5), 209 (alleging Appellants SP Advisors and Piazza purchased Ashmore's ULF notes); *id.* at p. 71 ¶ 109; (alleging Appellant Piazza purchased Ukrsibank's AVG/ULF debt).[8] Based on Appellees' pleading alone, the very same provisions discussed above that bind Appellees as noteholders must equally apply to the Piazza Appellants as noteholders. In purchasing notes, the Piazza Appellants agreed to

[8] The complaint also alleges that Appellant Piazza purchased senior, secured debt for which the allegedly transferred assets are security. App'x Vol. I, pp. 66, 87–88 ¶¶ 96, 150 (alleging that PS Capital and Appellant Piazza purchased Sberbank's debt).

and intended to be bound by the notes and trust deeds. They are thus parties to the agreement to arbitrate and can assert their arbitration rights against Appellees.

The district court dodged this conclusion by reading the complaint through an overly technical, tortured lens. It focused on a single sentence of a single paragraph stating that an entity that is "part of SP Advisors, [Appellant] Piazza's network of related companies under the umbrella of [Appellant] SP Capital" bought AVG and ULF notes from another investor (*id.* at p. 68 ¶ 102), and concluding based on that single sentence, that "the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders." App'x Vol. XIII, p. 3169 n.11. The district court ignored the ***next*** sentence, which alleges that "[Appellant] Piazza, through [Appellant] SP Capital, holds roughly $200 million in the Company's secured and unsecured debt, which is consistent with Piazza . . . being the ultimate owner of the debt." App'x Vol. I, p. 67 ¶ 102. It also ignores the multiple complaint paragraphs cited above that unequivocally allege that Piazza and SP Capital purchased and own AVG and ULF notes. Indeed, Appellees claim the so-called "straw purchases" are one of "three phases of the

scheme" to try to make out a key element of continuity for Appellee's RICO claim. *Id.* at pp. 32 ¶ 10, 100 ¶ 172. In sum, Appellees themselves allege and do not dispute that Appellants are noteholders.

C. Bakhmatyuk Is Also a Party to the Trust Deeds.

The district court also erred in finding Bakhmatyuk is not a party to the trust deeds. This Court should follow the approach taken by the Eleventh Circuit on remand from the Supreme Court and find that Bakhmatyuk, who is referenced throughout the documents, is a party to the trust deeds. *Outokumpu Stainless USA, LLC v. Coverteam SAS*, 2022 WL 2643936, at *2–3 (11th Cir. July 8, 2022) ("*GE Energy II*"). In *GE Energy II*, the court held that a defendant was a party to an arbitration agreement it did not sign because the definition of Seller included subcontractors like the defendant. *Id.* at *3. Thus, to the extent that the district court's holding that Bakhmatyuk is not a party to the trust deeds relies on the fact that he did not physically sign them, the district court's ruling is flatly inconsistent with the Supreme Court's holding in *GE Energy I*. *Compare* App'x Vol. XIII, p. 3166, *with GE Energy I*, 140 S. Ct. at 1647–48, and *GE Energy II*, 2022 WL 2643936, at *1–2.

Like in *GE Energy II,* Bakhmatyuk is "a defined party covered by the arbitration clause" with the right to assert the arbitration clause therein, as demonstrated by the repeated references to him and his role in the trust deeds and other documents. *GE Energy II*, 2022 WL 2643936, at *3. Bakhmatyuk is *not* merely an unrelated third party, but instead CEO, Chairman of the Board, and controlling shareholder of ULF and AVG, as is stated plainly in the controlling documents governing the investment. He is referenced throughout the trust deeds setting forth his obligations and duties, and signed the applicable Directors' Certificate to the trust deed made part of the trust deed issuing documents. More specifically, the trust deeds, prospectuses, and relationship agreement require Bakhmatyuk to fulfill certain actions and refrain from making certain transfers of assets – the issues that Appellees cite that are accepted as true for purposes of a motion to dismiss but will be proven false in any arbitration. App'x Vol. V, p. 1372–73 § 5.6; App'x Vol. VI, pp. 1525–26 § 5.6; App'x Vol. IV, p. 896; App'x Vol. III, p. 582–85.

