IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0487

STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *Petitioner,*

v.

RENE G. DENISE, *Respondent*

Honorable Tera L. Salango, Judge
Circuit Court of Kanawha County
Civil Action No. 19-C-1045

REPLY BRIEF OF THE PETITIONER

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I. INTRODUCTION/ASSIGNMENTS OF ERROR

For the reasons set forth below and in Petitioner State of West Virginia Department of Health and Human Resource's (DHHR's) initial brief, the "Order Denying Defendant's Motion to Dismiss, or, in the Alternative, Compel Arbitration And Granting Plaintiff's Leave to File A Second Amended Complaint" must be reserved. This Reply Brief will specifically address issues raised in Respondent's Brief with respect to the following assignments of error:

- The Circuit Court erred as a matter of law in ruling that Denise's West Virginia Human Rights Act ("WVHRA") claims are outside the scope of the arbitration agreement Denise entered into, because employment-related claims are clearly within the scope of an employment agreement, and any question regarding the scope of arbitrable issues must be resolved in favor of arbitration.

- The Circuit Court erred as a matter of law in ruling that equitable estoppel does not apply to allow DHHR, a non-party to the contract, to enforce the arbitration agreement Denise entered into as Denise's claims are employment-related and, therefore, are intertwined with, rely on, and/or arise out of and relate to her employment contract with Sunbelt Staffing, LLC, from which she benefited.

Respondent asks this Court to adopt the "clear and unmistakable" standard as to the scope of the arbitration clause at issue, irrespective of the fact that Denise's employment agreement is not a collective bargaining agreement ("CBA"). Respectfully, as recently as November 17, 2020, this Court recognized that arbitration clauses in employment agreements that are not CBAs have been enforced as applicable to statutory claims, not when such agreements were "clear and unmistakable", but when such claims were specifically addressed in the agreement. *AC&S Inc. v. George*, No. 19-0459, n. 47 (W.Va. Nov. 17, 2020) (citing *Hampden Coal, LLC v. Varney*, 240 W.Va. 284, 810 S.E.2d 286 (2018)). To hold otherwise would be to ignore not only this Court's precedent, but also fundamental distinctions between CBAs and individual employment agreements. As commentators have noted, the "different standard concerning the arbitration of

statutory claims is the result of a historical concern that individual employees were either unaware of or had not consented to the waiver of their rights under a CBA. There is a 'tension between collective representation and individual statutory rights.' When the union makes a concession affecting an individual's rights to achieve a larger, corporate goal, individual employees should be informed of this decision. But where an individual has chosen to enter into an individualized agreement and makes his or her own decisions regarding representation, 'the same concerns are not present.' Thus, in order to ensure that individual employees covered under a CBA are aware of what they are agreeing to, the CBA must clearly spell out what individual statutory rights are subject to arbitration." Arthur T. Carter , Edward F. Berbarie , and Sean M. McCrory, "The Principal Differences Between Labor and Employment Arbitration", 69 The Advocate (Texas) 85 (Winter 2014) (footnotes omitted).

Respondent Denise also argues that equitable estoppel, a doctrine well-recognized by this Court, does not operate in this matter so as to allow DHHR to enforce her employment agreement and compel arbitration of this employment suit. On one hand, Denise asserts that this Court applies a "specific and exacting" test for the application of the doctrine, yet nevertheless recognizes that this Court has prescribed enforcement " 'when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement'" such that the claims "sufficiently arise out of and relate to the written agreement". [Respondent's Brief at 24 (citing Syl. Pt. 4, *Bluestone Brands, Inc.,* 239 W.Va. 694, 805 S.E.2d 805)]. In the instant matter, Respondent ***explicitly*** alleged employment-related claims against DHHR, an entity she alleges was her "joint employer," [JA0024 at ¶ 2; JA0035 at ¶ 4]. The theory adopted by this Court with respect to equitable estoppel is the "intertwined claims" theory. It is inconceivable to think that the employment-related suit brought by Denise is not intertwined with her employment agreement.

