Rel: August 19, 2022

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1200551

Equity Trust Company

v.

Stephen Morris, Steven Sketo, Robert Fry, Dannie Maddox, Jerry Maddox, Gary Morgan, and Donna Taylor

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1200552

ETC Brokerage Services, LLC

v.

Robert Fry, Dannie Maddox, and Jerry Maddox

Appeals from Houston Circuit Court
(CV-20-900301)

WISE, Justice.

Equity Trust Company ("Equity Trust") and ETC Brokerage Services, LLC ("ETC"), appeal from the Houston Circuit Court's order denying their motions to compel arbitration and to stay the proceedings below. See Rule 4(d), Ala. R. App. P.

Procedural History

On July 10, 2020, Stephen Morris, Dannie Maddox, Jerry Maddox, Steven Sketo, Sheryl Sketo, and Robert Fry sued Kestra Investment Services, LLC ("Kestra"); James Blake Daughtry; The Daughtry Group, LLC ("Daughtry Group"); ETC; Equity Trust; Graysail Advisors, LLC ("Graysail"); Jared Eakes; Small World Capital, LLC ("SWC"); David Smalls; Trust Financial Corporation d/b/a SunTrust Bank ("SunTrust Bank"); and various fictitiously named defendants in the Houston Circuit Court.

On September 1, 2021, "Stephen Morris, individually and FBO Stephen Morris IRA; Dannie Maddox, individually and FBO Dannie Maddox IRA; Jerry Maddox, individually and FBO Jerry Maddox IRA; Steve Sketo, individually and FBO Steve Sketo IRA; Sheryl Sketo, individually and FBO Sheryl Sketo IRA; Robert Fry, individually and FBO Robert Fry IRA; Donna Taylor, individually and FBO Donna Taylor

IRA; and Gary Morgan, individually and FBO Gary Morgan IRA" (collectively referred to as "the plaintiffs") filed a first amended complaint against Graysail, Kestra, Daughtry, Daughtry Group, ETC, Equity Trust, Eakes, Smalls, SWC, SunTrust Bank, and fictitiously named defendants. In pertinent part, the first amended complaint included negligence, civil-conspiracy, and breach-of-fiduciary duty claims against Equity Trust and ETC.

On September 18, 2020, Equity Trust and ETC filed motions to compel arbitration and to stay the proceedings or, in the alternative, to dismiss the claims against them.

On September 30, 2020, the plaintiffs filed their second amended complaint. The second amended complaint alleged:

> "As set in particularity below, Dannie Maddox, Jerry Maddox, Sheryl Sketo, Steve Sketo, Stephen Morris, Robert Fry, and their respective IRAs (collectively, 'Kestra Plaintiffs')[1] plead intentional tort claims against Daughtry, Eakes, Smalls, Daughtry Group, Graysail, SWC, and/or fictitious defendants A through F (hereafter 'the Conspirators' or 'Co-Conspirators') for stealing nearly $1.5 million dollars of Kestra Plaintiffs' retirement savings.[2] Kestra Plaintiffs also plead breach of fiduciary claims against Daughtry's broker-dealer -- Kestra -- as well as Daughtry Group, Daughtry himself, and/or fictitious defendants G through P. Kestra Plaintiffs also sue Kestra, Daughtry's principal, as being vicariously liable for the intentional torts committed by Daughtry.

"Furthermore, Kestra Plaintiffs plead claims against Kestra, Daughtry Group, Daughtry, Eakes, Graysail, Smalls, SWC, Equity Trust, and fictitious defendants Q-T, for violating Alabama and Florida's blue-sky law.

"Alternatively, Kestra Plaintiffs plead negligence claims against Kestra, ETC, Equity Trust, Daughtry, Daughtry Group, and/or fictitious defendants U-W.

"Donna Taylor, individually and on behalf of her IRA, pleads the claims listed above against each defendant except Kestra.[3]

"Gary Morgan, who was not a client of Kestra or Daughtry but had roughly $233,000.00 stolen from him by Eakes and other co-conspirators, pleads, individually and on behalf of his IRA, intentional tort claims against Eakes, Smalls, Graysail, SWC, Equity Trust, ETC and fictitious defendants A-F. Furthermore, Morgan pleads claims against Eakes, Graysail, Smalls, SWC, Equity Trust, and fictitious defendants Q-T, for violating Arkansas' blue-sky law. Alternatively, Gary Morgan, individually and on behalf of his IRA, pleads negligence claims against Equity Trust and fictitious defendants U-W.

"Finally, all Plaintiffs plead negligence and negligent supervision, hiring and training against SunTrust Bank. Plaintiffs Jerry Maddox, Dannie Maddox, and Sheryl Sketo, on behalf of their IRA's, also plead a UCC claim against SunTrust Bank.

"________________________

"[1]Kestra Plaintiffs invested their retirement savings with Daughtry while he was a registered representative and agent of Kestra.

"[2]Kestra Plaintiffs also plead intentional tort claims against Equity Trust and ETC.

"[3]Donna Taylor asserted claims against Kestra in a previously filed FINRA arbitration."

The second amended complaint alleged that Blake Daughtry was a registered representative of Kestra and a broker-dealer who was registered with the Financial Industry Regulatory Association ("FINRA") until Daughtry "was barred by FINRA in March 2020 because of the fraud or breaches of fiduciary duties committed against Plaintiffs and others." It further alleged that Daughtry operated his financial-advising business through Daughtry Group, which had its principal place of business in Dothan.

Morris, Dannie Maddox ("Dannie"), Jerry Maddox ("Jerry"), Steven Sketo ("Steven"), Sheryl Sketo ("Sheryl"), Fry, and Taylor ("the Daughtry plaintiffs") were clients of Daughtry who had individual retirement accounts ("IRAs") with Kestra. The second amended complaint alleged that, in early 2019, while still an agent of Kestra, and without their knowledge, Daughtry devised a scheme to sell the accounts of the Daughtry plaintiffs to Eakes. That complaint alleged that Eakes was "a previously registered financial advisor with Merrill Lynch"; that, in 2018,

Eakes formed Graysail; that Graysail was a "sham company owned and controlled by Eakes"; that Graysail was previously registered with FINRA as a "Registered Independent Advisory"; and that Graysail's registration with the Securities and Exchange Commission ("SEC") was terminated in September 2019.