These governing agreements clearly bind Bakhmatyuk, including to their arbitration provisions. The district court attempted to

distinguish Bakhmatyuk's relationship to the trust deeds by virtue of his capacity as a director or officer, rather than an individual. This is a distinction without consequence because the trust deeds do not distinguish between Bakhmatyuk's individual versus official capacity in imposing the rights and restrictions discussed above.

Further, Appellees specifically allege that Bakhmatyuk purchased AVG and ULF debt through others, including Piazza, who "held the debt on behalf of Bakhmatyuk." App'x Vol. I, pp. 32–33 ¶ 19(b); *see also id.* at pp. 65, 72, 87–88, 113–14, 118–19 ¶¶ 93, 112, 150, 200, 208(3). Thus, in alleging that "straw purchasers, including Piazza himself, gave Bakhmatyuk the option to eventually acquire the debt himself, or . . . held the debt on Bakhmatyuk's behalf," Appellees plead that Bakhmatyuk is also a noteholder, and thus a party to the relevant arbitration provisions, just like the other Appellants.

* * *

Given that Appellees and Appellants are parties to the trust deeds and the arbitration clauses, the district court erred in refusing to compel arbitration. Federal law "strongly favors enforcement of agreements to arbitrate," *Hill v. Ricoh Ams. Corp.*, 603 F.3d 76, 777

(10th Cir. 2010), and if a court has any "doubts concerning the scope of arbitrable issues," it must resolve them "in favor of arbitration." *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). In this case, Appellees never even bothered to challenge the Appellants' argument that "[t]he arbitration agreements in the Trust Deeds are broad and encompass all of [Appellees'] claims." App'x Vol. I, p. 162. Rather, Appellees conceded that "whether [their] claims fall within the scope of the arbitration agreements would be a question for the arbitrator—not th[e] [c]ourt" because, as described further below, the arbitration agreements adopt the delegation provision in LCIA rules. App'x Vol. XI, p. 2688 n.5.

If this Court concluded that the arbitration clauses apply only to certain claims or fewer than all Appellees, the Court must stay the remaining claims pending the arbitration because the arbitrable claims in this matter predominate. *Riley Mfg. Co. Inc. v. Anchor Glass Co. Corp.*, 157 F.3d 775, 785 (10th Cir. 1998). Moreover, permitting any non-arbitrable claims to proceed before the district court would have a preclusive effect over the arbitrable claims. *Id.*

II. The District Court Erred in Failing to Order Arbitration Under Principles of Equitable Estoppel.

Even if this Court determines that Appellees are not parties to the trust deeds, it should still reverse the decision below. As this Court has repeatedly recognized, the doctrine of equitable estoppel allows a nonsignatory to enforce an arbitration agreement against a signatory in certain circumstances. *E.g.*, *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1012 (10th Cir. 2021). The district court's refusal to apply equitable estoppel in this case constitutes reversible error for two independent reasons. *First*, the district court incorrectly applied English law, rather than federal common law or Wyoming state law, under both of which Appellees are equitably estopped from disclaiming the arbitration agreements. *Second*, even if English law applied to this issue, Appellees would still be required to arbitrate their claims.

A. The District Court Erred in Refusing to Apply Federal Common Law or Wyoming Law.

i. Either Federal Common Law or Wyoming Law Applies to the Equitable Estoppel Issue.

In *GE Energy I*, the Supreme Court acknowledged that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") does not conflict "with domestic equitable

estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories." 140 S. Ct. 1637, 1642 (2020). At the same time, the Court left open the choice-of-law question. That is, it noted that "[b]ecause the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel *or which body of law governs that determination*. Those questions can be addressed on remand." *Id.* at 1648 (emphasis added).

