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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

O'DONNELL STRATEGIC  
INDUSTRIAL REIT, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

STRATEGIC CAPITAL ADVISORY  
SERVICES, LLC et al.,

Real Parties in Interest.

G049498

(Super. Ct. No. 30-2013-658547)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, John C. Gastelum, Judge. Petition denied.

Rutan & Tucker, Richard K. Howell and Damon D. Mircheff for Petitioner.

No appearance for Respondent.

Stradling Yocca Carlson & Rauth, Marc J. Schneider and Justin Klaeb for  
Real Parties in Interest.

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Petitioner and plaintiff O'Donnell Strategic Industrial REIT, Inc. (O'Donnell REIT) challenges an order to arbitrate claims against defendants and real parties in interest Strategic Capital Advisory Services, LLC (SCAS), SC Distributors, LLC (SC Distributors), Patrick Miller (Miller), and Kenneth Jaffe (Jaffe; collectively defendants). Petitioner and the other plaintiffs, O'Donnell REIT Advisors, LLC (Sponsor) and O'Donnell Strategic Industrial Advisors, LLC (Advisor; all three collectively plaintiffs), allege defendants breached two related agreements, an advisory operating agreement and a dealer manager agreement, and made fraudulent misrepresentations leading up to the agreements. Although not all parties signed both agreements and only the advisory operating agreement contained an arbitration provision, the trial court granted defendants' motion to compel arbitration of all claims.

The primary issues before us are whether the two agreements are sufficiently related and whether all of plaintiffs' claims fall within the broad language of the arbitration provision in the advisory operating agreement, thus binding petitioner and all plaintiffs to arbitrate.

We hold the arbitration provision covers all claims included in the complaint because the allegations are so broad and inclusive as to impinge on both agreements. Further, a choice of law/venue provision in the dealer manager agreement does not preclude arbitration. In addition, all plaintiffs are equitably required to arbitrate their claims against all defendants. Finally, there is no need for the trial court to exercise its discretion under Code of Civil Procedure section 1281.2 (all further statutory references are to this code) to deny or stay arbitration. We deny the petition.

## **FACTS AND PROCEDURAL HISTORY**

Douglas O'Donnell (O'Donnell) met with Miller to discuss whether Miller and his companies would be interested in working with him to set up a real estate investment trust (REIT) and provide services to it. After the two reached a tentative agreement, an O'Donnell affiliated company and SCAS, by Miller, executed a Preliminary Term Sheet setting out the basic provisions of their anticipated agreement: SCAS would assist in creating and obtaining approval of the REIT O'Donnell was to create, and SC Distributors<sup>1</sup> would act as the exclusive dealer manager to sell the O'Donnell REIT shares.

In August 2010 Sponsor and SCAS entered into an agreement (Advisor Operating Agreement) pursuant to which Advisor was formed and jointly owned. Advisor's purpose was to act as the external advisor to the O'Donnell REIT. Sponsor and SCAS were each to provide capital for the O'Donnell REIT, and SCAS also was to perform certain services for it.

The Advisor Operating Agreement contemplates and even defines a second agreement, the Dealer Manager Agreement. It was to be executed between SC Distributors, the O'Donnell REIT, and the O'Donnell REIT's operating partnership (not a party to the action). The Advisor Operating Agreement contains provisions for Sponsor to purchase SCAS's interest upon certain "triggers," including termination of the Dealer Manager Agreement. The integration provision states the Advisor Operating Agreement "and any other documents, instruments or agreements to be executed by the parties in connection with the transactions contemplated by this Agreement set forth the entire agreement between the parties relating to the subject matter hereof."

The Advisor Operating Agreement contains an arbitration provision, the applicable portion of which reads, "Any dispute, controversy, or claim arising out of or in

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<sup>1</sup> Miller and Jaffe are the principals in SCAS and SC Distributors.

connection with this Agreement shall be submitted to, and resolved by, arbitration in Orange County, California . . . .”

After the Advisor Operating Agreement was executed, O’Donnell formed the O’Donnell REIT.

In June 2011, SC Distributors and the O’Donnell REIT entered into the Dealer Manager Agreement, pursuant to which SC Distributors was to act as the exclusive dealer manager for the O’Donnell REIT.