The second amended complaint alleged that, between March 2019 and June 2019, Daughtry told the Daughtry plaintiffs that he was merging with another agency but that he would continue to manage their accounts. That complaint alleged that Daughtry asked the Daughtry plaintiffs to sign a signature page to facilitate the process and that each of the Daughtry plaintiffs signed a signature page. That complaint further alleged:

> "... Unbeknownst to [the Daughtry plaintiffs], Daughtry or Eakes attached the signature pages to a document reflecting that Graysail was now 'advisor' for [the Daughtry plaintiffs] and had discretionary authority to 'invest' their funds.
>
> "... Using the original signatures from the signature pages, Daughtry's Co-Conspirators copied and pasted the signatures onto account documents to open fraudulent custodian and brokerage accounts at Equity Trust and ETC.
>
> "... Daughtry and his Co-Conspirators suppressed their scheme from [the Daughtry plaintiffs]. Daughtry, in fact, never mentioned the name Eakes to [the Daughtry plaintiffs]

one single time; or that someone other than himself would be managing their accounts; or that he was selling away their accounts.

"... After certain [Daughtry plaintiffs] received letters in the mail from Equity Trust in November 2019 that Graysail had lost its registration and that Graysail and Eakes were no longer the 'advisors' on their accounts, they contacted Daughtry in confusion because they were not aware that 'Eakes' was managing their retirement portfolios. Based on the Conspirators' misrepresentations and suppressions, they believed their accounts were with Kestra and that Daughtry was managing their accounts. Rather than come clean, Daughtry lied."

The second amended complaint further alleged:

"... Eakes and his Co-Conspirators transposed Plaintiffs' signatures over one hundred times onto ETC and Equity Trust account documents and opened brokerage and custodian accounts in Plaintiffs' names.[7]

"... ETC and Equity Trust knew these account documents were fraudulent as each signature was identical to the others (because all had been copied and pasted from the signature pages). Indeed, ETC and Equity Trust never should have allowed the Conspirators to open the fraudulent accounts in the first place.

"... The Conspirators fraudulently transferred Plaintiffs' accounts using two primary methods. First, the Conspirators copied and pasted certain Kestra plaintiffs' signatures on ACATs,[8] which 'authorized' Kestra to transfer the accounts to Equity Trust or another broker-dealer. Kestra and Equity Trust negligently and wantonly accepted the fraudulent ACATs without proper review or investigation, which allowed certain Kestra Plaintiffs' accounts to transfer to Equity Trust.

"... Acceptance of suspect accounts without authentic review for fraud is Equity Trust's business model. Afterwards, once the incipient fraud becomes too hot to handle in terms of legal liability, Equity Trust freezes accounts as necessary. This is after the damage is done to the victims. By these means Equity Trust profits from known systemic fraud for as long as it can get away with. The vast majority of Equity Trust Clients are not owners of 'self-directed' retirement accounts in fact; rather, they are unsophisticated investors whose life savings are being raided and risked by known fraudsters and high-rollers. These fraudsters and high-rollers are the ones 'directing' the accounts in the name of unsophisticated investors and Equity Trust has been fully aware of this for many years and has made boatloads of dirty money on the backs of unsophisticated investors.

"... Second, Daughtry instructed [the Daughtry plaintiffs'] retirement account providers to wire funds or issue checks made payable to Equity Trust FBO 'Client'; Interactive Brokers FBO 'Client', an online trading platform; or National Financial Services FBO 'Client', which is a subsidiary or affiliate of Kestra. The Conspirators suppressed that they deposited [the Daughtry plaintiffs'] retirement funds into the fraudulent accounts at Equity Trust, or directly into bank accounts under the Conspirators' control. Had Equity Trust and ETC acted with honesty, or with reasonable diligence, and discovered the fraudulent accounts and informed Plaintiffs about the fraudulent accounts, the funds in Plaintiffs' Equity Trust or ETC accounts would have been frozen at the onset.

"... While the Maddoxes and Mr. Fry's funds were held in Equity Trust custodian accounts, the Conspirators traded large quantities of Tesla stock for their benefit through ETC's trading platform. The Conspirators withdrew funds from

Plaintiffs' accounts into a SunTrust Bank account using BillPay requests.

"... The Conspirators outrageously and mockingly charged Plaintiffs' accounts with large 'management fees' for their 'services'. Likewise, Equity Trust and ETC charged fees even though they were aware that the accounts were fraudulent.

"... The Conspirators submitted fraudulent requests to Equity Trust for the issuance of checks. These requests contained the same forgeries as the fraudulent promissory notes and account documents. Equity Trust knew the check requests were fraudulent but issued the checks to the Conspirators anyway. Even though the checks were made payable to specific Plaintiffs, the Conspirators deposited the checks into SWC's account at a SunTrust Bank branch in or near Jacksonville, Florida.

"... After the fraudulent Equity Trust accounts were opened and funded, Eakes and his Co-Conspirators transferred most of the funds to SWC, a sham entity whose sole purpose was to steal Plaintiffs' money and operate a Ponzi scheme.[10] The Conspirators forged Plaintiffs' signatures on fraudulent promissory notes provided to Equity Trust. The fraudulent promissory notes reflect that Plaintiffs were 'investing' in SWC in exchange for an interest payment upon maturity. These promissory notes were fake and used by the Co-Conspirators to transfer money from Plaintiffs' fraudulent Equity Trust IRA custodian accounts to SWC. Once the money was deposited into SWC, the Conspirators took the money for themselves.

"....