It is simply without question that the Circuit Judge erred and, in doing so, deprived DHHR of the benefit of arbitration. *See McCormick v. America Online, Inc.,* 909 F.3d 677, 683 (4th Cir. 2018) (Noting that goal of the Federal Arbitration Act is efficiency). The "Order denying Defendants' Motion to Dismiss, or in the Alternative, Compel Arbitration and Granting Plaintiff's Leave to File A Second Amended Complaint" must be reversed, and Denise be compelled to arbitrate.

II. ARGUMENT

A. The Circuit Court erred as a matter of law in ruling that Denise's West Virginia Human Rights Act ("WVHRA") claims are outside the scope of the arbitration agreement Denise entered into, because employment-related claims are clearly within the scope of an employment agreement, and any question regarding the scope of arbitrable issues must be resolved in favor of arbitration.

The arbitration agreement at issue clearly and conspicuously stated:

> **Arbitration**
>
> *Any dispute or difference* between Sunbelt and Consultant *arising out of or relating to this Agreement* shall be finally settled by arbitration in accordance with the rules of the American Arbitration Association by a single arbitrator. The Sunbelt and Consultant shall agree on an arbitrator. If Sunbelt and the Consultant fail to agree on an arbitrator within thirty (30) days after notice of commencement of arbitration, the American Arbitration Association shall, upon the request of either party, appoint the arbitrator to constitute the panel. Arbitration proceedings hereunder may be initialed by either Sunbelt or Consultant by making a written request to the American Arbitration Association, together with any appropriate filing fee, at the office of the American Arbitration Association in Jacksonville, Florida. All arbitration proceedings shall be held in Jacksonville, Florida.[1] Any order or determination of the arbitral tribunal shall be

[1] Inexplicably, Denise continues to argue that the location for arbitration specified in the agreement renders the agreement substantively unconscionable [Respondent's Brief at 29] in complete and total disregard of DHHR's expressed desire to hold proceedings in Charleston, West Virginia. [JA0174 ("The DHHR has no intention of enforcing that location. Rather, the DHHR is more than willing to arbitrate this matter in Charleston, West Virginia.")].

> final and binding upon the parties to the arbitration and may be entered in any court having jurisdiction.

[JA0119 (italicized emphasis added)]. Denise, arguing the standard this Court has employed to evaluate arbitration clauses contained in wholly distinct CBA agreements, asserts that the trial court "was correct in ruling that the subject arbitration agreement does not contain a ***clear and unmistakable requirement*** to arbitrate [her] WVHRA claims". [Respondent's Brief at 18 (emphasis added)]. Denise seemingly recognizes that the scope of the agreement *would* require the arbitration of her WVHRA claims if this Court's non-CBA standard is employed in evaluating the scope of the arbitration agreement. Notably, as recently as November 17, 2020 this Court recognized the distinction between the standard governing the scope of arbitration provisions in CBAs and that governing the scope of arbitration provisions in individual employment agreements. *See AC&S Inc. v. George*, No. 19-0459 (W.Va. Nov. 17, 2020). The distinction recognized by this Court in *AC&S* is prevalent in the precedent on this issue, and with good reason. Respectfully, as more fully set forth hereafter, Denise's claims unquestionably arise from her employment and termination of employment with Sunbelt and placement at Sharpe Hospital, and are therefore a "dispute or difference . . . arising out of or relating to" her Consultant Employment Agreement with Sunbelt subject to arbitration.

In *AC&S Inc., supra* this Court noted that "[w]e have held that an arbitration clause in an employment contract entered directly between an employer and employee (not in a CBA) is enforceable when it specifically addressed the claims at issue." *AC&S Inc.* at n. 47. In *AC&S*, this Court quoted approvingly in this context the decision of *Hampden Coal, LLC v. Varney*, 240 W.Va. 284, 810 S.E.2d 286 (2018). Notably, in *Hampden Coal* this Court stated "we are mindful that '[i]n determining whether the language of an agreement to arbitrate covers a particular controversy, the federal policy favoring arbitration of disputes requires that a court construe

liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration.'" *Hampden Coal* at 298 (quoting *State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004)).