A provision in the Dealer Manager Agreement, entitled “Applicable Law; Venue” (underscoring omitted), provides: “THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO THE PRINCIPLES OF CONFLICTS OF LAWS. EACH OF THE PARTEIS HERETO WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) RELATED TO OR ARISING OUT OF OF THIS AGREEMENT. The parties hereto irrevocably submit to the exclusive jurisdiction of the courts of the State of New York and the Federal courts of the Unites States of America located in Borough of Manhattan, New York for purposes of any suit, action or other proceeding arising from this Agreement and the Offering, and hereby waive, and agree not to assert, as a defense in any action, suit or proceeding for the interpretation or enforcement hereof or thereof, that it is not subject thereto or that such action, suit or proceeding may not be brought or is not maintainable in such courts or that the venue thereof may not be appropriate or that this Agreement or any such document may not be enforced in or by such courts. Each of the parties hereby consents to and grants any such court jurisdiction over the person of such parties and over the subject matter of any such dispute.”

When disputes arose between the parties, the O'Donnell REIT terminated the Dealer Manager Agreement and plaintiffs filed this action containing four causes of action: breach of contract, fraud, breach of fiduciary duty, and declaratory relief.

In the general allegations, plaintiffs allege, "The Advisor Operating Agreement expressly contemplated the agreement for SC Distributors" to act as dealer manager for the O'Donnell REIT, and the Dealer Manager Agreement was incorporated into the Advisor Operating Agreement. Further, "the Advisor Operating Agreement and the Dealer Manager Agreement are expressly interconnected and part of a single legal contract."

The breach of contract cause of action, against SCAS (which signed the Advisor Operating Agreement) and SC Distributors (which signed the Dealer Manager Agreement), incorporates all of the general allegations. It alleges SC Distributors failed to use its best efforts to sell shares of the O'Donnell REIT, thereby breaching the "Contract." The Contract is defined in the complaint as the Advisor Operating Agreement and the Dealer Manager Agreement collectively.

The fraud cause of action, against all defendants, incorporates all prior allegations. The general allegations plead Miller and Jaffe represented to plaintiffs that SC Distributors would also be acting as the dealer manager for another REIT, referred to as the Carter REIT, and that marketing the Carter REIT and the O'Donnell REIT together would be advantageous to the O'Donnell REIT. Defendants never disclosed to plaintiffs that the principals of the Carter REIT had a controlling interest in SC Distributors. SC Distributors gave preference to selling shares of the Carter REIT instead of the O'Donnell REIT.

The fraud cause of action again alleges defendants' failure to disclose the material information about the Carter REIT. Defendants intended plaintiffs would rely on the incomplete disclosure to enter into the Advisor Operating Agreement. Plaintiffs detrimentally relied on the omissions of facts and on SC Distributors's false promise it

would use its best efforts to sell the O'Donnell REIT's shares by, among other things, entering into both the Advisor Operating Agreement and the Dealer Manager Agreement.

The breach of fiduciary duty cause of action, against SC Distributors, incorporates all previous allegations. It repeats the allegations defendants breached their duty by failing to disclose the overlapping ownership of the Carter REIT and SC Distributors.

Finally, in the declaratory relief cause of action against SCAS and SC Distributors, which incorporates all prior allegations, plaintiffs seek a declaration as to whether Sponsor appropriately exercised its rights to buy out SCAS under the Advisor Operating Agreement. This is based on, among other things, SC Distributors's alleged breach of the Dealer Manager Agreement.

In granting defendants' motion to compel arbitration the court ordered all claims be arbitrated. It found the Advisor Operating Agreement was "part of a larger contract, including [the] written Dealer Manger Agreement," and that the two agreements "must be read together as though part of the same, unified contract." As a result the court found there was an "apparent conflict" between the arbitration provision and the forum selection clause.

The court concluded the arbitration provision required all claims "'arising out of or in connection with' the unified contract" be arbitrated. It also found all of plaintiffs' causes of action arose out of or were connected with "the unified contract."

In addition, even though SC Distributors was not a party to the Advisor Operating Agreement, and Miller and Jaffe were not parties to either agreement, because their claims were "intimately founded in and inextricably intertwined with the unified contract," plaintiffs were equitably estopped from disputing defendants' rights to compel arbitration. Moreover, although the O'Donnell REIT was not a party to the Advisor Operating Agreement, because its claims arose out of that agreement, it was also

equitably estopped from challenging defendants' right to compel arbitration. Finally, the court ruled it had no discretion under section 1281.2 to stay or deny arbitration.