"... The Conspirators opened fraudulent 'self-directed' IRA custodian accounts with Equity Trust and brokerage accounts with ETC in the name of Plaintiffs by forging their

signatures over one hundred times in account documents and fake promissory notes. Equity Trust and ETC were aware that its account documents and the promissory notes were fraudulent, but they concealed the forgeries and stolen confidential information of Plaintiffs -- which aided and abetted the Conspirators in fraudulently transferring Plaintiffs' retirement savings.

"... Equity Trust ignored numerous red flags concerning Eakes/Graysail and the fraudulent promissory notes issued by SWC. In violation of Equity Trust's own supposed 'policies and procedures,' the 'promissory notes' issued by SWC lacked proper documentation.

"... Furthermore, Equity Trust and ETC knew that Eakes and Graysail were fraudsters. Graysail operated out of a virtual office with no registered representatives according to brokercheck, a publicly available database; Eakes held no securities licenses; the fraudulent accounts opened by the Conspirators were purported IRA accounts belonging to an older clientele; and the documents Co-Conspirators submitted contained hundreds of forgeries.[11]

"... In furtherance of their pattern and practice of fraud, ETC and Equity Trust not only concealed the true nature of the fraudulent accounts and transfers from Plaintiffs, but they intentionally and actively tried to keep Plaintiffs from discovering that their retirement savings had been stolen.

"... Though Equity Trust and ETC became aware of the fraud much earlier, Equity Trust failed to permanently freeze Plaintiffs' accounts or disclose the Conspirators' nefarious activity to Plaintiffs even after Graysails' registration with the SEC was terminated in September 2019.

"... Rather than come clean, Equity Trust waited two months to mail Plaintiffs a vague letter at the end of

November 2019 stating that Eakes and Graysail were no longer associated with Equity Trust or Plaintiffs' accounts.[12]

"... Equity Trust froze Mr. Morgan's account around the time it mailed the November 2019 letter. After receiving the letter, which was the first time Mr. Morgan became aware of Eakes, Mr. Morgan tried to log into his account but was unable to because the account had been frozen. Mr. Morgan contacted Equity Trust who told him the account had been frozen because Graysail and Eakes were not registered with the SEC and that Eakes had tried to access his account. Apparently, Eakes tried to log in to steal the several grand remaining in Mr. Morgan's account. Equity Trust suppressed from Mr. Morgan that his account only held several grand and that the bulk of his retirement savings had been stolen.

"... Though Equity Trust knew that Eakes was a fraudster; that SWC was a sham entity and its 'promissory notes' were worthless; that Plaintiffs' accounts and transfers were littered with forgeries; and that the Conspirators had stolen almost all Mr. Morgan's and other victims' retirement savings months prior, Equity Trust intentionally suppressed the fraud and underlying facts to keep Mr. Morgan and other victims in the dark.

"... Starting in or around August 2020, to actively conceal the fraud, Equity Trust mailed, emailed, or made available fraudulent quarterly statements to Plaintiffs reflecting that the account balances of the fraudulent accounts contained the approximate amount that had been stolen. The true balances were zero (or close to zero). Equity Trust was fully aware that the real account balances were zero (or close to zero) but it misrepresented to Plaintiffs on the statements, that their retirement portfolios still had full value. The fraudulent statements even reflected that the fake promissory notes with SWC had full value. Equity Trust mockingly continued to assess the fraudulent accounts with fees well after it became aware of the fraud. Equity Trust to

this day continues to mail fraudulent statements to Plaintiffs reflecting that the fake promissory notes have value.

"... Had Equity Trust disclosed the fraud back in August 2019, the entire fraud would have been prevented because Plaintiffs' stolen funds would not have been fraudulently transferred out of the fraudulent accounts. Had Equity Trust disclosed the fraud in September 2019 (when Graysail's registration with the SEC was terminated), Plaintiffs would have been able to freeze and recover the remaining funds in the fraudulent accounts; and any remaining funds in SWC's accounts or under the Conspirators' control.

"... Furthermore, the $116,000.00 in stolen funds that were withdrawn from the Maddoxes' fraudulent Equity Trust account in November 2019 would have been frozen and Plaintiff Sheryl Sketo, who invested with Daughtry in November 2019, would have been privy to the fraud and thus would not have allowed her retirement plan administrator to provide Daughtry with a check payable to the payee: Equity Trust Company FBO Sheryl Sketo.

"... Kestra Plaintiffs became aware of the fraud after Daughtry was barred by FINRA in the Spring of 2020. Two local financial advisors in Dothan, Alabama assisted Kestra Plaintiffs in obtaining the fraudulent account documents from Equity Trust and ETC; obtaining access to the fraudulent accounts; canceling any automatic IRA contributions; and withdrawing any funds that remained in the fraudulent accounts. From the documents obtained from Equity Trust and ETC (which Equity Trust and ETC had previously concealed), Kestra Plaintiffs learned for the first time that these fraudulent accounts had been opened by the Conspirators using forgery and misappropriated personal information. Kestra Plaintiffs also learned their funds had been stolen through a Ponzi scheme.

"... Donna Taylor became [aware] of the fraud in April 2020. Gary Morgan became aware of the fraud in March 2020.

"______________________

"[7]Gary Morgan signed an account application with Equity Trust based on misrepresentations and suppressions made by his 'advisor,' Rhett Bedwell, who unbeknownst to Mr. Morgan was working with Eakes. At the time Mr. Morgan signed the account application, he was unaware of Eakes and the fact that Equity Trust and ETC were themselves Co-Conspirators and aiding and abetting the Conspirators. Other account documents and 'promissory notes' purporting to be approved by Mr. Morgan contained roughly fifteen forgeries, which Equity Trust and ETC were aware of but concealed from Mr. Morgan.

"[8]ACAT is the process of transferring accounts from one broker-dealer to another broker-dealer. To transfer an account, the client must sign an 'ACAT form' authorizing and requesting the transfer.

"....

"[10]David Smalls, Eakes['s] partner and co-conspirator, is listed as the registered agent.