Indeed, in concluding that a Plaintiff could be compelled to arbitrate a statutory Age Discrimination in Employment Act claim, the United States Supreme Court recognized:

> because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a 'liberal federal policy favoring arbitration agreements.' *Mitsubishi*, 473 U.S., at 625, 105 S.Ct., at 3353.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

As commentators have recognized:

> This different standard concerning the arbitration of statutory claims is the result of a historical concern that individual employees were either unaware of or had not consented to the waiver of their rights under a CBA. There is a 'tension between collective representation and individual statutory rights.' When the union makes a concession affecting an individual's rights to achieve a larger, corporate goal, individual employees should be informed of this decision. But where an individual has chosen to enter into an individualized agreement and makes his or her own decisions regarding representation, 'the same concerns are not present.' Thus, in order to ensure that individual employees covered under a CBA are aware of what they are agreeing to, the CBA must clearly spell out what individual statutory rights are subject to arbitration.
>
> A second major difference relates to the jurisdictional basis and the accompanying body of law concerning the enforcement of arbitration agreements. Although there is no question that employment arbitration agreements are covered by the FAA, it is not clear whether labor arbitration agreements are as well, because historically courts have not always used the FAA to enforce labor arbitration agreements. It is well accepted that employment arbitration agreements draw their power from the FAA which 'reflects a 'liberal federal policy favoring arbitration

> agreements.''44 Labor arbitration agreements are usually enforced through §301(a). The Court in *Penn Plaza* did not resolve whether the FAA requires the enforcement of the arbitration agreement; instead, it relied primarily on the LMRA despite the fact that the issue in the lower courts was whether the FAA required the arbitration of the claim under the ADEA. Courts using the FAA to enforce an arbitration agreement have consistently found that the FAA favors broad coverage; an arbitration agreement must be enforced where a valid, written agreement exists and the claims made are within the scope of the agreement. Since it is not clear that labor arbitration agreements are always enforced under the FAA, labor arbitration agreements may not be entitled to the same presumptions under the FAA; however, § 301 (a) does have similar broad presumptions of coverage.
>
> Finally, there are practical differences in the prosecution of labor and employment cases. Discovery, as it is understood in civil litigation, is not available in labor arbitration. Labor arbitration is largely informal, because it developed as a flexible means of resolving disputes concerning contract interpretation between two repeat-players, the union and management, and to calm 'industrial strife.' Employment arbitration, on the other hand, as a substitute for litigation, allows for discovery and contains many of the safeguards present in civil litigation. Typically employment arbitration allows 'document production, information requests, depositions, and subpoenas.' Although employment arbitration is relatively informal compared to civil litigation, it is more procedurally rigorous than labor arbitration since it is a substitute for litigation. As a consequence, labor arbitration is quicker and offers a speedy resolution, while sometimes, employment arbitration can take nearly as long as civil litigation.

Arthur T. Carter , Edward F. Berbarie , and Sean M. McCrory, "The Principal Differences Between Labor and Employment Arbitration", 69 The Advocate (Texas) 85, 87-88 (Winter 2014) (footnotes omitted).

Accordingly, the standard for examining the scope of arbitration provisions in individual employment agreements is different than that employed in the examination of CBAs. "Employment arbitration agreements, on the other hand, do not have the same 'clear and unmistakable' requirement in order for statutory claims to fall under their coverage. Broad language, such as language covering 'any other disputes,' is sufficient to encompass statutory

claims arising out of the employer-employee relationship." *Id.* at 87 (footnote omitted). Indeed, the arbitration provision this Court found to include a West Virginia Human Rights Act claim in *Hampden Coal* included "all disputes or claims of any kind" *Hampden Coal, supra* at 299, 301. *See also Sanchez v. Nitro-Lift Technologies, L.L.C.*, 762 F.3d 1139, 1142 (10th Cir. 2014) (Requiring arbitration of FLSA claims per agreement which stated "Any dispute, difference or unresolved question between Nitro–Lift and the Employee . . . shall be settled by arbitration by a single arbitrator") (emphasis omitted); *Arafa v. Health Express Corp.*, 243 N.J. 147, 233 A.3d 495, 499 (2020) (Employees' statutory claims subject to arbitration per agreement that read "The parties agree that any dispute, difference, question or claim arising out of or in any way relating to this Agreement or the transportation services provided hereunder shall be subject to binding arbitration . . . ."); *Bleumer v. Parkway Ins. Co.*, 277 N.J. Super. 378, 649 A.2d 913, 926 (1994) (Arbitration agreement encompassed statutory claims because " . . . that clause, in requiring arbitration of '[a]ny dispute ... regarding this agreement,' is very broadly worded. Webster's Third New International Dictionary (Unabridged 1969), at p. 1911, defines the word 'regarding' as meaning 'with respect to: concerning.' The word 'concerning' is defined as "relating to: regarding, respecting, about.' *Id.* at 470.").