While neither the Supreme Court nor this Court has ever directly addressed the choice-of-law issue, a number of other circuits—including the First, Second, Ninth, and Eleventh—have concluded that they must apply federal common law when adjudicating an equitable estoppel claim under the Convention. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1168 (9th Cir. 2021) ("In cases involving the New York Convention, in determining the arbitrability of federal claims by or against non-signatories to an arbitration agreement, we apply 'federal substantive law,' for which we look to 'ordinary contract and agency principles.'") (quotation omitted); *Northrop & Johnson Yachts-Ships,*

Inc. v. Royal Van Lent Shipyard, B.V., 855 F. App'x. 468 n.4 (11th Cir. 2021) (applying federal common law version of equitable estoppel to a nonsignatory in a Convention case) (unpublished); *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) ("As between state law and federal common law, we conclude that uniform federal standards are appropriate."); *Smith/Enron Cogeneration Ltd. P'shipv. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

Below, the district court declined to apply federal common law. Instead, it held that the Supreme Court's decision in *Arthur Andersen L.L.P. v. Carlisle* "made plain that federal courts should not apply federal common law to this issue." App'x Vol. XIV, p. 2540 (quoting *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 630–31 (2009)). Certainly, if this case was governed by the domestic FAA, rather than the Convention, *Arthur Andersen* might require application of state law to the equitable estoppel issue. *Arthur Andersen*, 556 U.S. at 630–31

(state law applies to "determine which contracts are binding under § 2 and enforceable under § 3 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'"); *Reeves, LP*, 17 F.4th at 1011 (applying the *Arthur Anderson* choice-of-law rule to "[t]he scope of the arbitration agreement, including the question of who it binds"). And in fact, a number of circuit and district courts across the country have continued to apply federal common law to Convention cases *even after* the Supreme Court handed down its *Arthur Andersen* decision in 2009. *See*, *e.g.*, *Setty*, 3 F.4th 1166 at 1169; *Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B.V.*, 855 F. App'x. 468, at n.4 (11th Cir. 2021); *Cases Del Caffe Vergnano S.P.A. v. Italfavlros San Diego, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371–72 (4th Cir. 2012); *Bhandara Fam. Living Tr. v. Underwriters at Lloyd's, London, No. CV H-19-968, 2020 WL 1482559*, at *6 (S.D. Tex. Feb. 20, 2020); *Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, No. CV 18-6192, 2018 WL 4042874, at *6–8 (E.D. La. Aug. 24, 2018).

More importantly, if the district court had applied state law as *Arthur Andersen* suggests, it would not have committed reversible error. As explained below, under *either* federal common law or Wyoming law, Gramercy is equitably estopped from disclaiming the arbitration agreements in this case. *See infra* Section II.iii. Rather than following *Arthur Andersen*'s holding that "state law" applies, 556 U.S. at 631, the district court instead erroneously applied English law.

ii. The Choice-of-Law Provision Does Not Justify Application of English Law.

In the Bakhmatyuk Order, the district court justified its application of English law by relying on a choice-of-law provision in the trust deeds' arbitration agreements. App'x Vol. XIV, p. 2541 ("[T]he parties' choice of law governs equitable estoppel."). That decision was error. It is true that the trust deeds provide that disputes "arising out of or in connection with [the Notes, Trust Deeds, or Surety Agreement] are governed by and, and will be construed in accordance with, English law." App'x Vol. V, § 20.1 p. 1116; App'x Vol. VI, § 23.1 p. 1445. But for four distinct reasons, that choice-of-law provision doesn't apply to the equitable estoppel issue.

First, a number of federal courts have acknowledged the existence of a choice-of-law provision but nevertheless applied federal common law to the equitable estoppel question. For example, in *Aggarao v. MOL Ship Management Co.*, the Fourth Circuit noted that the operative agreement selected Philippian law, but it nevertheless applied federal common law to hold "that the doctrine of equitable estoppel applies, and that [one party] must arbitrate his claims against" signatories and nonsignatories alike. 675 F.3d 355, 371–72, 374–75 (4th Cir. 2012). Other courts have followed a similar path. *E.g.*, *Campaniello Imps., Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 659 (2d Cir. 1997) (applying federal common law despite an Italian choice-of-law clause); *Bhandara Fam. Living Tr. v. Underwriters at Lloyd's, London*, No. CV H-19-968, 2020 WL 1482559, at *5–6 (S.D. Tex. Feb. 20, 2020) (applying federal common law to an equitable estoppel claim under the Convention. even with a choice-of-law provision in the contract); *Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, No. CV 18-6192, 2018 WL 4042874, at *6–8. (E.D. La. Aug. 24, 2018) (same).