"[11]Eakes and his co-conspirators also preyed on victims in Florida and Arkansas in addition to the forty or so victims connected with Daughtry. The total number of forgeries could be in the thousands.

"[12]After receiving the letter from Equity Trust in November 2019, Plaintiffs asked their advisor (Daughtry or Bedwell) what the letter meant as they were confused by it. Daughtry and Bedwell concealed the fraud and misrepresented that Graysail was merely underdoing a name change because of a trademark issue. Daughtry further

> represented everything was fine and that he would take care of it."

(Footnote 9 omitted.) The second amended complaint alleged claims of fraudulent suppression; fraudulent misrepresentation; violations of Alabama, Florida, or Arkansas securities laws; civil conspiracy; aiding and abetting fraud; the tort of outrage; negligence; and wantonness against Equity Trust and ETC.

After the plaintiffs filed the second amended complaint, Equity Trust and ETC filed new motions to compel arbitration and to stay the proceedings against them or, in the alternative, to dismiss all the claims asserted against them. The plaintiffs filed responses in opposition to the motions to compel. Subsequently, Equity Trust and ETC filed replies in support of the motions to compel. After conducting a hearing, the trial court denied the motions to compel filed by Equity Trust and ETC.[1] Equity Trust appealed, naming all the plaintiffs except Sheryl as appellees (see note 2, infra); ETC separately appealed, naming only Fry, Dannie, and Jerry as appellees. This Court consolidated the appeals ex mero motu.

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[1]The record on appeal does not include a transcript of that hearing.

Standard of Review

> "This Court's standard of review of a denial of a motion to compel arbitration is well settled:
>
> > "'"'This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995)(opinion on application for rehearing).'"'
>
> "Hoover Gen. Contractors-Homewood, Inc. v. Key, 201 So. 3d 550, 552 (Ala. 2016) (quoting Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003), quoting in turn Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000))."

Health Care Auth. for Baptist Health v. Dickson, 330 So. 3d 805, 808 (Ala. 2021).

<u>Discussion</u>

Equity Trust and ETC argue that the trial court erroneously denied their motions to compel arbitration.

In support of its motions to compel arbitration, Equity Trust attached an affidavit from Mary Colleen Kilbane. Kilbane stated that she was the director of operations for Equity Trust and that she was employed by Equity Administrative Services, Inc., to provide services to its affiliate, Equity Trust. Kilbane stated:

> "Equity Trust is engaged in the business of providing services as a directed custodian for self-directed retirement accounts, including self-directed individual retirement accounts ('IRAs'). Equity Trust does not provide investment advice to its clients, and its role with respect to its customers' accounts is generally limited to performing administrative actions needed to complete transactions directed by its customers, holding their IRA assets, and performing certain tax reporting required by the Internal Revenue Code."

Copies of IRA applications Equity Trust had received for all of the plaintiffs except Sheryl ("the customer plaintiffs") were attached to Kilbane's affidavit.[2] Those applications included the names, residence

[2]Kilbane asserted that Sheryl never applied for, opened, or maintained any accounts with Equity Trust.

addresses, dates of birth, and Social Security numbers of the customer plaintiffs as well as the purported signatures of the customer plaintiffs.

Kilbane stated:

> "Following receiving each Customer Plaintiff's IRA Application, Equity Trust verified his or her residence address, date of birth, social security number, and other personal identifying information by obtaining a LexisNexis Instant ID consumer verification report."

She also stated that Equity Trust established self-directed IRAs for each customer plaintiff and sent "Welcome Correspondence" to each customer plaintiff's verified residence address; that, on or about November 22, 2019, Equity Trust sent a letter to each customer plaintiff's verified residence address; and that "Equity Trust sent quarterly account statements to each Customer Plaintiff reflecting activity in his or her self-directed IRA." Kilbane further stated that the quarterly statements were sent either to the customer plaintiff's verified residence address or via e-mail notification, depending on the previously elected delivery method.

Equity Trust also attached copies of the "Traditional and Roth IRA Custodial Account Agreements and Disclosure Statements" ("the Equity Trust custodial agreement") in effect at the time the customer plaintiffs'

accounts were opened. The Equity Trust custodial agreement included an arbitration agreement that provided, in pertinent part:

> "SCOPE. You and Custodian agree that MANDATORY BINDING ARBITRATION will be the exclusive means of resolving *any claim* between you and Custodian or any of its officers, directors, or affiliates (including Equity Administration Services, Inc.), *including any existing or future claim arising out of or relating in any way to* (1) this Agreement, (2) any prior Agreement between you and Custodian, (3) *your IRA account, or (4) any services provided by Custodian*.
>
> "*All claims are subject to arbitration, no matter what law or legal theory they are based on or what remedy they seek*. The arbitrator has exclusive authority to resolve any questions regarding the application, enforceability, unconscionability, or interpretation of this Agreement and this arbitration provision. The arbitrator has exclusive authority to resolve any disputes regarding the timeliness of any demand for arbitration. Any questions about whether claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced."

(Emphasis added.) The Equity Trust IRA applications referenced the Equity Trust custodial agreement and included an acknowledgment of the arbitration agreement therein above the signature lines on the applications.

Kilbane stated that, in or around January 2020, copies of the Equity Trust custodial agreement were sent to each of the customer plaintiffs

"at either his or her verified residence address or via email notification, depending on the delivery method that he or she previously elected," and that "[n]one of the Customer Plaintiffs notified Equity Trust in writing or otherwise, that he or she did not consent to the Custodial Agreement." Kilbane also attached to her affidavit a copy of the Equity Trust custodial agreement "that was in force at Equity Trust as of January 1, 2020" ("the 2020 Equity Trust custodial agreement"). The 2020 Equity Trust custodial agreement also included an arbitration agreement that was virtually identical to the arbitration agreement included in the Equity Trust custodial agreement. Kilbane also discussed various correspondence that had been sent to each of the customer plaintiffs.