In the instant case, as noted in Petitioner's Brief, it is more than a little disingenuous for Denise to argue, and the Circuit Judge to accept, that the scope of the arbitration agreement found in her employment contract does not include employment-related claims.[2] Moreover, any question relating to the scope of arbitrable issues must be resolved in favor of enforcing the agreement to arbitrate. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *Highlands Wellmont Health Network,*

[2] Critically, the trial court relied on the inappropriate "clear and unmistakable" standard in rendering her erroneous decision. JA0015-17 ("the Court finds that the arbitration agreement at issue does not contain a clear and unmistakable waiver for Plaintiff's statutory anti-discrimination claims.").

Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 576-77 (6th Cir. 2003). Applying the proper standard herein, the "Order Denying Defendant's Motion to Dismiss, or, in the Alternative, Compel Arbitration And Granting Plaintiff's Leave to File A Second Amended Complaint" must be reserved.[3]

B. The Circuit Court erred as a matter of law in ruling that equitable estoppel does not apply to allow DHHR, a non-party to the contract, to enforce the arbitration agreement Denise entered into as Denise's claims are employment-related and, therefore, are intertwined with, rely on, and/or arise out of and relate to her employment contract with Sunbelt Staffing, LLC, from which she benefited.

As more thoroughly described in Petitioner's Brief, the Circuit Judge has allowed Denise to sue for employment-related claims, yet not comply with her employment agreement, which requires arbitration. Respectfully, this Court applies the doctrine of equitable estoppel under which

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[3] It bears repeating that Denise seeks to be rewarded for her procedural antics. Denise initially brought suit against Sunbelt in order to allege she was a "joint employee" of Sunbelt and DHHR, only to voluntarily dismiss Sunbelt in an attempt to avoid arbitration. Denise now argues that she "only agreed to arbitrate disputes or differences with Sunbelt" and "did not agree to arbitrate any disputes, differences, claims, or other matters with DHHR." [Respondent's Brief at 12]. Rewarding such behavior flies in the face of the law and the intent of the parties entering into contracts expressly containing an arbitration agreement. Denise's claims arise from her employment and termination of employment with Sunbelt, and her placement at Sharpe Hospital, and are therefore a "dispute or difference . . . arising out of or relating to" her Consultant Employment Agreement with Sunbelt. As noted *infra,* the *Boucher v. Alliance Title Co., Inc.* Court noted:

> The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. (Sunkist, supra, 10 F.3d at pp. 757–758; see Metalclad, supra, 109 Cal.App.4th at p. 1717, 1 Cal.Rptr.3d 328.) That the claims are cast in tort rather than contract does not avoid the arbitration clause. (Sunkist, supra, 10 F.3d at p. 758.) Moreover, the federal decisional authority is not limited, as plaintiff suggests, to cases in which a contract with a subsidiary corporation is relied upon to compel arbitration with a parent entity. The fundamental point is that 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. (Metalclad, supra, 109 Cal.App.4th at p. 1714, 1 Cal.Rptr.3d 328; NORCAL Mut. Ins. Co. v. Newton, supra, 84 Cal.App.4th at p. 84, 100 Cal.Rptr.2d 683.)

127 Cal.App.4th 262, 272 (2005).

DHHR can enforce Denise's employment agreement and compel arbitration of this employment suit.

Estoppel allows a non-signatory to enforce a contract's arbitration agreement. Analyzing the issue, this Court held in *Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 702, 805 S.E.2d 805, 813 (2017) that "a non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration." *Bluestem* at 814. It is without question that an employment-related suit "arises out of and relates to" her employment agreement.

