Filed 5/3/17 TIBCO Software v. RapidMiner CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TIBCO SOFTWARE, INC., Plaintiff and Respondent, v. RAPIDMINER, INC., ET AL., Defendants and Appellants.	A147556 (San Mateo County Super. Ct. No. CIV534404)

RapidMiner, Inc., Peter Lee, and Steven Ruggieri appeal from an order denying their petition to compel arbitration. They contend that (1) RapidMiner and Lee are entitled to arbitrate respondent's claims against them, because the claims rely on other defendants' contracts that contain arbitration provisions; (2) the court erred by declining to compel arbitration of the arbitrable claims against Ruggieri (Code Civ. Proc., § 1281.2, subd. (c)); (3) the court did not have jurisdiction to determine the arbitrability issues; (4) respondent must pay the arbitrator's fees and related costs and expenses; and (5) the action should be stayed pending completion of arbitration.

We agree that RapidMiner and Lee are entitled to arbitrate the claims asserted against them by respondent. Accordingly, we will reverse the trial court's order denying the petition to compel arbitration and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Appellants Lee and Ruggieri were employees of respondent TIBCO Software, Inc. (TIBCO) until 2015, when they left to join appellant RapidMiner, Inc. (RapidMiner), a

software company. This litigation arose when TIBCO believed that RapidMiner, Lee, Ruggieri, and others were liable for the misappropriation of TIBCO trade secrets and the defection of TIBCO employees to RapidMiner.

A. TIBCO's Employee Agreements

TIBCO creates analytics software, which helps professionals organize and utilize data about their business. According to TIBCO's allegations, the analytics market is highly competitive, and TIBCO's success in the market depends on, among other things, hiring and retaining skilled employees capable of maintaining strong relationships with customers and partners. TIBCO's confidential information about its employees (including skillsets, sales performance, compensation, and client relationships) assists the company in developing a competitive workforce. To remain competitive, TIBCO also gathers and maintains confidential information concerning its product strategies, plans, market intelligence, and customer-related information.

TIBCO's relevant employment agreements include a non-solicitation provision. Under this provision, employees are prohibited, during employment with TIBCO and for one year thereafter, from soliciting any TIBCO employee to leave TIBCO's employ, or to use its proprietary information to "divert or solicit" TIBCO's customers.

The employment agreements also contain a non-disclosure provision, which prohibits employees from disclosing any of TIBCO's trade secrets or confidential information.

And the employment agreements contain an arbitration clause. For appellants Lee and Ruggieri, the arbitration clause excepted disputes related to trade secret misappropriation claims: "Any dispute or claim, including all contract, tort, discrimination or other statutory claims, arising under or relating to this Agreement, or regarding termination of my employment with TIBCO, but excepting claims under applicable workers' compensation law and unemployment insurance claims ('arbitrable claims') shall be resolved by arbitration. . . . HOWEVER, the parties agree that *this arbitration provision shall not apply to any disputes or claims relating to or arising out*

of the misuse or misappropriation of TIBCO's trade secrets or proprietary information." (Italics added.) These agreements provided that California law applied.

TIBCO's employment agreement with another employee—Monica Hart—contained an arbitration provision that was different in that it (1) did not contain the language italicized above excepting misappropriation-related claims from arbitration and (2) provided that the arbitration clause was an "agreement to arbitrate under the Federal Arbitration Act [(FAA; see 9 U.S.C. §1 et seq.)]."

B. TIBCO's Complaint

In January 2014, Lee left TIBCO and became the Chief Executive Officer of RapidMiner. About a year later, a number of TIBCO employees left TIBCO to join RapidMiner, arousing TIBCO's suspicions that RapidMiner was poaching TIBCO's employees. TIBCO conducted an internal investigation, which led it to conclude that Lee had raided TIBCO's employees on behalf of RapidMiner, and that employees solicited by RapidMiner had taken TIBCO's trade secrets and confidential information.

TIBCO filed a lawsuit in superior court against RapidMiner, Lee, and one of the defecting employees, Tarlock Sagoo (Sagoo), seeking an injunction preventing them from using TIBCO's trade secrets and confidential information and from interfering with TIBCO's contracts, as well as damages, restitution, and other relief.

In essence, TIBCO's complaint alleged that Lee persuaded TIBCO's employees to steal TIBCO's confidential information for RapidMiner, encouraged former TIBCO employees to recruit other TIBCO employees despite knowing that their contracts with TIBCO forbade it, and directed the departing TIBCO employees to conceal their intention to join RapidMiner so they could continue to access TIBCO's systems and data.[1]

[1] For example, Sagoo allegedly gave TIBCO two weeks' notice of his resignation; falsely represented that he would not be joining a competitor; and in his remaining time at TIBCO took confidential and trade secret information and "wiped" the hard drive of his company laptop to conceal his activity.

C. TIBCO's First Amended Complaint

In its first amended complaint filed in July 2015, TIBCO added three defendants: Ruggieri, Lars Bauerle (Bauerle), and Hart. The amended complaint alleges that Ruggieri had been recruiting TIBCO employee Nathaniel Masih on behalf of RapidMiner, in violation of the non-solicitation clause in his employment agreement. It alleges that Bauerle had attached mass-storage devices to his TIBCO-issued laptop before he left TIBCO's employ and, like Sagoo, covered his tracks by wiping the hard drive on his laptop. And it alleges that Hart deceived TIBCO about her intentions to join RapidMiner, enabling her to send to Sagoo materials that Sagoo took with him to RapidMiner.