In support of its motions to compel arbitration, ETC attached an affidavit from Steven Bocan, a brokerage-services manager/chief compliance officer with ETC. In his affidavit, Bocan stated that, if the plaintiffs wished to open brokerage accounts with ETC, they first had to open an account with ETC's affiliate, Equity Trust. He further stated that ETC customers "may only open brokerage accounts by signing and submitting the relevant account agreement by mail, electronically, or fax to ETC's office in Ohio."

Copies of the ETC brokerage-account applications for Fry, Dannie, and Jerry were attached as exhibits to Bocan's affidavit. Bocan stated that "ETC's affiliate, Equity Trust, verified the residence address, date of birth, and social security number reflected on the ETC Customer Plaintiffs' Brokerage Applications by obtaining a LexisNexis Instant ID customer verification report." Bocan stated that, after the ETC brokerage accounts were established for Fry, Dannie, and Jerry, welcome letters were sent to them at their verified residence addresses; that "[n]one of the ETC Customer Plaintiffs ever contacted ETC to indicate that he or she did not open ETC brokerage accounts, correct any information reflected in the letter, or protest the terms of the Customer Agreement"; and that "ETC sent the ETC Customer Plaintiffs separate Trade Confirmation statements reflecting transactions executed in their respective Brokerage Accounts." The ETC brokerage-account applications included an arbitration agreement that provided: "Any controversy or claim arising out of or relating to this agreement or the brokerage account established under this agreement or any transaction therein shall be determined by FINRA arbitration under its procedures then in effect."

Copies of ETC's "Customer Agreement" ("the ETC customer agreement") that was in effect at the time the ETC brokerage accounts were established for Fry, Dannie, and Jerry were also attached as exhibits to Bocan's affidavit. The ETC customer agreement also included an arbitration agreement that provided, in pertinent part: "Any controversy or claim arising out of or relating to this Agreement or the brokerage account established by this Agreement or any transaction therein shall be determined by FINRA arbitration under its procedures then in effect." (Emphasis omitted.)

In this case, it is undisputed that the Equity Trust custodial agreement, the ETC brokerage-account applications, and the ETC customer agreement included arbitration agreements. However, the plaintiffs in this case challenge the validity and enforceability of those arbitration agreements. Morgan, who actually signed an Equity Trust IRA application that referenced the Equity Trust custodial agreement and its arbitration agreement, argues that he should not be bound by the arbitration agreement in the Equity Trust custodial agreement based on fraud. The remaining customer plaintiffs, Morris, Steven, Fry, Dannie, Jerry, and Taylor ("the nonsignatory plaintiffs") argue that there was no

agreement to arbitrate any claims against Equity Trust and ETC because the signatures on the applications that created their accounts were forged. We will address the arguments regarding Morgan and the nonsignatory plaintiffs separately.

I.

Equity Trust argues that the trial court erroneously denied its motions to compel arbitration of Morgan's claims against it because Morgan was a signatory to an Equity Trust IRA application that referenced the Equity Trust custodial agreement and the arbitration agreement included therein. In his affidavit submitted in support of the plaintiffs' opposition to the motion to compel, Morgan admitted that he had executed an Equity Trust IRA application and that he had authorized the transfer of the funds from his existing IRA to Equity Trust. However, he argues that the Equity Trust "agreements bearing his signature that contain arbitration provisions are also void and unenforceable due to fraud in the factum." Appellees' brief at p. 69.

> "Typically, challenges directed at a contract that contains an arbitration agreement, and not at the arbitration agreement itself, are for an arbitrator to resolve. Mason v. Acceptance Loan Co., 850 So. 2d 289, 294 (Ala. 2002); Investment Mgmt. & Research, Inc. v. Hamilton, 727 So. 2d 71, 78 (Ala. 1999) (relying on Prima Paint Corp. v. Flood & Conklin Mfg. Co.,

388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). However, 'a challenge to the very existence of the contract ... is an issue for a court, not an arbitrator, to decide.' Mason, 850 So. 2d at 295; J.C. Bradford & Co. v. Vick, 837 So. 2d 271, 273 (Ala. 2002) ('When a party is seeking to enforce an arbitration clause, the question whether a valid contract exists between the parties is to be decided by the trial court, not an arbitrator.'). In J.C. Bradford & Co. we explained this distinction:

> "'In Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967), the United States Supreme Court held that a fraud-in-the-inducement challenge to a contract that contained an arbitration clause should be decided by an arbitrator, and not by a court. However, we follow the reasoning of other courts that limit the holding in Prima Paint Corp. to "voidable" contracts (e.g., a contract where a party is induced through fraud or a contract where a party is an infant). However, where a party challenges the very existence of a contract, that dispute must be decided by a court. See Shearson Lehman Bros. v. Crisp, 646 So. 2d 613 (Ala. 1994).'

"837 So. 2d at 237 n. 2.

"Under these principles, it is clear that Hudson's fraud-in-the-factum claim is to be resolved by the trial court. Indeed, we have recently recognized that fraud-in-the-factum claims test the 'very existence of a contract' and are not subject to arbitration. See Anderson v. Ashby, 873 So. 2d 168 (Ala. 2003)(discussing Harold Allen's Mobile Home Factory Outlet, Inc. v. Early, [776 So. 2d 777 (Ala. 2000)], and Oakwood Mobile Homes, Inc. v. Barger, 773 So. 2d 454 (Ala. 2000))."

Hudson v. Outlet Rental Car Sales, Inc., 876 So. 2d 455, 458 (Ala. 2003).

Morgan's allegation of fraud in the factum is based on his assertions that Bedwell procured his signature on an Equity Trust IRA application by misrepresenting that signing the application and opening an Equity Trust IRA account "would allow Bedwell to 'invest in "safer investments"' on [his] behalf, which Bedwell never intended to do," and that "Bedwell concealed, suppressed, and never mentioned or disclosed to [him] the involvement of Jared Eakes, David Smalls, Small World Capital, or any other detail of the scheme and plan to defraud [him] of which Bedwell was aware and which he intended to effectuate." Appellee's brief at p. 69.