## DISCUSSION

### 1. Introduction

In a motion to compel arbitration, “[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense.” (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683; see § 1281.2.) When there is no conflicting extrinsic evidence, as here, we review the trial court’s order de novo. (*Lane*, at p. 683.)

### 2. Interpretation of Agreements and Application to Complaint

#### a. Applicability of Arbitration Provision to All Causes of Action

The right to arbitration derives from contract. (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284.) Here, the Advisor Operating Agreement contains an arbitration provision on which the court based its order. It provides that “[a]ny dispute, controversy, or claim arising out of or in connection with” the Advisor Operating Agreement must be arbitrated. The claims within each of the four causes of action fall within and are governed by this provision.

Plaintiffs do not seriously dispute that the fraud and declaratory relief causes of action arise from and are connected to the Advisor Operating Agreement. The general allegations, incorporated into all causes of action, allege defendants never advised plaintiffs the principals of the Carter REIT owned a controlling interest in SC Distributors. Instead, defendants misrepresented the purported advantages of marketing the Carter REIT and the O’Donnell REIT together, when in fact they intended to and did put the interests of the Carter REIT ahead of those of the O’Donnell REIT. The misrepresentations caused plaintiffs to enter into the Advisor Operating Agreement.

The fraud cause of action repeats some of the same general allegations, pleading that defendants misrepresented to plaintiffs about the Carter REIT and its principals' ownership of a controlling interest in SC Distributors. It alleges that despite the representation to the contrary, defendants never intended to use their best efforts to sell O'Donnell REIT shares because their first priority was the Carter REIT. As a result of these misrepresentations, plaintiffs were induced to enter into both the Advisor Operating Agreement and the Dealer Manager Agreement. In addition, plaintiffs paid SCAS \$1 million in fees pursuant to the Advisor Operating Agreement before any shares of the O'Donnell REIT were sold.

In the declaratory relief cause of action, plaintiffs seek a declaration as to whether Sponsor had the right to buy out SCAS pursuant to the Advisor Operating Agreement based, in part, on SC Distributor's alleged breach of the Dealer Manager Agreement. Thus, both of these causes of action are directly based on claims arising out of the Advisor Operating Agreement.

Plaintiffs strongly contest that the breach of contract and breach of fiduciary duty causes of action arise from the Advisor Operating Agreement. They argue the gravamen of the claims is based on the Dealer Manager Agreement and cannot be arbitrated. We are not persuaded.

Plaintiffs cite no law that supports a "gravamen" theory. Rather, the issue is whether the claims arise out of or are connected with the Advisor Operating Agreement. "Arising out of or in connection with" is to be interpreted broadly.

"It is clear that the parties agreed to arbitrate 'any problem or dispute' that arose under or concerned the terms of the [agreement]. That contractual language is both clear and plain. It is also very broad. In interpreting an unambiguous contractual provision we are bound to give effect to the plain and ordinary meaning of the language used by the parties. [Citations.] We interpret ["any problem or dispute"] to mean just

what it says.” (*EFund Capital Partners v. Pless* (2007)150 Cal.App.4th 1311, 1322, italics omitted.)

Further, “the phrase ‘all disputes arising in connection with this agreement’ has been construed to include ‘every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract,’ including antitrust, trade secrets, defamation, and misrepresentation claims. [Citation.]” (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1522-1523.)

The complaint shows that, like the fraud and breach of fiduciary duty causes of action, the breach of contract and declaratory relief causes of action also arise out of or are connected to the Advisor Operating Agreement. The breach of contract cause of action alleges SC Distributors breached the “Contract,” that is, both the Advisor Operating Agreement and the Dealer Manager Agreement. The breach of fiduciary duty cause of action alleges SC Distributors breached its fiduciary duty by failing to disclose the Carter REIT principals owned the controlling interest in SC Distributors. This is premised on the general allegation that defendants failed to make such disclosure before plaintiffs executed the Advisory Operating Agreement, or in that agreement itself.

Thus, both of these causes of action arise out of or are connected with the Advisor Operating Agreement, thereby triggering the arbitration provision.

