UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
11-3768
11-3773

In re: Wholesale Grocery Products Antitrust Litigation

Blue Goose Super Market, Inc., and Millennium Operations, Inc. d/b/a R.C. Dick's Market,

Plaintiffs-Appellants,

v.

SuperValu Inc. and C&S Wholesale Grocers, Inc.,

Defendants-Appellees.

King Cole Foods, Inc.; JFM Market, Inc.; MJF Market, Inc.,

Plaintiffs-Appellants,

v.

SuperValu Inc.; C&S Wholesale Grocers, Inc.,

Defendants-Appellees.

APPELLANTS' RESPONSE TO APPELLEES' PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Sources

INTRODUCTION

Appellants Blue Goose Super Market, Inc., Millennium Operations, Inc., d/b/a R.C. Dick's Market, King Cole Foods, Inc., JFM Market, Inc., and MJF Market, Inc. (collectively "Retailers"), submit that the panel's decision aligns with the decisions of every Circuit applying or declining to apply equitable estoppel, including this Court, and with Minnesota law, which follows federal law. The panel decision neither creates nor exacerbates an intercircuit split, nor undermines a controlling state's law. Therefore, Appellees SuperValu Inc. and C&S Wholesale Grocers Inc.'s (collectively "Wholesalers") petition for rehearing *en banc* and panel rehearing should be denied.

ARGUMENT

I. The Panel's Decision Reflects Settled Law that Equitable Estoppel Requires Reliance on the Terms of an Agreement Subject to Arbitration

The panel properly rejected Wholesalers' argument that "concerted misconduct" allegations alone, without reliance on a contract subject to arbitration, is sufficient for equitable estoppel. Under Wholesalers' approach,[1] arbitration would extend to every non-signatory co-conspirator so long as a plaintiff agreed to arbitrate with one conspirator. No Circuit has ever applied equitable estoppel in this manner and the Eleventh Circuit has specifically rejected this reading of its own case upon which Wholesalers rely. The panel instead followed settled law

[1] Wholesalers' Petition ("Wh. Pet.") at 6 ff.

that a plaintiff's claims must rely on the terms of a contract containing an arbitration clause for equitable estoppel to apply. *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 924, n.8 (8th Cir. 2013).

This Court has never applied equitable estoppel unless plaintiff's claims relied on the terms of an agreement subject to arbitration. *See PRM Energy Sys., Inc. v. Primenergy L.L.C.*, 592 F.3d 830, 836 (8th Cir. 2010) (equitable estoppel applied where plaintiff alleged defendants conspired to violate terms of agreement with arbitration provision); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 797 (8th Cir. 2005) (equitable estoppel applied where plaintiffs alleged that defendants did not fulfill promises made in agreement with arbitration provisions). Where a plaintiff's claims did not rely on the terms of a contract subject to arbitration, this Court has denied application of equitable estoppel. *See Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726 at 733-35 (8th Cir. 2009) (equitable estoppel did not apply where claimants would have basis for recovery even if there were no agreement subject to arbitration, applying Mississippi law).

Every Circuit of which Retailers are aware has applied equitable estoppel only where plaintiff's claims relied upon the terms of an agreement subject to arbitration. [2]

[2] *Applying equitable estoppel*: *Aggarao v. MOL Ship Mgt. Co., Ltd.*, No. 10-2211, 2012 WL 887595, at *13-14 (4th Cir. Mar. 16, 2012) (contract with arbitration clause "sets forth the terms and conditions of employment" providing

The panel's decision thus aligns with decisions from the Second, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits. Wholesalers' position is at odds with

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basis for plaintiff's claims); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 528 (5th Cir. 2000) (district court did not abuse discretion in applying equitable estoppel when "plaintiffs' claims are so intertwined with and dependent upon [the agreement with an arbitration provision]"); *Hughes Masonry Co., Inc. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 841 (7th Cir. 1981) (equitable estoppel appropriate because "facts alleged constitute breaches of obligations spelled out in the [agreement with arbitration provisions]. Ultimately, therefore, [plaintiff] must rely on the terms of the [agreement with arbitration provisions] in its claims against [defendant]."); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 948 (11th Cir. 1999) (equitable estoppel applied where plaintiff's allegations of collusive behavior were "intimately founded in and intertwined with obligations imposed by [the contract incorporating an arbitration provision].").