> "Fraud in the factum occurs when a party 'procures a[nother] party's signature to an instrument without knowledge of its true nature or contents.' Langley v. Federal Deposit Ins. Corp., 484 U.S. 86, 93, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987). See also Drinkard v. Embalmers Supply Co., 244 Ala. 619, 14 So. 2d 585 (1943), and Burroughs v. Pacific Guano Co., 81 Ala. 255, 1 So. 212 (1887). Fraud in the factum constitutes ineffective assent to the contract. Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986)."

Oakwood Mobile Homes, Inc. v. Barger, 773 So. 2d 454, 459 (Ala. 2000).

In Harold Allen's Mobile Home Factory Outlet, Inc. v. Early, 776 So. 2d 777 (Ala. 2000), this Court discussed the differences between fraud in the inducement and fraud in the factum as follows:

> "As Professor Farnsworth explains in his treatise, fraud in the factum applies only '[i]n rare cases [where] the misrepresentation is regarded as going to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect.' E. Allan Farnsworth, Contracts, § 4.10 (1982); see also Restatement (Second) of Contracts § 163 & cmt. a (1981) ('If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.'). These rare cases '"include situations involving blind persons, illiterate persons, [and] foreign speaking persons."' Alfa Mutual Ins. Co. v. Northington, 561 So. 2d 1041, 1049 (on application for rehearing) (Houston, J., concurring specially) (citations omitted); see, e.g., Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998 (11th Cir. 1986) (case involving persons who '[had] no knowledge of the English language[,]' 805 F.2d at 999). Alabama law has a long line of cases recognizing the following rule regarding fraud in the factum:
>
> > "'"When the execution of an instrument, which the party signing did not intend to sign, and did not know he was signing, is procured by a misrepresentation of its contents, and the party signing it does so without reading it or having it read, relying upon such misrepresentations and fraud, and believing he is signing a different instrument, he can avoid the effect of his signature

> > notwithstanding he was able to read and had an opportunity to read the instrument."'
>
> "Willcutt v. Union Oil Co. of California, 432 So. 2d 1217, 1220 (Ala.1983) (quoting earlier cases and collecting cases). See also W.T. Rawleigh Medical Co. v. Wilson, 7 Ala. App. 242, 252, 60 So. 1001, 1005 (1912), and cases cited therein. Alabama caselaw, like the Restatement, recognizes that to constitute fraud in the factum, and thereby to prevent the formation of a contract, the misrepresentation must go to the essential nature or existence of the contract itself, for example, a misrepresentation that an instrument is a promissory note when in fact it is a mortgage, see Edwards v. Tabb, 242 Ala. 209, 210, 5 So. 2d 770, 771 (1942)."

776 So. 2d at 783 n.6 (emphasis added).

In this case, Morgan does not argue that, at the time he signed the Equity Trust IRA application, he did not have knowledge of the true nature or contents of that document. He does not allege that he did not understand that he was signing an application to open an Equity Trust IRA or that he did not understand that he was signing a document that included by reference to the Equity Trust custodial agreement an arbitration agreement. Also, Morgan does not allege that Bedwell made any misrepresentations to him regarding the nature of the Equity Trust IRA application that he signed. Rather, Morgan argues that Bedwell induced him to execute the Equity Trust IRA application by misrepresenting that opening an Equity Trust IRA account would allow

him to invest in safer investments. Thus, although Morgan asserts that he is raising a claim of fraud in the factum, it is actually a claim of fraud in the inducement. Cf. Hudson v. Outlet Rental Car Sales, Inc., 876 So. 2d at 457 (noting that the plaintiff in that case asserted that he had been deceived as to the true nature of the document he had signed; asserted that "he actually signed a lease contract when he thought he was signing a purchase contract"; and asserted that the defendant had committed a fraud in the factum).

> "It is well settled that claims of fraud in the inducement are, themselves, subject to arbitration, unless the alleged fraud directly involves the arbitration clause itself. Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 604 So. 2d 332 (Ala. 1991); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). In Jones, this Court explained:
>
> > "'Since Prima Paint, it has become clear that in cases involving claims of fraud in the inducement of a contract affecting interstate commerce, the court must first determine whether the fraud claim is directed solely at the arbitration clause itself. Coleman v. Prudential Bache Securities, Inc., 802 F.2d 1350, 1352 (11th Cir. 1986) (must be asserted that "arbitration clause itself, standing apart from the whole agreement, was induced by fraud"); Bhatia v. Johnston, 818 F.2d 418, 422 (5th Cir. 1987) (must be asserted that "arbitration clause alone, as opposed to the Customer Agreement generally," had been induced by fraud); see also Schacht v. Beacon Ins.

> Co., 742 F.2d 386, 390 (7th Cir. 1984). If so, the party opposing arbitration is entitled to a trial involving state law issues relating to the making of the arbitration clause.'

> "604 So. 2d at 337 (emphasis in original). However, in making this determination, the court is required to 'look[ ] beyond the ad hoc arguments of counsel' and to determine whether the 'claim of fraud actually bears upon the entire agreement and upon the activities of the parties in general.' Id. (emphasis added)."

AmSouth Inv. Servs., Inc. v. Bhuta, 757 So. 2d 1120, 1123-24 (Ala. 2000).

In this case, Morgan's fraud-in-the-inducement claim is directed toward the Equity Trust custodial agreement as a whole and not solely at the arbitration agreement contained therein. Therefore, Morgan's "allegations of fraud in the inducement do not provide a basis for avoiding arbitration." 757 So. 2d at 1124. Accordingly, the trial court erred when it denied Equity Trust's motions to compel arbitration as to Morgan's claims against it.

II.