Second, as a doctrinal matter, these decisions make sense. The equitable estoppel question is a "threshold" issue, and one that doesn't

depend on the terms of the agreement. As a result, the court must decide the issue *without* looking to the agreement itself. After all, the question is whether the arbitration agreement applies to the parties based on a legal principle that *isn't* grounded in the text of the agreement; holding litigants to the terms of the agreement to decide that issue puts the cart before the horse. The Ninth Circuit acknowledged as much in *Setty* when it held: "To argue that Indian law applies, SS Mumbai points to the Partnership Deed's arbitration provision [which contained an Indian choice-of-law provision]. But whether SS Mumbai may enforce the Partnership Deed as a non-signatory is a 'threshold issue' for which we do not look to the agreement itself." *Setty*, 3 F.4th at 1168 (citing *Casa Del Caffe*, 816 F.3d at 1211). Other circuit courts have likewise acknowledged this critical distinction between "threshold" and "merits" issues. *E.g.*, *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014) ("Cargotec relies on the disputed arbitration agreement itself in arguing that the parties intended to submit the present case to an arbitrator. . . . However, *Fallo* did not address the threshold question we now confront: whether the arbitration agreement itself is valid. Thus,

Cargotec's argument puts the cart before the horse, as it presumes the arbitration provision formed part of the contract at issue."); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (acknowledging that courts must enforce arbitration agreements as written unless the issue involves "a threshold question regarding the validity of the arbitration agreement itself or the applicability of an arbitration agreement to a given dispute").[9]

Third, applying federal common law is consistent with the need for uniformity in international agreements. The Supreme Court has long recognized that the very purpose of the Convention is "to unify the standard by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-*

[9] For this same reason, the court's decision in *Yavuz v. 61MM Ltd.*, 465 F.3d 418 (10th Cir. 2006), is inapposite. In that case, the court held that a forum-selection clause in an arbitration agreement was subject to that agreement's choice-of-law provision. *Id.* at 428. But as the court acknowledged, its holding was predicated on an actual agreement the parties had signed about which law governs. *Id.* at 430. Here, in contrast, the "threshold" question of arbitrability doesn't depend on anything that the parties did or did not agree to, but instead on whether equitable principles prevent Gramercy from avoiding arbitration. Moreover, the *Yavuz* court took pains to acknowledge that even in the context of forum-selection clauses, "special circumstances" can defeat a choice-of-law provision. *Id.*

Culver Co., 417 U.S. 506, 520 n.15 (1974); *see also Setty*, 3 F.4th at 1169 ("The New York Convention and its implementing legislation emphasize the need for uniformity in the application of international arbitration agreements."). Thus, where "the federal statute in question demands national uniformity, federal common law provides the determinative rules of decision." *InterGen*, 344 F.3d at 143 (quoting *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (2000)); *see also Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable. . . . [P]roceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law.").

Notably, this is precisely the tack that Judge Tjoflat took in his concurrence in *GE Energy II*, the appellate decision that issued after the Supreme Court remanded *GE Energy I* back to the Eleventh Circuit.

There, Judge Tjoflat began by noting "that German law will govern the substantive issues in the case, as the choice of law provision in the contract . . . dictates." *Outokumpu Stainless USA, LLC v. CoverteamSAS*, 2022 WL 2643936 at *5 (11th Cir. July 8, 2022). "But we aren't dealing with the substantive issues in the appeal right now. We are dealing with the threshold inquiry of arbitrability[.]" *Id.* Judge Tjoflat went on to argue that, although the question was one "of first impression in our Circuit," the court should hold that "federal common law [governs] in determining whether equitable estoppel applies in New York Convention cases." *Id.* That conclusion was based on two factors. One, "we have a quintessential 'uniquely federal interest.'" *Id.* at *6 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988)). "The whole goal of the New York Convention is to standardize the enforcement of international arbitration agreements, and there is a strong federal interest in making sure that the United States lives up to its treaty obligations." *Id.* And two, "allowing each state or international law to impose its own test for threshold questions of arbitrability would create an unmanageable tangle of arbitration law in the United States, lead to forum shopping, and frustrate the uniform

standards the New York Convention and Chapter 2 of the FAA were enacted to create." *Id.*