In total, the first amended complaint asserts nine counts. Count one, against RapidMiner, Hart, and other former employees, alleges misappropriation of TIBCO's trade secrets based in part on Hart's violation of the terms of her employment agreement. Specifically, it alleges that "RapidMiner knowingly induced and solicited TIBCO employees, including . . . Hart . . . to leave TIBCO and to join RapidMiner with full access and knowledge to TIBCO's trades secrets . . . with the intent to use and exploit TIBCO's trade secrets for RapidMiner's benefit."

Counts two, three and five allege that Lee and Ruggieri breached their *own* employment agreements: respectively, Lee and Ruggieri (and others) breached the non-disclosure provision; Ruggieri breached his non-solicitation provision; and Ruggieri breached his implied covenant of good faith and fair dealing. (Count four, not directly at issue in this appeal, alleged that Sagoo and Bauerle breached their fiduciary duties.)

Count six, asserted against RapidMiner, Lee, Ruggieri, and others, alleges unfair competition based on activities that included, among other things, encouraging the violation of non-disclosure and non-solicitation obligations that they knew *other* employees owed to TIBCO under their employment agreements.

Counts seven and eight similarly allege that RapidMiner and Lee intentionally interfered with the non-disclosure and non-solicitation provisions that were contained

in TIBCO's employment agreements with *other* TIBCO employees. Specifically, count seven contends that RapidMiner interfered with Lee's obligation not to disclose confidential information, and RapidMiner and Lee interfered with Sagoo's obligation not to disclose such information. And count eight asserts that RapidMiner and Lee induced Ruggieri to solicit Masih.

In the same vein, count nine alleges that RapidMiner, Lee, and Ruggieri interfered with TIBCO's prospective economic advantage by inducing employees to breach their TIBCO employment relationships and leave TIBCO with TIBCO's trade secrets.

D. Petition to Compel Arbitration

In September 2015, RapidMiner, Lee, Ruggieri, and Hart (but not Bauerle or Sagoo) filed a joint petition requesting the trial court to compel arbitration. They asserted that TIBCO had entered into enforceable arbitration agreements with Ruggieri and Hart, and the claims asserted against Ruggieri and Hart were therefore arbitrable. They did not contend that TIBCO had entered into an applicable agreement with RapidMiner and Lee, but that "the doctrine of equitable estoppel applies to require TIBCO to also arbitrate" its claims against RapidMiner and Lee "because many of TIBCO's claims in the [complaint] against Lee and RapidMiner are intimately founded in and intertwined with arbitrable claims against Hart and Ruggieri."

In particular, appellants argued, TIBCO's claims against RapidMiner and Lee for unfair competition, interference with the non-solicitation provision of the employment agreement, and interference with prospective economic advantage were arbitrable because those claims were based on a breach of *Ruggieri's* employment agreement, which contained an applicable arbitration provision. And TIBCO's claims against RapidMiner and Lee for misappropriation of trade secrets and interference with the employment agreement's non-disclosure provision were arbitrable because those claims were based on a breach of *Hart's* arbitration agreement, which contained an applicable arbitration provision.

RapidMiner, Lee, Ruggieri and Hart also asked the trial court to stay the entire action against all defendants "until the arbitration is completed."

TIBCO opposed the petition to compel arbitration. It acknowledged that its claims against Hart and Ruggieri were arbitrable, but asserted it had not agreed to arbitrate any disputes with RapidMiner or Lee, and equitable estoppel did not require arbitration. TIBCO also noted that the petition did not seek arbitration as to many of TIBCO's claims, including all of TIBCO's claims against Sagoo and Bauerle and all of the Sagoo- and-Bauerle-related claims against RapidMiner and Lee. And RapidMiner sought arbitration of the trade-secret claim only to the extent it was based on Hart's misconduct and her arbitration clause.

Finally, TIBCO argued that, if the court determined the arbitrable and non-arbitrable issues were severable, the court should sever the claims and allow all claims to proceed on parallel tracks in their respective forums. But if the court concluded that the arbitrable and non-arbitrable claims were not severable, TIBCO urged the court to deny the arbitration petition as to all claims under Code of Civil Procedure section 1281.2, subdivision (c), which allows the court to refuse to enforce an arbitration agreement if a party to the arbitration is also a party to litigation in a pending court action and there is a risk of conflicting rulings if both the arbitration and court action proceed.

E. Trial Court's Order

The trial court issued a tentative ruling indicating it would deny the petition to compel arbitration as to RapidMiner, Lee, and Ruggieri, but grant the petition as to Hart.

At the ensuing hearing on September 22, 2015, TIBCO stated it would dismiss its claims against Hart to avoid a stay of its litigation against the other defendants. The court indicated it could issue a "ruling taking into account the Plaintiff's suggestion that they will dismiss their lawsuit as to Hart . . . [and] deny entirely the request for arbitration. . . . " The matter was taken under submission.

The next day (September 23), TIBCO voluntarily dismissed, without prejudice, its claims against Hart.

The court issued its statement of decision in December 2015. It denied the petition as to RapidMiner and Lee, finding that equitable estoppel did not apply to TIBCO's claims that were based on Hart's and Ruggieri's alleged conduct, because the claims did not rely on the terms of those employment agreements, but only used the existence of the agreements as a "foundation" for the claims.

The court also denied the petition as to Ruggieri. The court found that three claims against him (counts two, six and nine) were not arbitrable because, as pled, they appear to relate to and arise out of misuse or misappropriation of TIBCO's trade secrets or proprietary information, and Ruggieri's employment agreement excepted such claims from its arbitration provision. The court found that other claims against Ruggieri, dealing with his solicitation of Masih (counts three and five), did not appear to relate to or arise out of alleged misuse or misappropriation of TIBCO's trade secrets and *were* arbitrable pursuant to the arbitration provision. The court also noted that TIBCO previously agreed to arbitrate some but not all of the counts against Ruggieri (counts two, five, six and nine). However, the court found that both the arbitrable claims and the non-arbitrable claims were related to the underlying allegation that Ruggieri colluded to steal TIBCO employees and trade secrets. Because the claims were closely related and there was an overlap of facts, the court found it more appropriate to handle all claims against Ruggieri in one forum rather than two. Pursuant to Code of Civil Procedure section 1281.2, subdivision (c), the court therefore refused arbitration of the arbitrable claims due to the possibility of conflicting rulings in arbitration and the court action.