*b. Agreements Part of One Contract*

In any event, the two agreements are part of the same transaction and must be read together. Civil Code section 1642 provides that “[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”

The language of the Preliminary Term Sheet and two agreements show the parties intended the Advisor Operating Agreement and the Dealer Manager Agreement to be part of one transaction. The Preliminary Term Sheet summarizes the basic provisions

of the parties' agreement, i.e., that SCAS would help create the O'Donnell REIT and SC Distributors would act as the O'Donnell REIT's exclusive dealer manager. This agreement was set out in the two separate documents.

The Advisor Operating Agreement, executed by Sponsor and SCAS, created Advisor, owned by SCAS and Sponsor. It states the Dealer Manager Agreement is to be executed by SC Distributors and the O'Donnell REIT, the latter of which was to be created after execution of the Advisor Operating Agreement.

The Advisor Operating Agreement also spells out the events allowing Sponsor to purchase SCAS's interest, one of which is termination of the Dealer Manager Agreement. Moreover, it contains an integration provision, stating that the Advisor Operating Agreement and any other documents executed by the parties in connection "with the transactions contemplated by this Agreement set forth the entire agreement between the parties relating to the subject matter hereof." In sum, the Advisor Operating Agreement was either executed by, or refers to, parties to both agreements. (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222 (*JSM*) [where all plaintiffs are related entities, nonsignatory plaintiff may be compelled to arbitrate if equitable under specific circumstances].)

Moreover, the Dealer Manager Agreement provides that the O'Donnell REIT would be advised by Advisor, as set out in the Advisor Operating Agreement.

A review of the terms shows the two agreements were dependent upon each other and were executed in contemplation of and as part of one transaction. Each of the entity parties either signed or was referred to in at least one of the agreements. To be treated as part of the same transaction, documents need not even refer to each other if the contents make the parties' intent clear. (*Cadigan v. American Trust Co.* (1955) 131 Cal.App.2d 780, 786-787.) Here, however, the documents not only refer to each other, they make clear they were both parts of the same transaction.

That the Dealer Manager Agreement was not executed for 10 months after the Advisor Operating Agreement does not control. Nothing in the law requires contemporaneous execution. (*Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378; *Cadigan v. AmericanTrust Co.*, *supra*, 131 Cal.App.2d at p. 786 [letter sent four months after note and deed executed part of same transaction].) The critical point is that the writings be executed as part of one transaction. (Civ. Code, § 1642; *Cadigan*, at p. 786.)

Plaintiffs' argument the two agreements are separate is belied by their allegations in the complaints and arguments in the petition and reply. The complaint refers to the two agreements collectively as the "Contract," and alleges SC Distributors breached the Contract. Further, it pleads that plaintiffs entered into the two agreements in reliance on defendants' misrepresentations.

In the petition plaintiffs argue the claims under the two "overlapping agreements" cannot be divided without risking conflicting rulings on common factual issue.

Plaintiffs contend defendants cannot rely on the argument the two agreements are an integrated contract because they would not stipulate to that fact at the hearing on the motion to compel. Without deciding this issue, we are not relying on the allegation in the complaint that the agreements are "expressly interconnected and part of a single legal contract." Integration is not the issue. Rather, the issue is whether the contents of the agreements and the Preliminary Term Sheet show the agreements are sufficiently related to be read together for the purpose of compelling arbitration. They are.

*Personal Security & Safety Systems Inc. v. Motorola* (5th Cir. 2002) 297 F.3d 388 (*Personal Security*) is based on facts strikingly similar to ours and we find it persuasive. In *Personal Security*, the parties executed two agreements, a stock purchase agreement and a licensing agreement, as part of one larger transaction. The stock

purchase agreement contained an arbitration provision while the product development agreement did not. The arbitration provision covered “any and all claims, demands, actions, disputes, controversies, damages, losses, liabilities, judgments, payments of interest, penalties, enforcement of settlement agreements, deficiencies, any and all demands not yet matured . . . and other matters in question arising out of or relating to this Agreement . . . .” (*Id.* at p. 392.) The licensing agreement contained a forum selection provision.