In apparent recognition of the fact that she cannot escape the arbitration agreement in the employment contract she signed, Denise now challenges the numerous cases cited by DHHR in support of the application of equitable estoppel as employing a "test" less "exacting" than that employed by this Court in *Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 702, 805 S.E.2d 805, 813 (2017). Respectfully, Denise's position amounts to little more than table pounding. Richard L. Gabriel, "Professionalism in Today's Competitive Market", 39-Jun Col. Law. 65, 66 (June 2010) ("the old lawyer admonition, 'If you have the facts on your side, pound the facts; if you have the law on your side, pound the law; if you have neither on your side, pound the table.'").

As commentators have recognized:

> The theory of equitable estoppel provides one basis for bringing a nonsignatory within an arbitration agreement. The doctrine of equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory or where the signatory to the written agreement raises allegations of substantially interdependent and concerted misconduct by both the

> nonsignatory and one or more of the signatories to the contract. The rationale behind allowing a nonparty to an arbitration agreement to use equitable estoppel to compel a party to arbitrate is that otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

21 Williston on Contracts § 57:19 (4th ed.) (footnotes omitted). According to commentators, "[a] signatory also cannot have it both ways. It cannot seek to hold the nonsignatory liable pursuant to duties imposed an agreement, which contains an arbitration provision, but deny the arbitration provision's applicability because the defendant is a nonsignatory." *Id.* (footnote omitted). Thus, ***"[w]hen a signatory's claims against a nonsignatory refer to or presume the existence of a written agreement that compels arbitration, the signatory's claims may be considered to arise out of and be directly intertwined with that agreement, rendering arbitration appropriate. If the party's claims are so intimately found in and closely related to an agreement which also mandates arbitration, the party opposing arbitration is equitably estopped from denying the arbitrability of its claims, even against a nonsignatory."*** *Id.* (footnotes omitted) (emphasis added). *See also* 1 Domke on Com. Arb. § 13:9 ("Equitable estoppel also applies when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.").

Relying on the decision of the Fourth Circuit Court of Appeals in *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006), this Court in *Bluestem* applied equitable estoppel when "the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration." *Bluestem* at 814. This Court reiterated the holding in *Bluestem* and offered further clarification in *Bayles v. Evans*, stating "[t]he inquiry into whether estoppel applies is fact

specific, but essentially involves a review of 'the relationships of persons, wrongs and issues, in particular whether the claims ... [asserted are] ***intimately founded in and intertwined with the underlying contract obligations.***'"243 W.Va. 31, 842 S.E.2d 235, 244 (2020) (citing *Choctaw Generation Ltd. P'ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001)) (additional citations omitted) (emphasis added).

The theory, therefore, employed by this Court is known as the *intertwined claims* theory. *See* 1 Commercial Arbitration § 8:16 (citing *Bluestem Brands, supra*). Importantly, also recognized by the commentary as employing the intertwined claims theory is *Ragone v. Atl. Video*, 595 F.3d 115 (2d Cir. 2010), one of the decisions cited by Petitioner herein and challenged by Respondent as employing a "less exacting" test for the "application of equitable estoppel." *Id.* at n. 8; Respondent's Brief at 22.[4]

Respondent's challenges to the other decisions cited in Petitioner's brief are similarly meritless. *See, e.g., Garcia v. Pexco, LLC,* 11 Cal.App.5th 782, 796-7, 217 Cal.Rptr.3d 793 (2017) ("all of Garcia's claims are ***intimately founded in and intertwined with*** his employment relationship with Real Time, which is governed by the employment agreement compelling arbitration. Garcia cannot avoid his obligation to arbitrate his causes of action arising out of his employment relationship by framing his claims as merely statutory. On these facts, it is inequitable