As to Hart, apparently uninformed that TIBCO had dismissed its claims against her, the court granted the petition for arbitration and stayed the entire litigation pending the arbitration's outcome pursuant to the FAA and Code of Civil Procedure section 1281.2, subdivision (c). However, the court stated, "if [TIBCO] dismisses its claims without prejudice against Hart, the Court will DENY Petitioners'

request to stay litigation against defendants Sagoo, RapidMiner, Lee, Bauerle, and Ruggieri …." In effect, since the litigation was dismissed as to Hart (and the court denied arbitration as to RapidMiner, Ruggieri and Lee), the trial court's decision indicates that no claim will be arbitrated and the litigation shall proceed.

RapidMiner, Lee, and Ruggieri appealed from the denial of their petition. Because no formal order or judgment followed the statement of decision, we exercise our discretion to treat the statement of decision as appealable. (*Alan v. American Honda Motor Co. Inc.* (2007) 40 Cal.4th 894, 901.)

II. DISCUSSION

A. Arbitration of Claims Against RapidMiner and Lee

A strong public policy favors the arbitration of disputes, and doubts should be resolved in favor of arbitration. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 97; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) At the same time, arbitration is a matter of contract, and there is no public policy requiring persons to arbitrate controversies they did not agree to arbitrate. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59.) As a result, generally only signatories to a contract may enforce its arbitration provisions; the limited exceptions to this rule include the concept, at issue here, that a plaintiff signatory who chooses to sue a nonsignatory based on a breach of a contract that contains an arbitration clause is equitably estopped from refusing to arbitrate the claim. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1286–1287 (*Rowe*).)

Here, RapidMiner and Lee contend they are entitled to arbitrate the claims TIBCO made against them, because those claims are based at least in part on TIBCO's allegations that RapidMiner and Lee induced Ruggieri and Hart to breach *their* employment agreements, and those employment agreements contain arbitration

provisions requiring arbitration of Ruggieri and Hart's alleged breaches. We review the court's decision de novo. (*Rowe, supra*, 153 Cal.App.4th at p. 1283.)[2]

1. Law

To provide context for the parties' arguments, we begin with a survey of the primary cases on which they rely.

In *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705 (*Metalclad*), Geologic had entered into an agreement with Metalclad to purchase the stock of a Metalclad subsidiary. The contract contained an arbitration clause. Metalclad later sued numerous defendants, including the parent of Geologic that did not sign the Metalclad-Geologic contract (Ventana), for causes of action including breach of contract, fraud and misrepresentation, breach of fiduciary duty, and unfair business practices. Non-signatory Ventana sought to enforce the arbitration clause in the Metalclad-Geologic contract. (*Id*. at pp. 1710–1711.) Relying on federal case law, the appellate court found that equitable estoppel precludes a signatory plaintiff from avoiding arbitration on a claim against a nonsignatory if the claim is " 'intimately founded in and intertwined with' " the obligations in the contract containing the arbitration clause. (*Id*. at p. 1713.) The plaintiff's claim that nonsignatory Ventana caused signatory Geologic to breach the underlying contract, and its tort claims against Ventana, were intimately founded in and intertwined with the underlying contract, and thus arbitrable. (*Id*. at pp. 1717–1718.) In so concluding, the court emphasized equity: "Metalclad agreed to arbitration in the underlying written contract but now, in effect, seeks the benefit of that contract in the form of damages from Ventana while avoiding its arbitration provision. Estoppel prevents this." (*Id*. at p. 1717.)

---

[2] The FAA is explicitly stated to apply to Hart's arbitration provision. Appellants contend the FAA also governs Ruggieri's arbitration provision, because his employment agreement is a contract involving interstate commerce. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1712.) TIBCO counters that the FAA does not apply to Ruggieri's agreement because the agreement provides that California law applies and, even if the FAA did apply, state contract law determines whether arbitration may be compelled based on equitable estoppel. As discussed *post*, California law applies to the estoppel issue.

Metalclad was followed in *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262 (*Boucher*). There, the plaintiff signatory alleged, among other things, that a nonsignatory interfered with its prospective economic relations and performance of an employment contract containing an arbitration provision. (*Id*. at pp. 265–266, 272.) Applying federal case law and *Metalclad*, the court of appeal held that the plaintiff was estopped from avoiding arbitration with the nonsignatory, because his claims against the nonsignatory relied on, made reference to, and presumed the existence of the employment agreement. (*Id*. at pp. 272–273.) In the court's words: "By *relying on* contract terms in a claim against a nonsignatory defendant, *even if not exclusively*, a plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement." (*Id*. at p. 272, italics added; see also *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833 (*Turtle Ridge*) [equitable estoppel applies when signatory sues nonsignatories for claims that are " ' "based on the same facts and are inherently inseparable" ' " from arbitrable claims against signatories].)