Denying equitable estoppel: *Ross v. Am. Express Co.*, 547 F.3d 137, 146 (2d Cir. 2008) (that subject matter of dispute is intertwined with contract providing for arbitration is a necessary, but not sufficient, condition for equitable estoppel); *R.J. Griffin & Co. v. Beach Club II Homeowners Assoc.*, 384 F.3d 157, 161-62 (4th Cir. 2004) (equitable estoppel inappropriate where duties allegedly violated arose under state law and were "not dependent on the terms of the general contract" under which the work was performed); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009) (equitable estoppel inappropriate where, *inter alia*, "[t]he resolution of [plaintiff's] claims does not require the examination of any provision of the [agreement subject to arbitration]"); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x. 704, 710 (10th Cir. 2011) (unpublished) (equitable estoppel did not apply in antitrust case where "the Agreement does not form the legal basis for [plaintiff]'s claims. … [Plaintiff]'s claims do not rely on the terms of the Agreement in a manner that would make it unfair for [plaintiff] to avoid arbitrating those claims with the [defendants]."); *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds sub nom. Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (declining to apply equitable estoppel without reliance: "Plaintiff's actual dependence on the underlying contract in making out the claim against the non-signatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel."). *But see Hill v. G E Power Systems, Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) (affirming denial of equitable estoppel where no reliance and plaintiff alleged substantially interdependent and concerted misconduct, but noting that the latter may provide an alternative basis for equitable estoppel).

the overwhelming weight of authority and would create a split among the Circuits if adopted by this Court.

As the parties agreed, Minnesota law governs the ability of non-signatories to enforce arbitration provisions here. *See* 707 F.3d at 921 (citing *PRM Energy*, 592 F.3d at 833). Minnesota law (following federal law) requires reliance on a contract subject to arbitration for equitable estoppel to apply. *See Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 356 (Minn. 2003) ("Equitable estoppel prevents a signatory from relying on the underlying contract to make his or her claims against the nonsignatory." (citing *MS Dealer*, 177 F.3d at 947)). There is no basis to conclude that Minnesota courts would depart from the Minnesota Supreme Court's formulation and apply equitable estoppel in the absence of such reliance.[3]

"[T]he lynchpin for equitable estoppel is equity and the point of applying it to compel arbitration is to prevent a situation that would fly in the face of fairness."

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[3] Wholesalers' sole post-*Onvoy* Minnesota case, *ev3 Inc. v. Collins*, Nos. A08-1816, A08-1901, 2009 WL 2432348 (Minn. Ct. App. Aug. 11, 2009), is unpublished and therefore not precedential. 707 F.3d at 921-22. Moreover, *ev3* affirmed the district court's *refusal* to apply equitable estoppel because, *inter alia*, many of the claims asserted "have nothing to do with the individual contracts." 2009 WL 2432348, at *7. The court's discussion of when equitable estoppel *might* apply is therefore *dicta* from a non-precedential decision. The other Minnesota case Wholesalers cite, *Dominium Austin Partners, LLC v. Lindquist*, No. C5-00-2010, 2001 WL 950085 (Minn. Ct. App. Aug. 21, 2001), was decided eight years before *Onvoy* and is also unpublished and of no precedential value. Moreover, the court in *Dominium* applied equitable estoppel because the signatory's claims were "premised on contractual relationships and obligations that exist because of, and pursuant to, the agreements [with arbitration provisions]." *Id.* at *8.

In re Humana, 285 F.3d at 976 (internal citations and quotations omitted). The purpose of this equitable remedy is to prevent a party from "relying on the contract when it works to his advantage by establishing the claim, and repudiating it when it works to his disadvantage by requiring arbitration." *Id.* (internal alterations and quotations omitted). This is the teaching of the Minnesota Supreme Court in *Onvoy* and is the "*sine qua non*" for equitable estoppel. *Id*. To eliminate this reliance requirement would eliminate the "equitable" element from equitable estoppel.