Fourth and finally, in seeking to enforce the choice-of-law provision against Appellants, Gramercy is trying to have its cake and eat it too. In the district court below, Appellants argued that this lawsuit should be sent to arbitration for another, independent reason: the parties clearly and unmistakably expressed their intent to have the *arbitrator* decide any questions of arbitrability. Under long-established precedent, to delegate the question of arbitrability to an arbitrator, the parties must express their "clear and unmistakable" intent to do so. *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1243–44 (10th Cir. 2018). Here, the arbitration agreement plainly evinces just such an intent. The trust deeds expressly incorporate the LCIA arbitration rules, and those rules provide that "[t]he Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objections to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement." App'x Vol I, p. 163. This Court has repeatedly held that when parties incorporate arbitration rules that delegate arbitrability questions to the arbitrator, they have satisfied the "clear

and unmistakable intent" requirement. *Goldgroup Res., Inc. v. DyanResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1191 (10th Cir. 2021) (intent expressed via adoption of AAA Rules); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281 (10th Cir. 2017) (intent expressed via adoption of JAMS Rules).

The district court, however, rejected the argument that the arbitrator should determine arbitrability. It held that "[w]hen there is a nonsignatory involved, the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability." App'x Vol. XIII, p. 3160. The lower court's order improperly uses Appellants' status as a nonsignatory as both a sword and shield: On the one hand, the trust deeds' choice-of-law provision *does* apply to the threshold question about whether this dispute is arbitrable. On the other hand, the trust deeds' choice-of-arbitration-rules provision *doesn't* apply to the threshold question about whether this dispute is arbitrable. Those two statements are mutually exclusive. Either the provisions in the trust deed apply to this dispute over arbitrability or they do not. The district court erred in selectively picking and choosing which contractual provisions it would enforce. Put

another way, there is no principled basis to say that the choice-of-law provision governs this dispute, but that the choice-of-arbitration rules do not.

iii. Under Either Federal or Wyoming Law, Appellees Are Equitably Estopped From Disclaiming the Arbitration Agreements.

If the district court had correctly applied *either* federal common law or Wyoming law, it would have ordered the parties to arbitrate. In *Reeves v. Enterprise Products Partners, LP*, this Court held that equitable estoppel permits a nonsignatory to compel arbitration in two independent circumstances: (1) where the signatory must "rely on the terms of the written agreement containing the arbitration clause" and (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." 17 F.4th 1008, 1010 (10th Cir. 2021); *see also id.* at 12 ("Many other states and circuits have adopted th[is] . . . understanding of equitable estoppel").

As to the first prong, there is no question that Gramercy relied on the trust deeds' terms in asserting its claims. Indeed, the entire crux of Gramercy's allegations is that Appellants carried out a scheme to

prevent Gramercy from exercising its rights under the trust deeds that contain the arbitration agreements. *See, e.g.*, App'x Vol. I, p. 94 ¶ 168 (alleging that aim of RICO enterprise was to prevent Gramercy "[f]rom exercising its contractual rights under the Notes"); *id.* at p. 123 ¶ 212 (alleging that Appellants "fraudulently induced Gramercy to forego enforcement of its contractual rights"); *id.* at pp. 123– 125 ¶¶ 214–18 (alleging "Gramercy formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed"); *id.* at p. 125 ¶ 220 (alleging Appellants "combined and agreed to participate in a scheme designed to defraud Gramercy and deprive it of its contractual rights").

As to the second prong, Gramercy's complaint alleges concerted misconduct by both signatories (Appellants) and nonsignatories (AVG and ULF). As noted above, Gramercy's claims are entirely dependent on AVG's and ULF's obligations to Gramercy under the trust deeds—so much so that Gramercy devotes an entire section of the complaint to listing those obligations so it can allege how Appellants allegedly interfered with the ability to enforce them. *Id.* at pp. 44–49 ¶¶ 45–50. "The purpose of the doctrine of equitable estoppel is to prevent parties

playing fast and loose with the courts and also to protect[] the judicial system." *Reeves*, 17 F.4th at 1014. Gramercy cannot avoid enforcement of an arbitration agreement by "simply plead[ing] around" signatories "who would have to become crucial parties to the litigation." *Id.*

B. The Court Erred in Holding that English Law Would Not Permit Appellants to Enforce the Arbitration Clause.

Even if this Court determines that English law applies, reversal is still compelled. English law, like federal common law and Wyoming law, equitably estops Gramercy from disclaiming the arbitration agreements.