That the equitable rule set forth in *Metalclad* and *Boucher* states the operable law in California was put to rest in this Division's decision in *Rowe, supra,* 153 Cal.App.4th 1276. There, the plaintiff signatory sued nonsignatories for breach of contract (as alter egos of the other signatory) and for violation of certain statutes. We recognized that "a signatory to an arbitration clause may be compelled to arbitrate [its claims] against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract containing the arbitration provision." (*Id*. at pp. 1286–1287.) Acknowledging that *Boucher* and *Metalclad* pertained to contracts governed by the FAA and applied federal law, we concluded that the equitable underpinning of that law was nonetheless consistent with California jurisprudence. (*Id*. at p. 1288.) We ruled that the breach of contract claim based on alter ego liability, as well as the statutory claims, "rel[ied] upon, made reference to, presumed the existence of, and [were] intertwined with" the contract containing the arbitration clause and were subject to arbitration. (*Id*. at p. 1287.)

In *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209 (*Goldman*), plaintiff investors sued an accounting firm, a law firm, and others for breach of fiduciary duty and

fraud-related causes of action arising out of an allegedly fraudulent tax shelter scheme. One of the schemes involved the formation of limited liability companies, who had standard operating agreements containing arbitration clauses, which the plaintiffs signed. The accounting firm and law firm, which were not parties to the operating agreements, sought to compel arbitration under the operating agreements on the basis of equitable estoppel. (*Id*. at pp. 214–217.)

Noting the FAA applied and relying on federal case law, the court in *Goldman* observed that a plaintiff may be equitably estopped from repudiating an arbitration clause in a contract if it relies on the terms of that contract to assert claims against a nonsignatory: "a signatory to an agreement with an arbitration clause cannot ' "have it both ways" '; the signatory 'cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory.' [Citations.]" (*Goldman*, *supra*, 173 Cal.App.4th at p. 220.) The court concluded that equitable estoppel did not apply in that particular case, however, because the investors' claims against the accounting firm and law firm did not rely upon, and were not dependent or inextricably bound up with, the contractual obligations of the agreements containing arbitration provisions; to the contrary, the claims did not even mention the terms of the operating agreements. Accordingly, there was no basis in equity for requiring arbitration of the claims against the nonsignatories. (*Id*. at pp. 214, 218, 230.) In so ruling, the court *contrasted* instances where—as here—plaintiffs sued nonsignatories for inducing the breach of agreements containing arbitration clauses: "Claims of tortious interference with contract are *particularly well suited for imposing equitable estoppel against the signatory*: But for the contract containing the arbitration clause, there would be no breach and no claim for interference with the contract." (*Id*. at p. 227 fn.10, italics added.)

Finally, in *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696 (*Molecular*), the plaintiff asserted claims against Ciphergen and Bio-Rad, arising from contracts it had signed only with Ciphergen. (*Id*. at p. 701.) Both

Ciphergen and Bio-Rad moved to compel arbitration based on arbitration provisions in the contracts. (*Id.* at p. 702.) The court observed that, under the equitable estoppel doctrine as applied in both federal and California case law, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate claims that are intimately founded in and intertwined with the obligations of the contract containing the arbitration clause. (*Id.* at p. 706.) That is, " '[b]y relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement.' [Citations.]" (*Ibid.*) The court further recognized: "Though its use in this context developed under federal arbitration law, the doctrine applies with equal force under California law." (*Id.* at p. 714, citing *Rowe, supra,* 153 Cal.App.4th at p. 1288.) Because the claims asserting conversion and interference with contract relied upon and referred to a contract containing an arbitration clause, the claims were arbitrable. (*Id.* at p. 716.)[3]

2. Analysis

In light of the foregoing precedents, TIBCO's claims against RapidMiner and Lee are premised on Hart's and Ruggieri's breach of the employment agreements, which contain arbitration clauses, and are therefore subject to arbitration.

a. TIBCO's Interference and Unfair Competition Claims

TIBCO's claim against RapidMiner and Lee for intentional interference with the non-disclosure provision of the contract (count seven) is based on its allegation that RapidMiner and Lee instructed and induced *Hart* (among others) to violate her employment agreement by accessing TIBCO trade secrets for RapidMiner's benefit and concealing that she was joining RapidMiner.

---

[3] TIBCO argues that the plaintiff in *Molecular* sued the defendant for tortious interference with contract *and,* alternatively, breach of the same contract (*Molecular, supra,*186 Cal.App.4th at pp. 702, 716), so the plaintiff's attempt to enforce the contract against the defendant explains why it was equitably estopped from refusing to arbitrate. The court in *Molecular* said nothing of the sort. To the contrary, the court in *Molecular* analyzed the arbitrability of the tort claims independently from the arbitrability of the breach of contract claims. (*Id.* at pp. 716–717.)

TIBCO's claims against RapidMiner and Lee for intentional interference with the non-solicitation provision of the contract (count eight) and interference with prospective economic advantage (count nine) allege that RapidMiner and Lee induced *Ruggieri* to violate the non-solicitation clause in his TIBCO employment agreement.

As alleged by TIBCO, therefore, these claims rely on the terms of TIBCO's employment agreement with its employees, including Hart and Ruggieri, and one of the ways TIBCO seeks to hold RapidMiner and Lee liable is by proving that Hart and Ruggieri breached their employment agreements. (See *Pacific Gas & Electric Co. v. Bear Stearns & Co*. (1990) 50 Cal.3d 1118, 1126 [elements of tortious interference claim include defendant's knowledge of the contract, acts intended to induce a party to breach it, and the *actual breach of the contract* by the party].) Indeed, in discovery, TIBCO identified Hart and Ruggieri's purported breaches of their employment agreements as evidence supporting its interference claims.