The court stated that when “an arbitration provision purports to cover all disputes ‘related to’ or ‘connected with’ the agreement, we have held that the provision is ‘not limited to claims that literally “arise under the contract,” but rather embraces all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute.’ [Citation.]” (*Personal Security, supra*, 297 F.3d at p. 393.) It held that “in the absence of a contrary expression of intent in the Stock Purchase Agreement, the arbitration provision in the Product Development Agreement covers all disputes related to the subject matter of the entire transaction . . . .” (*Id.* at p. 395.) Such is the case here.

*c. Choice of Law and Venue Provision*

Plaintiffs assert the choice of law/venue provision in the Dealer Manager Agreement does express a contrary intent and must govern the breach of contract and breach of fiduciary duty claims. We disagree.

The same argument was made and rejected in *Personal Security, supra*, 297 F.3d 388 where one of several contemporaneously executed documents contained a forum selection provision. It stated the agreement would “be governed and construed in accordance with the laws of the State of Texas. Any suit or proceeding brought hereunder shall be subject to the exclusive jurisdiction of the courts located in Texas.” (*Id.* at p. 395, capitalization omitted.)

The court found that, examining that provision alone, it could be interpreted to mean courts in Texas had sole authority to resolve all actions arising from the stock purchase agreement. However, the agreement was not to be read alone but in conjunction with all the terms of all the documents that were part of the transaction. Based on the finding the arbitration provision in the Product Development Agreement applied to every claim, the forum selection clause had to be interpreted consistently. (*Personal Security, supra*, 297 F.3d at p. 395.) In that light, the forum selection clause meant that the actions in the Texas courts were those “not subject to arbitration.” (*Id.* at p. 396.)

The same is true here. First, the title of the provision in the Dealer Manager Agreement denominates it as “Applicable Law; Venue” (underscoring omitted). (See *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1030 [heading used to interpret indemnification provision].)

The language states the agreement is to be governed by the laws of the State of New York. Plaintiffs have not cited any New York law pursuant to which the Dealer Manager Agreement should be construed.

The choice of law/venue provision goes on to provide that New York state and federal courts provide exclusive jurisdiction for any disputes. Contrary to plaintiffs’ claim, this language does not “express[] the O’Donnell REIT and SC Distributors’s intent to [solely] litigate in court disputes arising from the Dealer Manager Agreement.” The paragraph actually states jurisdiction shall exclusively be in courts in New York for “any suit, action or other proceeding arising from this Agreement and the Offering . . . .”<sup>2</sup> It is not a dispute resolution clause that requires the breach of contract and breach of fiduciary causes of action be tried. Thus, Civil Code section 1636, which provides that a contract must be construed to effect the parties’ intention at the time of contracting, does not apply

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<sup>2</sup> In this paragraph the parties waived their rights to a jury trial.

because it is based on the premise the Dealer Manager Agreement expresses the intent to litigate actions in court.

When construing various portions of agreements, we must “try to give effect to every clause and harmonize the various parts with each other.” (*Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.* (2004) 120 Cal.App.4th 17, 33-34.) Like the court did in *Personal Security*, to harmonize the choice of law/venue provision with the arbitration provision in the Advisor Operating Agreement, we determine it means any disputes not subject to arbitration are to be litigated in New York.

In filing suit in Orange County Superior Court, plaintiffs chose to ignore this requirement<sup>3</sup> as well as the arbitration clause that plaintiffs concede applies to at least two of their causes of action.

Plaintiffs misplace their reliance on language stating the parties waive their right to assert an action is not subject to the venue provision. The reasonable interpretation of this sentence is that if one party brings an action in New York for a non-arbitrable matter, the other will not challenge that venue or jurisdiction.

Further, as noted above, it does not matter that the agreements here were executed by different parties or at a later date. The two agreements were part of one larger “unified contract” to which all the entities except Advisor were parties. Advisor was created by the Advisory Operating Agreement, is owned by SCAS and Sponsor, and is an integral part of the entire transaction documented by the unified contract. In addition creation of the O’Donnell REIT was contemplated by the Preliminary Term Sheet and the Advisory Operating Agreement. In fact, the O’Donnell REIT is the reason for the entire transaction. And, as discussed in the next section, Advisor is equitably estopped from denying the applicability of the arbitration provision.

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<sup>3</sup> Plaintiffs argue this provision should not apply because all parties are located in Orange County, the transactions have no relation to Orange County, and defendants have never demanded transfer to New York.