A. Wholesalers' Mistaken Reading of *MS Dealer* Has Been Rejected by this Court and by the Eleventh Circuit.

Wholesalers are incorrect that the reliance principle in *Onvoy* and followed by the panel would nullify "half of the doctrine" in *MS Dealer*. Wh. Pet. at 9. Equitable estoppel's "concerted misconduct" element always requires that a claim be "intimately founded in and intertwined with obligations imposed by [the contract containing the arbitration clause]." *MS Dealer*, 177 F.3d at 948; *accord PRM Energy*, 592 F.3d at 835 ("The concerted-misconduct test requires allegations of 'pre-arranged, collusive behavior' demonstrating that the claims are 'intimately founded in and intertwined with' the agreement at issue." (quoting *MS Dealer*, 177 F.3d at 948)).[4] Reading the reliance requirement out of *MS Dealer*, as Wholesalers

[4] Defense counsel conceded this point during oral argument below: (JA-224) (Oral Arg. Tr.) (*PRM Energy* "sets forth the basic test for equitable estoppel. Two

would do, was rejected by the Eleventh Circuit as "tenable only if the passage [on which Wholesalers rely] is read completely out of context." *In re Humana*, 285 F.3d at 976 (reliance on underlying contract in claim against the non-signatory defendant is "always the *sine qua non* of an appropriate situation for applying equitable estoppel"). There is no basis to presume that the Minnesota Supreme Court would reverse itself and commit such an error, particularly where *Onvoy* specifically refers to "reliance on the underlying contract" in describing equitable estoppel. *See Onvoy*, 699 N.W. 2d at 356.

II. The Panel's Interpretation of the "Relies On" Test Does Not Conflict with *MS Dealer* or *JLM Industries*

That Wholesalers disagree with the panel that Retailers' Clayton Act claims did not rely on the contracts in this case does not warrant *en banc* review. "Mere substantive disagreement with a panel decision is not, under Fed. R. App. P. 35, sufficient reason for an *en banc* rehearing." *Landell v. Sorrell*, 406 F.3d 159, 165-66 (2d Cir. 2005) (Sotomayor, J., concurring in denial of rehearing en banc) (internal quotation omitted). Second, Wholesalers' complaints are unfounded. The panel noted that, unlike plaintiffs in *PRM Energy* and *CD Partners*, who had no cause of action without the contracts at issue, Retailers' Clayton Act claims

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conditions have to be satisfied: First, the plaintiff needs to allege 'substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories'; and, *second, the concerted conduct must be 'intimately founded in and intertwined with the agreement at issue*.'") (emphasis added).

"exist independent of the supply and arbitration agreements." 707 F.3d at 923. Moreover, "since none of the Retailers' contracts with the Wholesalers specify price terms, the Retailers' claims do not involve alleged violation of any terms of these contracts." *Id*. This case is therefore unlike *JLM Industries Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004), where plaintiffs alleged that contractual price terms were inflated. Nor is there evidence (unlike *PRM Energy*) that the Retailers' contracts explicitly anticipated that a signatory would enter the relationship with a non-signatory – *viz*., conspiring in violation of the antitrust laws – that gives rise to Retailers' claims. 707 F.3d at 923. Thus, the panel concluded that "we cannot say that the Retailers' claims 'rely on' and have an 'intimate [ ] … and intertwined' relationship with the contracts such that equitable estoppel should apply." *Id.* at 924 (footnote and citation omitted).

Wholesalers seize on one phrase in the panel's opinion (no alleged "violation of any terms of the contracts"), elevate it into the holding and claim that it conflicts with *MS Dealer* and *JLM Industries v. Stolt-Nielsen*.[5] But the panel did not require a "violation" of a contract for equitable estoppel to apply. In discussing contract terms the panel simply ruled out one possibility for applying equitable estoppel, it was not stating a requirement for every application of the doctrine. Second, the panel's decision is fully consistent with *MS Dealer* where, unlike the

[5] Wholesalers also later mention *PRM*, Wh. Pet. at 12, but completely ignore the panel's grounds for distinguishing that case. *See* 707 F.3d at 924.

Retailers' claims, "each of [plaintiff's] fraud and conspiracy claims depended entirely upon her contractual obligation" which contained an arbitration provision. *In re Humana*, 285 F.3d at 973 (internal alterations and quotations omitted).