Although the claims against RapidMiner and Lee are viable without necessarily establishing a breach of Hart's and Ruggieri's employment agreement—since they also include allegations that RapidMiner and Lee induced a breach by other employees—the claims against RapidMiner and Lee are nonetheless arbitrable to the extent they *are* based on the breach of Hart's and Ruggieri's contracts. (See *Molecular*, *supra*, 186 Cal.App.4th at p. 706; *Boucher*, *supra*, 127 Cal.App.4th at p. 272.)[4]

b. TIBCO's Unfair Competition Claim

[4] In ruling that the claims were not arbitrable, the trial court misplaced reliance on *Goldman*, *supra*, 173 Cal.App.4th 209. As discussed *ante*, the court in *Goldman* found that equitable estoppel did not apply because the plaintiff's claims against the nonsignatory were unrelated to, and only tangentially or impliedly mentioned, the contract containing the arbitration provision. Here, by contrast, TIBCO does not merely tangentially reference Hart's and Ruggieri's employment agreements, but alleges that RapidMiner and Lee are liable because they interfered with those employment agreements and induced their *breaches*. As the court in *Goldman* itself stated, "[c]laims of tortious interference with contract are particularly well suited for imposing equitable estoppel against the signatory." (*Id*. at p. 226 fn.10.)

TIBCO's claim against RapidMiner and Lee for unfair competition (count six) realleges earlier allegations of the first amended complaint and relies on both Hart's and Ruggieri's alleged breaches of their employment agreements and RapidMiner's and Lee's knowing inducement of those breaches. Thus, the claim is arbitrable.

c. TIBCO's Misappropriation of Trade Secrets Claim

TIBCO's claim against RapidMiner for misappropriation of trade secrets (count one) is based on the conduct of Hart, as well as Sagoo and Bauerle. TIBCO alleges that RapidMiner knowingly induced Hart to access TIBCO confidential information and trade secrets while she was a TIBCO employee, and that RapidMiner is liable in light of its alleged instructions to Hart to misuse TIBCO information. (Although TIBCO dismissed Hart as a defendant, its allegations in the first amended complaint remain.) In response to discovery requests asking TIBCO to identify evidence supporting its trade secrets claim against RapidMiner, TIBCO identified Hart's alleged misuse of TIBCO's confidential information.

As TIBCO framed its misappropriation claim, therefore, one way TIBCO may prevail against RapidMiner is if it proves RapidMiner acquired TIBCO's trade secrets knowing it did so by "improper means," which includes a "breach or *inducement of a breach of a duty to maintain secrecy*," such as inducement of Hart to violate the non-disclosure provisions of her employment agreement. (Civ. Code, § 3426.1, subds. (a), (b). Italics added.) Another way TIBCO may prevail on its misappropriation claim is if it proves RapidMiner used TIBCO's trade secrets without consent, having used "improper means" to acquire the trade secrets, or knowing or having reason to know that its awareness of the trade secret was "[d]erived from or through a person who *owed a duty to the person seeking relief to maintain its secrecy or limit its use*." (Civ. Code, § 3426.1, subd. (b). Italics added.) Since TIBCO's attempt to recover against RapidMiner for misappropriation relies at least in part on Hart's violation of the non-disclosure provision in her employment agreement, and there is no dispute that Hart's employment agreement requires arbitration of claims for misappropriation of trade secrets, TIBCO's claim against RapidMiner for trade secret misappropriation is subject to arbitration. (See

Torbit, Inc. v. Datanyze (N.D. Cal. Feb. 13, 2013 No. 5:12-CV-05889-EJD) 2013 U.S. Dist. Lexis 19584 [trade secrets claim against defendant employee's new company, a nonsignatory, was subject to arbitration where it alleged that the company knew the trade secret was obtained by improper means due to its awareness of employee's agreement not to disclose]; *Uptown Drug Co. v. CVS Caremark Corp.* (N.D.Cal. 2013) 962 F.Supp.2d 1172, 1184 [under California law, claims based on alleged misappropriation of trade secret information in breach of a confidentiality clause must be arbitrated].)

Again, the fact that TIBCO's misappropriation of trade secrets claim could be proven based on another defendant's breach of his or her employment agreement is not the point; the point is that, based on TIBCO's crafting of its first amended complaint, one way to prove count one would be to prove RapidMiner's connection to Hart's misappropriation. (*Molecular*, *supra*, 186 Cal.App.4th at p. 706; *Boucher*, *supra*, 127 Cal.App.4th at p. 272.)[5]

3. TIBCO's Arguments

TIBCO does not cite any California case prohibiting a nonsignatory from arbitrating a claim against it for interfering with a contract that contains an arbitration provision. Instead, it argues that state courts have been liberated from having to follow federal decisions that compel arbitration for claims against nonsignatories if those claims are "intertwined" with other arbitrable claims. (Citing *Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630–631 (*Carlisle*).) TIBCO urges that we should therefore "jettison the federal 'intertwined' theory," abandon the precedents in *Molecular* and *Boucher*, and "return" to California's equitable principles.

[5] At this stage of the analysis, the concern is simply whether claims (or parts of counts, as alleged by the plaintiff) are arbitrable. Where, as here, a misappropriation claim is arbitrable to the extent it is based on one person's breach of an employment contract, but not arbitrable to the extent it is based on other conduct or asserted against other defendants, the court has discretion at the next stage of the analysis to decide whether the arbitration provision should be enforced or not. (Code Civ. Proc., § 1281.2, subd. (c).)