Next, Equity Trust and ETC argue that the trial court erroneously denied their motions to compel arbitration as to the nonsignatory plaintiffs' claims against them. Equity Trust submitted an affidavit from Kilbane, copies of the Equity Trust IRA applications for the nonsignatory

plaintiffs that referenced the Equity Trust custodial agreement containing an arbitration agreement; copies of the Equity Trust custodial agreement that included the arbitration agreement; and a copy of the 2020 Equity Trust custodial agreement that included an arbitration agreement. ETC submitted an affidavit from Bocan, copies of brokerage-account applications for Fry, Dannie, and Jerry that included an arbitration agreement, and copies of the ETC customer agreement that included an arbitration agreement. That evidence

> "satisfied [Equity Trust's and ETC's] initial burden of '"'proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce.'"' [SSC Montgomery Cedar Crest Operating Co. v.]Bolding, 130 So. 3d [1194,] 1196 [(Ala. 2013)]. Therefore, the burden shifted to [the nonsignatory plaintiffs] to '"'"present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question."'"' Bolding, 130 So. 3d 1196 (quoting other cases)."

Wayne Farms LLC v. Primus Builders, Inc., 330 So. 3d 468, 474 (Ala. 2020).

Each of the nonsignatory plaintiffs submitted affidavits in which they stated that they did not sign the Equity Trust IRA applications and that their signatures on those applications had been copied and pasted by Daughtry, Eakes, and/or Smalls. Additionally, Fry, Dannie, and Jerry

submitted affidavits in which they stated that they did not sign the ETC brokerage-account applications and that their signatures on those applications had been copied and pasted by Daughtry, Eakes, and/or Smalls. Neither Equity Trust nor ETC presented any evidence to dispute the evidence presented by the nonsignatory plaintiffs in this regard.

> "It is black-letter law that arbitration agreements must be enforced according to general standards of contract law. See Quality Truck & Auto Sales, Inc. v. Yassine, 730 So. 2d 1164, 1167-68 (Ala. 1999). Accordingly, '"a party cannot be required to submit to arbitration any dispute he has not agreed to submit."' Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258, 1260 (Ala. 1994) (quoting A.G. Edwards & Sons, Inc. v. Clark, 558 So. 2d 358, 362 (Ala. 1990)). It is the general rule that a nonsignatory to an arbitration agreement cannot be forced to arbitrate her claims. See Ex parte Stripling, 694 So. 2d 1281 (Ala. 1997); Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995)."

Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524, 526 (Ala. 2001).

However, this Court has also recognized that there are exceptions to that general rule.

> "In Custom Performance, Inc. v. Dawson, 57 So. 3d 90, 97-99 (Ala. 2010), this Court recently explained the circumstances under which a nonsignatory to an arbitration agreement may be forced to arbitrate his or her claims:
>
> > "'"Generally, 'a nonsignatory to an arbitration agreement cannot be forced to arbitrate [his] claims.'" Edward D. Jones & Co. v. Ventura, 907 So. 2d 1035, 1042 (Ala. 2005) (quoting Cook's Pest

Control, Inc. v. Boykin, 807 So. 2d 524, 526 (Ala. 2001)). However, there are exceptions to this general rule.

"'A. Third-Party-Beneficiary Status

"'A nonsignatory can be bound to an arbitration agreement if "the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to incidental benefit upon the third party." Dunning v. New England Life Ins. Co., 890 So. 2d 92, 97 (Ala. 2003). See also Edwards v. Costner, 979 So. 2d 757, 763 (Ala. 2007). "[I]n order for a person to be a third-party beneficiary of a contract, the contracting parties must have intended to bestow benefits on third parties." Locke v. Ozark City Bd. of Educ., 910 So. 2d 1247, 1251 (Ala. 2005)....

"'B. Equitable Estoppel

"'"A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions." Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1134 (Ala. 2000). Thus, this Court has developed a second exception to the general rule that a nonsignatory cannot be forced to arbitrate. Regardless of whether a nonsignatory is in fact a third-party beneficiary, the nonsignatory is treated as a third-party beneficiary -- and is equitably estopped from avoiding arbitration -- when he or she asserts legal claims to enforce rights or obtain benefits that depend on the existence of the contract that contains the arbitration agreement. See, e.g., Capitol Chevrolet & Imports, Inc. v. Grantham, 784 So. 2d 285, 289 (Ala. 2000) ("[T]o maintain her claims, [the nonsignatory plaintiff] must be

treated as a third-party beneficiary.... [A] third-party beneficiary is afforded all the rights and benefits, and has imposed upon him or her the burdens, of a contract, including those benefits and burdens associated with arbitration. Ex parte Stamey, 776 So. 2d 85 (Ala. 2000). Therefore, [the nonsignatory] cannot base her claims on the contract executed between her husband and Capitol Chevrolet, and at the same time seek to avoid the arbitration agreement....")....

"'However, as this Court explained in Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524, 526-27 (Ala. 2001), to the extent that the nonsignatory's claims do not rely on the existence of the contract containing the arbitration provision, the nonsignatory is not estopped from avoiding arbitration:

> "'"Under the facts of this present case, it appears [the nonsignatory] relies on theories of recovery that do not depend upon the existence of the contract [containing an arbitration provision]. To the extent that she can prove the prima facie elements of her case against [the defendant signatory] without reference to the contract between [the signatories], she is not bound by the arbitration agreement."

"'(Emphasis added.)....

"'....

"'C. "Intertwining Claims" Theory

> "'... Under this doctrine, a nonsignatory to an arbitration agreement may compel a signatory to arbitrate claims "where arbitrable and nonarbitrable claims are so closely related that the party to a controversy subject to arbitration is equitably estopped to deny the arbitrability of the related claim." Conseco Fin. Corp. v. Sharman, 828 So. 2d 890, 893 (Ala. 2001) (citing Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524 (Ala. 2001)); see also Ex parte Tony's Towing, Inc., 825 So. 2d 96, 97 (Ala. 2002) (explaining the reasons for limiting the doctrine of intertwining claims to use by the nonsignatory in compelling arbitration of a signatory's claims). The doctrine of intertwining claims "is not applicable, however, when a signatory attempts to compel a nonsignatory third party to arbitrate claims it may have against a signatory." Edwards v. Costner, 979 So. 2d at 764 (citing Ex parte Tony's Towing, supra) (emphasis added).'"