### 3. *Equitable Estoppel*

Plaintiffs claim the O'Donnell REIT cannot be compelled to arbitrate because it was not a party to the Advisor Operating Agreement. Further, they argue SC Distributors cannot compel arbitration because it, too, was not a party to the Advisor Operating Agreement. In addition to the fact the two agreements were part of one unified contract, equitable estoppel defeats this argument.

*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262 sets out the general principle of equitable estoppel in the arbitration context. “[A] party may not make use of a contract containing an arbitration clause and then attempt to avoid the duty to arbitrate by defining the forum in which the dispute will be resolved. [Citations.]” (*Id.* at p. 272; see *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833 [signatory plaintiff who sues on a written contract containing an arbitration clause may be estopped from denying arbitration if he sues nonsignatories or related or affiliated persons with the signatory entity].) “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. [Citations.]” (*Boucher*, at p. 272.) “[A] nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are ‘intimately founded in and intertwined’ with the underlying contract obligations. [Citation.]” (*Id.* at p. 271.)

As detailed above, all of plaintiffs’ claims arise from or are connected to the Advisor Operating Agreement. Further, there is a substantial overlap between the agreements such that they are one unified agreement. Plaintiffs also acknowledge the causes of action against each of the defendants are substantially intertwined with those against the others.

*JSM, supra*, 193 Cal.App.4th 1222 is instructive. In *JSM* the plaintiffs sued, among other things, for breach of three purchase and sale agreements (PSA’s),

which contained arbitration provisions, and three related deed restrictions agreements. The PSA's were signed by only two of the four plaintiffs and five of the twenty-seven defendants.

The court reiterated the rule in *Boucher* that the signing plaintiffs who sue on an agreement with an arbitration provision may be compelled by both signatory and nonsignatory defendants to arbitrate their claims if the claims are inextricably intertwined. (*JSM, supra*, 193 Cal.App.4th at p. 1239.) ““Courts applying equitable estoppel against a signatory have “looked to the relationships of the persons, wrongs and issues, in particular whether the claims that the nonsignatory sought to arbitrate were ““intimately founded in and intertwined with the underlying contract obligations.””” [Citation.]” (*Id.* at p. 1238.)

*JSM* went on to hold “this doctrine should . . . be equally applicable to a nonsignatory plaintiff. When that plaintiff is suing on a contract—on the basis that, even though the plaintiff was not a party to the contract, the plaintiff is nonetheless entitled to recover for its breach, the plaintiff should be equitably estopped from repudiating the contract’s arbitration clause. [Citations.]” (*JSM, supra*, 193 Cal.App.4th at pp. 1239-1240.)

The court found that rule was particularly germane “where, as appears to be the case here, all of the plaintiffs, signatory and nonsignatory, are related entities.” (*JSM, supra*, 193 Cal.App.4th at p. 1240.) Thus, “[a] nonsignatory plaintiff can be compelled to arbitrate a claim even against a nonsignatory defendant, when the claim is itself based on, or inextricably intertwined with, the contract containing the arbitration clause.” (*Id.* at p. 1241.)

As discussed above, all of plaintiffs’ claims arose under the Advisor Operating Agreement. But even had they not, the claims made in connection with that Agreement and the Dealer Manager Agreement were “inextricably intertwined” such that

all claims should be arbitrated together. Further, the parties are related to and affiliated with each other.

In attempting to distinguish *JSM*, plaintiffs argue the holding that a nonsigning defendant can compel a nonsigning plaintiff to arbitrate is merely dicta because the court made no finding the claims under the two documents at issue were sufficiently inextricably intertwined. While it is correct the appellate court remanded the case to the trial court, it did so merely because the record on appeal was insufficient to determine the degree of intertwining of the claims. (*JSM, supra*, 193 Cal.App.4th at p. 1244.) Underpinning any decision to be made by the trial court were the holdings that nonsigning parties could be compelled to arbitrate if the claims were sufficiently dependent on each other.

#### *4. Section 1281.2, Subdivision (c)*

Under section 1281.2, subdivision (c) where “[a] party to an arbitration agreement is also a party to a pending court action or special proceeding 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,” a court has the discretion to deny a motion to compel or to stay arbitration. Here, however, because we have determined all claims are arbitrable against all parties, section 1281.2. does not apply.

**DISPOSITION**

The petition is denied. Real parties in interest are entitled to their costs.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.