At the heart of TIBCO's argument is *Carlisle*, in which nonsignatories to an arbitration agreement sought a stay of litigation under the FAA on the ground that principles of equitable estoppel required arbitration of the claims against them. The federal district court denied the request, and the federal circuit court dismissed the appeal on the ground it had no jurisdiction over meritless appeals. (*Carlisle, supra*, 556 U.S. at pp. 627, 629.) The United States Supreme Court held that the circuit court did have jurisdiction over the appeal, and its ground for finding the appeal meritless was in error. (*Id*. at p. 629.) The Court explained that state law applies to determine which arbitration contracts are binding and enforceable under the FAA " '[i]f that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " (*Id*. at pp. 630–631.) And, " '[b]ecause 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through . . . estoppel,' " the circuit court's holding that nonparties to a contract are categorically barred from relief under the FAA was incorrect. (*Id*. at p. 631.) In short, the Court ruled, "a litigant who was not a party to the relevant arbitration agreement may invoke [the FAA] if the relevant state contract law allows him to enforce the agreement." (*Id*. at p. 632.)

TIBCO's contention that the claims in this case are not arbitrable due to *Carlisle* is meritless, for several reasons.

First, *Carlisle* merely decided that state law applies to determine whether a claim against a nonsignatory is arbitrable. It did not dictate what law the state should follow, or preclude the state from following federal precedents. (*Id*. at p. 632.)

Second, even before *Carlisle*, we recognized in *Rowe* that the law expressed in the federal cases *was* consistent with California law and the equitable principles of this state. (*Rowe, supra*, 153 Cal.App.4th at p. 1288.) Although TIBCO's brief skirts our discussion in *Rowe*, we stated the following: ". . . [Plaintiff] contends that we should reject the estoppel argument because *Boucher*, *Turtle Ridge*, and *Metalclad* involved arbitration agreements governed by the [FAA] and applied federal rather than California law. [Plaintiff's] argument is unconvincing. Merely because a legal concept emanates from federal jurisprudence does not necessarily make it unreasonable, inapplicable, or

unpersuasive in a California case. The equitable estoppel theory espoused in *Boucher*, *Turtle Ridge*, and *Metalclad* did not arise from a federal statute or case law that conflicts with California's arbitration law. Indeed, both federal and California arbitration law favor the arbitration of disputes. Furthermore, the notion of estoppel is familiar to California law, and California's concern for equity is just as strong as that of federal law. [Plaintiff] demonstrates no reason why California jurisprudence should reject the equitable principle that a plaintiff who seeks to hold nonsignatories liable for damages under a contract, by alleging they are unified with the signatory entity, cannot also adopt the inconsistent position that the arbitration provision in the contract is unenforceable by or against those individuals. This is the very type of equity underlying *Dryer* [*v. Los Angeles Rams* (1985) 40 Cal.3d 406], which was decided under California law." (*Rowe, supra*, 153 Cal.App.4th at p. 1288.)

Years after *Carlisle*, *Molecular* quoted our conclusion in *Rowe* with approval, observing that the equitable estoppel principles pertaining to arbitrability by nonsignatories "developed under federal arbitration law" but "applies with equal force under California law." (*Molecular, supra*, 186 Cal.App.4th at p. 714.)

Third, California cases decided after *Carlisle* have continued to refer to the pre-*Carlisle* precedent and the equitable rule that a plaintiff seeking to obtain recovery against a nonsignatory by enforcing the terms of a contract cannot refuse enforcement of an arbitration provision in that contract. (E.g., *UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 928–929; *Marenco v. DirectTV LLC* (2015) 233 Cal.App.4th 1409, 1419–1420; *DMS Services, LLC v. Superior* Court (2012) 205 Cal.App.4th 1346, 1352–1353; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 20–21; *JSM Tuscany, LLC v. Superior* Court (2011) 193 Cal.App.4th 1222, 1236–1238.)

Fourth, even authority on which TIBCO relies in proclaiming that the issue is one of state law demonstrates that California still abides by the rule established before *Carlisle*. (*Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122, 1128–1129 [equitable estoppel applies "when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are 'intimately

founded in and intertwined with' the underlying contract"]; see also *Murphy v. DirecTV, Inc.* (9th Cir. 2013) 724 F.3d 1218, 1229 [noting that *Kramer* "adopted as a controlling statement of California law the equitable estoppel rule"]; *Crawford Prof. Drugs, Inc. v. CVS Caremark Corp*. (5th Cir. 2014) 748 F.3d 249, 260.)

Fifth, although TIBCO argues that post-*Carlisle* we should not follow the " 'intertwined' standard" and instead adhere to traditional equitable principles, we did not hold in *Rowe*—or hold here—that nonsignatories can demand arbitration *merely* because the claims against it are "intertwined" with claims against a signatory. The rule is that nonsignatories can demand arbitration when the claims against them rely upon the contract terms to obtain relief against the nonsignatory, and in equity a plaintiff seeking relief based on breach of a contract cannot avoid the arbitration provision within that same contract.

And indeed, the rule promotes equity and fairness in the matter before us. TIBCO's attempt to rely on some provisions of the employment agreements (the non-solicitation and non-disclosure clauses) but repudiate others (the arbitration clause) is an inequitable effort to "have it both ways." (*Goldman*, *supra*, 173 Cal.App.4th at p. 220; see *Rowe*, *supra*, 153 Cal.App.4th at pp. 1287–1288.) Furthermore, since TIBCO agreed to arbitrate a claim that Hart and Ruggieri breached their employment agreements, it is not unfair to require TIBCO also to arbitrate its claims that RapidMiner induced Hart and Ruggieri to breach those agreements.