The panel's decision also aligns with the Second Circuit's decision in *JLM Industries*. There, plaintiffs alleged injury based on ship "charters containing allegedly inflated price terms"; the charters were subject to arbitration. 387 F.3d at 175. Here, Retailers do not allege injury based on inflated price terms contained in their contracts with Wholesalers, which in fact contain no price terms. *See* 707 F.3d at 920.[6] There was also a "close relationship" between the signatories to the arbitration agreements and the non-signatories seeking to enforce them through equitable estoppel, which is a further requirement for equitable estoppel in the Second Circuit. *See* 387 F.3d at 178; *Ross*, 547 F.3d at144 (parent companies and contracting subsidiaries). No such relationship exists between Wholesalers, who are horizontal competitors.

[6] Wholesalers' claim that the panel "misapprehended" the Retailers' supply agreements with Wholesalers is both inaccurate and irrelevant. The supply agreements do not "expressly incorporate the invoices and pricing terms by reference." Wh. Pet. at 11. *See*, *e.g.*, Millennium Supply Agreement (JA-102 ff) (no reference to invoices or pricing terms). But it would make no difference even if they did, since Retailers do not allege invoices or supply agreements as the basis for their claims. No reference to rebates in Retailer Millennium's Supply Agreement can be construed as setting prices, and its Clayton Act claims do not rely on rebate terms. The remaining Retailers agreements do not refer to rebates.

III. The Panel's Decision Correctly Restricts Equitable Estoppel to the "Limited Circumstances" for Which It is Intended

Arbitration is contractual, including deciding with whom a party will arbitrate. *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) ("[P]arties may specify *with whom* they choose to arbitrate their disputes."). Equitable estoppel therefore applies only in "limited circumstances" to prevent the manifest unfairness that would result from allowing a plaintiff to rely on some contractual terms while disavowing others. *PRM Energy*, 592 F.3d at 834. Wholesalers attack a straw man by arguing that the panel's decision "creates a major loophole in FAA enforcement" by requiring a breach of contract subject to arbitration. Wh. Pet. at 12-13. As noted above, the panel's decision does not require a breach of contract to apply equitable estoppel. Nor does reliance "categorically exempt" antitrust claims from arbitration based on equitable estoppel. Wh. Pet. at 13. For example, plaintiffs' antitrust claim in *JLM Industries* was subject to equitable estoppel based in part on plaintiffs entering into contracts with inflated price terms where these contracts were also subject to arbitration. *See* 387 F.3d at 178.

There is nothing unfair in allowing Retailers to sue in court a co-conspirator who agreed not to compete in its competitor's territory (SuperValu in New England and C&S in the Midwest) and with whom Retailers have no arbitration agreement. An antitrust plaintiff "is entitled to obtain damages from cartel

members that made no sales to plaintiffs whatsoever, provided that the plaintiff was a direct purchaser from at least one cartel member." Phillip E. Areeda & Herbert Hovenkamp, 2 ANTITRUST LAW ¶ 330d (2011) (citing *Paper Systems v. Nippon Paper Indus.*, 281 F.3d 629 (7th Cir. 2002) (Easterbrook, J.)). This is all that Retailers seek to do here and there is nothing inequitable about it.[7]

Retailers respectfully request that this Court deny Wholesalers' request for rehearing *en banc* and for panel rehearing.

[7] Wholesalers argue that the panel's opinion "overlooked" their argument that the exchange of Millennium's and Village Market's supply and arbitration agreements allegedly provide other grounds for finding that their antitrust claims "rely on" and are intertwined with those agreements. Wh. Pet. at 14-15. The panel is not required to address every argument raised by Wholesalers. Moreover, Retailers' Clayton Act claims are not based on the exchange of customer supply agreements. For example, Retailer Blue Goose's claim is identical to that of Millennium's even though no Blue Goose agreement was ever exchanged under the AEA. *See Lenox MacLaren*, 449 F. App'x. at 710 (for purposes of applying equitable estoppel, "[f]or a plaintiff's claims to rely on the contract containing the arbitration provision, the contract must form the legal basis of those claims; it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but-for' relationship with them").

Dated: May 1, 2013

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