[4] The *Ragone* decision is quite instructive. In *Ragone*, the Plaintiff was a makeup artist to television and movie actors. Ragone was employed by Atlantic Video (AVI) from 2005 to 2011. *Ragone* at 118. ESPN was a client of AVI's. *Id.* Ragone "knew from the date of her employment . . . that she would treat with ESPN personnel in the ordinary course of her daily duties. This knowledge that she would extensively treat with ESPN personnel is sufficient to demonstrate the existence of a relationship between the [make-up artist and cable TV company] that allows the latter to avail itself of the arbitration agreement" between the make-up artist and her employer. *Ragone, supra* at 125. Likewise herein, the "Consultant Employment Agreement" Plaintiff signed stated Plaintiff "agrees and understands he or she will provide services under the direction and supervision of" DHHR. [Employment Agreement at ¶ 6, JA0069]. Moreover, the *Ragone* Court stated "there is likewise no question that the subject matter of the dispute between Ragone and AVI is factually intertwined with the dispute between Ragone and ESPN. It is, in fact, the same dispute: whether or not Ragone was subjected to acts of sexual harassment which were condoned by supervisory personnel at AVI and ESPN." *Id.* at 128.

for the arbitration about Garcia's assignment with Pexco to proceed with Real Time, while preventing Pexco from participating. This is because Garcia's claims against Pexco are rooted in his employment relationship with Real Time, and the governing arbitration agreement expressly includes statutory wage and hour claims. Garcia does not distinguish between Real Time and Pexco in any way. All of Garcia's claims are based on the same facts alleged against Real Time. Garcia cannot attempt to link Pexco to Real Time to hold it liable for alleged wage and hour claims, while at the same time arguing the arbitration provision only applies to Real Time and not Pexco. Garcia agreed to arbitrate his wage and hour claims against his employer, and Garcia alleges Pexco and Real Time were his joint employers. Because the arbitration agreement controls Garcia's employment, he is equitably estopped from refusing to arbitrate his claims with Pexco.") (emphasis added).

In the instant case, Denise brings claims for harassment and retaliation under the WVHRA. [*See* Compl., JA0024-0033]. These claims arise from Denise's employment and termination of employment with Sunbelt and placement at Sharpe Hospital, and are therefore are intertwined with her Consultant Employment Agreement with Sunbelt. As the *Boucher v. Alliance Title Co., Inc.* Court noted:

> The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. (*Sunkist, supra*, 10 F.3d at pp. 757–758; *see Metalclad, supra*, 109 Cal.App.4th at p. 1717, 1 Cal.Rptr.3d 328.) That the claims are cast in tort rather than contract does not avoid the arbitration clause. (*Sunkist, supra*, 10 F.3d at p. 758.) Moreover, the federal decisional authority is not limited, as plaintiff suggests, to cases in which a contract with a subsidiary corporation is relied upon to compel arbitration with a parent entity. The fundamental point is that 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. (*Metalclad, supra*, 109 Cal.App.4th at p. 1714, 1 Cal.Rptr.3d 328; *NORCAL Mut. Ins. Co. v. Newton, supra*, 84 Cal.App.4th at p. 84, 100 Cal.Rptr.2d 683.)

127 Cal.App.4th 262, 267, 25 Cal.Rptr.3d 440 (2005). Notably, in rendering its decision, the *Boucher* Court recognized that California Courts utilized the "intertwined claims" theory, the same theory employed by this Court. *See Boucher* at 271 ("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") (citations omitted). In short, the cases cited by DHHR in support of the application of equitable estoppel, like the remarkably similar *Rangone* decision, rely upon the same test applied by this Court in *Bluestem* and support Denise being compelled to arbitrate her claims against DHHR

III. CONCLUSION

In the case before this Court, the Circuit Court erred in failing to compel Denise to arbitrate her employment-related claims as she agreed to do in her Consulting Employment Agreement. The agreement is not subject to the "clear and unmistakable" standard ascribed to CBAs, and by arguing for the improper standard Denise apparently concedes the agreement is otherwise enforceable. Moreover, DHHR may equitably enforce the arbitration agreement as Denise's claims are intertwined therewith in accordance with this Court's standards. Accordingly, the "Order Denying Defendant's Motion to Dismiss, or, in the Alternative, Compel Arbitration And Granting Plaintiff's Leave to File A Second Amended Complaint" must be reserved.

Respectfully submitted this 11th day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2020, I caused to be served a true and correct copy of the "***Reply Brief of the Petitioner***" by depositing the same in the United States Mail, postage prepaid, upon the Respondents and their counsel of record as follows:

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