Sixth, cases on which TIBCO relies in urging us to return to California common law are, ironically, not California decisions but federal and out-of-state cases that do not apply California common law. (*Kingsley Capital Management, LLC v. Sly* (D. Ariz. 2011) 820 F.Supp.2d 1011, 1025 (*Kingsley*) [plaintiff not estopped from refusing to arbitrate, because its allegation that defendants fraudulently induced it to enter into the contract did not seek liability based on the terms of the agreement]; *Hirsch v. Amper Financial Services, LLC* (N.J. 2013) 71 A.3d 849, 860 (*Hirsch*) [arbitration cannot be compelled based on the intertwinement of claims and parties alone]; *Sokol Holdings, Inc. v. BMB Munai, Inc.* (2d Cir. 2008) 542 F.3d 354, 358 (*Sokol Holdings*) [nonsignatory

defendant not entitled to arbitrate a tortious interference claim against it on the ground that the claims were intertwined].) Moreover, these cases are distinguishable from the matter at hand. Liability against the nonsignatory in *Kingsley* was not based on inducement of a breach of a term of the agreement, while the claims against RapidMiner and Lee are. *Hirsch* and *Sokol Holdings* are inapposite because we are not concluding that the claims against RapidMiner and Lee are arbitrable merely because they intertwine with other claims, but because they implicate California's long-standing equitable principle that a signatory who asserts liability against a nonsignatory based on a breach of a contract cannot refuse enforcement of the arbitration provision in that contract.[6]

TIBCO argues: "As a matter of public policy and common sense, a party that has tortiously interfered with a contract is not entitled to enforce the contract based on its own interference. That would be an absurd result. A party cannot acquire contract rights by committing torts, and there is "no unfairness" in denying arbitration to the nonsignatory tortfeasor. [(*Sokol Holdings, supra,* 542 F.3d at p. 362]." But RapidMiner and Lee are not "tortfeasors." They are *alleged* tortfeasors, based on *TIBCO's* allegations that they should be liable *because they induced signatories to breach* the agreement. TIBCO is in control of its own allegations and, despite the arbitration provision in Hart's and Ruggieri's employment agreements, it chose to allege not only that Ruggieri and Hart breached the agreements, but that RapidMiner and Lee induced them to breach those agreements. There is nothing "absurd" about arbitrating both the breach of the contract and the inducement of the breach.

---

[6] *Hirsch* noted that "equitable estoppel" under New Jersey law requires proof of detrimental reliance. (*Hirsch*, *supra*, 71 A.3d at pp. 857–858.) It is true that what California (and other) courts have called "equitable estoppel" in the context of compelling arbitration does not require proof of detrimental reliance by the nonsignatory defendant. But whether or not it is apt to use the term "equitable estoppel" to describe the rule is not the point. The point is that California has recognized for decades that equity precludes a plaintiff from both seeking to hold a nonsignatory liable for a breach of a contract and at the same time refusing to abide by the arbitration provision in that contract. It is this state determination of equitable principles that *Carlisle* protects.

In the final analysis, California law is that a signatory plaintiff suing a nonsignatory based on the breach of a contract is estopped from denying an arbitration provision in that contract. The trial court erred in denying the petition to compel arbitration with respect to the claims TIBCO asserted against RapidMiner and Lee.

B. Arbitration of Claims Against Ruggieri

As to the claims against Ruggieri, the trial court found that some were arbitrable and some were not. The court then exercised its discretion not to require arbitration of the arbitrable claims because it perceived a risk of conflicting rulings if some claims were arbitrated and others were decided in the court proceedings. (Code Civ. Proc., § 1281.2, subd. (c).) Appellants contend the court erred.

Under Code of Civil Procedure section 1281.2, subdivision (c) (hereafter, section 1281.2(c)), a court may choose not to enforce an arbitration provision if "[a] party to the arbitration agreement is also a *party to a pending court action* . . . with *a third party*, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (Italics added.)

When the trial court considered section 1281.2(c) with respect to Ruggieri, it ostensibly believed that Ruggieri was "a party to a pending court action" with "third part[ies]" because RapidMiner and Lee were not signatories to the employment agreements. Because we conclude that RapidMiner and Lee can enforce the arbitration provisions of Hart's and Ruggieri's employment agreements, however, RapidMiner and Lee are *not* third parties for purposes of section 1281.2(c). (*Rowe*, *supra*, 153 Cal.App.4th at p. 1290; *Molecular*, *supra*, 186 Cal.App.4th at p. 717.) Moreover, the trial court has not had the opportunity to exercise its discretion under section 1281.2(c) with the understanding that TIBCO's claims against RapidMiner and Lee are arbitrable. We will therefore also reverse the order denying the motion to compel arbitration as to Ruggieri, for further consideration by the trial court. (See *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 693–694.)

C. Delegation of Arbitrability Questions To The Arbitrator

It is usually for the court to decide whether the parties entered into an enforceable arbitration agreement and whether that agreement covers the parties' substantive dispute. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 781 (*Ajamian*); see Code Civ. Proc., § 1281.2.) The parties will be deemed to have delegated those questions to the arbitrator, however, if the delegation is established by "clear and unmistakable" evidence. (*Ajamian, supra,* 203 Cal.App.4th at pp. 781–782; *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal.App.4th 1185, 1190–1191.)

Appellants maintain that Ruggieri's and Hart's arbitration clauses "clearly and unmistakably" provided that the arbitrator, not the court, should decide whether any claims were arbitrable, because the arbitration clause calls for the arbitration to be conducted pursuant to certain AAA rules, and one of those rules authorizes arbitrators to decide questions of arbitrability. On that basis, appellants contend the trial court should not have decided the arbitrability issues and, therefore, its rulings on the petition to compel arbitration must be reversed.

Their argument is unavailing for several reasons.

1. Forfeiture

Appellants did not contend in the trial court that the arbitrability issues were for the arbitrators to decide. To the contrary, appellants were the ones who submitted those issues *to the court* by filing their petition to compel arbitration. Neither their petition nor their reply papers argued that the court to which they applied for relief lacked authority to provide it. By failing to raise the issue in the trial court, and effectively urging that the court could properly decide the matter, appellants cannot now challenge the court's authority to decide the arbitrability issues. (*Hepner v. Franchise Tax Board* (1997) 52 Cal.App.4th 1475, 1486 [waiver]; *Gee v. American Realty & Construction, Inc*. (2002) 99 Cal.App.4th 1412, 1414 [invited error].)