The district court wholly adopted the opinion of Appellees' expert on English equitable estoppel law, without a hearing or consideration of Appellants' criticism of the interpretation of English law. In fact, both Appellants' English law expert, Dr. Dracos, and Appellees' English law expert, Mr. Valentin, agree that it would be inequitable to permit a party who seeks to enforce a contract to disregard the arbitration provision contained within the same agreement. App'x Vol. XIV, p. 3492 ¶ 5; *see also id.* at p. 3441 ¶ 32 ("[W]here a party to a contract seeks to enforce the terms of that contract against a non-party, it would be inequitable for the enforcing party to be allowed to disregard the

jurisdiction or arbitration clause also contained within that same contract.").

As Dr. Dracos explained, English law recognizes equitable estoppel. *Id.* at p. 3492 ("[I]t may be inequitable for a party to an arbitration clause to act contrary to it, and the court can provide redress for that inequitable conduct not only at the request of a party to the agreement (which will be enforcing a contractual right) but also of a non-party."). English courts, like their American counterparts, retain "the general power … to prevent inequitable conduct" that underlies the equitable estoppel doctrine. App'x Vol. XIII, p. 3378. Pursuant to that authority, they have allowed nonsignatories to invoke arbitration and jurisdiction agreements when those agreements "covered claims asserted by the claimant, which was a party to those agreements" to prevent "inequitable, unconscionable, vexatious and or/oppressive" results. *Id.* at pp. 3370–71. The district court dismissed this case law off-hand because the parties in the cited cases were litigating contract claims, disregarding the general principles for which the cases stand (App'x Vol. XIV, p. 3538) and, again, ignoring that the arbitration clause in this case expressly covers tort claims, as well as contract

claims (App'x Vol. XIII, p. 3158–3160) ("The definition of 'dispute' in the Trust Deeds is quite broad, particularly as to any dispute connected with 'these presents' or in connection with the Trust Deed."). This fact undermines fatally the district court's effort to distinguish them and showing there was no proper basis to credit Appellees' expert and discredit Appellants' expert.

Finally, even if this Court decides the district court was correct to hold a nonparty to the choice-of-law clause in a contract on the question of equitable estoppel, this Court should then enforce the contract's delegation of the question of arbitrability to the arbitrator.[10] Further, the district court acknowledged that the incorporation of the LCIA Rules in the trust deeds included "vest[ing] the authority to determine arbitrability in the arbitrator." *Id.* at p. 3160. However, the district court declined to apply the provision because the case involved a nonsignatory. *See id.* (citing *Belnap v. Iasis Healthcare*, 844 F.3d 1272,

[10] If foreign law applies to the equitable estoppel question based on the contract's choice-of-law clause, presumably, the court would have to also apply the foreign body of law to the question of who is a party (which the district court here did not). This would leave courts in an unenviable position of independently determining how foreign law applies or choosing between competing party submissions offering "expert" interpretations.

1284 (10th Cir. 2017)). But, if the choice-of-law provision is to be applied against a nonsignatory to govern the equitable doctrine of estoppel, there is no reasoned distinction between enforcing that clause and enforcing the delegation provision. And honoring the delegation provision would eliminate the practical difficulties placed upon the courts here of determining the appropriate application of foreign law.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders declining to stay the action and refusing to compel arbitration.

ORAL ARGUMENT STATEMENT

Pursuant to Fed. R. App. P. 34(a)(1) and 10th Cir. R. 28.2(C)(2), Appellants state that oral argument would assist the Court in adjudicating this case, which presents several unresolved legal questions.

DATE: December 12, 2022

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on December 12, 2022, I electronically transmitted the foregoing Principal Brief to the clerk of the Court using the ECF system. The clerk will transmit a notice of electronic filing to the following attorneys:

/s/ Kathleen O'Riley
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ATTACHMENT 1