Appellants maintain that the scope of Ruggieri's and Hart's arbitration agreements, including what arbitrators are permitted to decide, is a jurisdictional question and therefore cannot be waived. We disagree. While questions of *subject matter* jurisdiction cannot be waived, appellants provide no authority holding that the question

of who will decide the arbitrability issues is a question of a court's subject matter jurisdiction. While appellants cite two cases that used the word "jurisdictional" in connection with arbitrability issues, those cases used the word simply to describe threshold questions as to who would decide certain issues *under the terms of the parties' agreement*, not the court's fundamental power to act. (*Brinkley v. Monterey Financial Services, Inc*. (2015) 242 Cal.App.4th 314, 354 [" 'incorporation of AAA Rules effectively delegates jurisdictional questions, including arbitrability and validity, to the arbitrator' "]; *Patchett v. Bergamot Station, Ltd*. (2006) 143 Cal.App.4th 1390, 1397 [parties delegated to arbitrator "the jurisdictional issue of arbitrability"].) The question of whether the arbitrator or the court decides the issues of arbitrability is merely a matter of party agreement, and is therefore not an issue of subject matter jurisdiction. (See *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243–244 [matter of party agreement]; see also *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 515 [whether arbitration is to proceed on classwide basis or individual basis is not a jurisdictional question, and the plaintiff's failure to ask the court to defer the class arbitration issues to the arbitrator precludes a later challenge to the court's authority to rule on those issues].)[7]

Appellants also argue that issues raised for the first time on appeal can be considered if they are issues of law, and the question of whether the parties delegated the arbitrability issues to the arbitrator is one of law because it can be resolved by examining the arbitration agreement and TIBCO's pleadings. It is true we have *discretion* to consider issues raised for the first time on appeal. (*Rowe, supra*, 153 Cal.App.4th at p. 1288; *Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810.) But

---

[7] Appellants' citation to *National Union Fire Ins. Co. of Pittsburgh v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1723–1724, is also unavailing. The court in that case asserted that the arbitrator's authority or power to adjudicate a type of fee dispute was a matter of subject matter jurisdiction that cannot be conferred by waiver, consent, or estoppel, and can be challenged at any time. But even if that were true, we are not concerned here with the scope of the *arbitrator's* authority to decide submitted issues, but whether the *court* had the authority to decide threshold questions of arbitrability.

appellants have not demonstrated we should exercise our discretion in this respect, particularly in light of the following.

2. Inadequate Appellate Record

Appellants' contention that the arbitrator should decide arbitrability questions is not adequately supported by citations to the appellate record. Appellants note that Ruggieri's and Hart's agreements refer to the "National Rules for the Resolution of Employment Disputes," but they do not include those rules in the record. They assert that the rules were renamed the "Employment Arbitration Rules and Mediation Procedures," and that rule 6(a) thereof provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," but they provide no citation to the record. We disregard assertions that lack record citations. (*Metis, supra,* 200 Cal.App.4th at p. 683 fn.1.) And while appellants belatedly provide the URL for the rules in their appellate reply brief, they did not do so in their *opening* brief. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Therefore, whether or not the issue they failed to raise in the trial court pertains to a legal question or even subject matter jurisdiction, they have not properly presented it to this court on appeal.

3. Facial Lack of Merit

Finally, while we do not reach the merits of the issue, the face of appellants' briefing indicates that their briefing is at least incomplete. It is true that California courts have decided in the *commercial* context that reference to AAA rules is sufficiently clear and unmistakable to allow the arbitrator to decide the issue. (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1123–1124 [AAA construction rules]; *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 552–553 [AAA commercial arbitration rules].) But this court has seriously questioned whether it would constitute clear and unmistakable evidence in the *employment* context. (*Ajamian, supra,* 203 Cal.App.4th at p. 790.) Furthermore, the fact that a AAA rule gives arbitrators the *authority* to decide arbitrability issues does not mean that *only* the arbitrators had such

authority, or that the parties were actually agreeing the issues *would* be presented to the arbitrators rather than to the court. (*Id*. at pp. 790–791; see *Sandquist*, *supra*, 1 Cal.5th at pp. 247–248 [ambiguity in an arbitration provision contained in an employment agreement must be construed against the employer who drafted it].) Appellants do not address these issues or, for that matter, our decision in *Ajamian*.

D. TIBCO's Obligation To Pay Arbitrator's Fees and Other Amounts

Appellants next ask us to direct the trial court to order TIBCO to pay the fees and costs of arbitration as to RapidMiner and Lee. Because the trial court has not had the opportunity to decide this question, however, there is nothing for us to review.

E. Stay Pending Completion Of Arbitration Based on Claims Against Hart

In connection with their petition to compel arbitration, appellants sought a stay of the litigation under Code of Civil Procedure section 1281.4, which provides: "If a court … has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies."

As explained *ante*, the trial court ordered a stay based on the arbitrability of the claims against Hart, but provided that the stay would be denied if the claims against Hart were dismissed. Because the claims against Hart have indeed been dismissed, the effect of the court's order is that there is no stay of the litigation.

While appellants contend the court erred, we need not decide the matter. Since we have ruled that specified claims against RapidMiner and Lee are arbitrable, and that the court must reconsider whether arbitration should proceed as to the arbitrable claims against Ruggieri, the question of whether the matter should be stayed solely due to the arbitration with Hart is moot.

III. DISPOSITION

The order is reversed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A147556)