Olshan Found. Repair Co. of Mobile, LP v. Schultz, 64 So. 3d 598, 606-07 (Ala. 2010).

Equity Trust and ETC argue that the nonsignatory plaintiffs are equitably estopped from avoiding arbitration because the nonsignatory plaintiffs' claims depend on the ETC customer agreement and/or the Equity Trust custodial agreement. In this regard, Equity Trust and ETC rely on this Court's decision in Olshan, supra. Initially, they assert that the nonsignatory plaintiffs assert claims on behalf of their IRAs; that an IRA is a creature of statute and contract; that applicable law, such as 26

C.F.R. 1.408.2(b), explicitly requires IRAs to be "created" by an "instrument ... in writing"; and that the written instruments governing the nonsignatory plaintiffs' accounts in this case are the ETC customer agreement and/or the Equity Trust custodial agreement. They go on to assert that, even if the nonsignatory plaintiffs did not assert claims on behalf of their IRAs, they would be equitably estopped from avoiding arbitration because all of their claims against ETC and/or Equity Trust are predicated on the ETC customer agreement and/or the Equity Trust custodial agreement.

In Olshan, supra, Arnold E. Schultz ("the husband") hired Olshan Foundation Repair Company of Mobile, LP ("Olshan"), in 2006 to perform repair work on the foundation of a house owned by him and his wife, Florence B. Schultz ("the wife"). That work was performed pursuant to a contract containing an arbitration agreement signed by the husband. The 2006 contract could not be found, but the husband did not deny that the 2006 contract included an arbitration agreement. The wife did not sign the 2006 contract. The Schultzes asserted that the condition of their house worsened after Olshan completed its work in 2006. In March 2007, the husband again hired Olshan to perform foundation-repair work on

the Schultzes' house, and that work was related to the work performed by Olshan in 2006. Evidence was presented indicating that in 2007 the husband signed another contract that included an arbitration agreement. The wife did not sign the 2007 contract. The husband asserted that the condition of the house worsened after Olshan completed the work in 2007 and that he did not pay Olshan for the work performed in 2007. In 2008, Olshan performed additional work on the foundation of the Schultzes house "'to provide customer service and to collect.'" Olshan, 64 So. 3d at 600. The Schultzes did not enter into an additional written agreement for the work Olshan performed in 2008. In July 2008, the Schultzes sued Olshan. The Schultzes asserted claims of breach of contract, breach of warranty, negligence, and wantonness and asserted that Olshan had "performed the foundation repair work negligently, wantonly, and in an unworkmanlike manner and that their house was damaged as a result." 64 So. 3d at 599. Olshan moved to stay the proceedings and to compel arbitration of the Schultzes' claims against it. Subsequently, the Schultzes amended their complaint so that the wife stated only claims of negligence and wantonness and no longer joined the husband's claims alleging breach of contract and breach of warranty. The trial court

granted Olshan's motion to compel arbitration as to the husband's claims relating to the work performed under the 2007 contract but denied Olshan's motion as to the husband's claims relating to the work performed in 2006 and 2008. It also denied the motion to compel arbitration as to the wife's claims. Olshan appealed to this Court.

On appeal, this Court held that the trial court had erroneously denied Olshan's motion to compel arbitration of the husband's claims arising from the repair work performed under the 2006 contract and his claims relating to the 2008 repair work. Regarding the wife's negligence and wantonness claims, this Court noted that it was undisputed that the wife did not sign either the 2006 contract or the 2007 contract. This Court set forth the exceptions to the general rule that a nonsignatory to an arbitration agreement cannot be forced to arbitrate his or her claims -- third party-beneficiary status, equitable estoppel, and the "intertwining claims" theory. This Court stated that, although the wife was a third-party beneficiary under the 2006 and 2007 contracts, she had disavowed any status as a third-party beneficiary under those contracts. This Court also noted that the intertwining-claims exception "does not

apply because Olshan, the signatory, is attempting to compel [the wife], the nonsignatory, to arbitrate against it." Olshan, 64 So. 3d at 607.

With regard to the equitable-estoppel exception, this Court noted that, in the amended complaint, the wife alleged that Olshan had negligently and/or wantonly performed work on the Schultzes' house in August 2006, March 2007, and January 2008. In determining whether the equitable-estoppel exception applied, this Court considered whether those claims depended upon the existence of 2006 and 2007 contracts as follows:

> "Olshan relies in part on this Court's decision in Capitol Chevrolet & Imports, Inc. v. Grantham, 784 So. 2d 285 (Ala. 2000). In that case, Robert Grantham purchased a vehicle from Capitol Chevrolet & Imports, Inc. ('Capitol'); he signed an arbitration agreement with Capitol at the time of the purchase. Shortly thereafter, Mr. Grantham returned the vehicle to Capitol for repairs to, among other things, the door locks on the vehicle. Subsequently, Mrs. Grantham 'was injured when someone entered the [vehicle] and robbed her. The Granthams allege[d] that the assailant was able to enter the vehicle because the power locks were malfunctioning.' 784 So. 2d at 286.
>
> "The Granthams sued Capitol and the manufacturer of the vehicle (hereinafter referred to collectively as 'Capitol'), alleging breach of contract, breach of warranty, and negligence related to Capitol's inspection and repair of the vehicle. Capitol moved to compel arbitration. The trial court denied Capitol's motion as to Mrs. Grantham and as to Mr.

Grantham's negligence claim and granted the motion as to Mr. Grantham's remaining claims. Capitol appealed.

"On appeal, this Court determined that the arbitration agreement was broad enough to encompass Mr. Grantham's negligence claim. This Court then considered whether Mrs. Grantham's claims were subject to the arbitration agreement, stating:

> "'The undisputed evidence demonstrates that Marcia Grantham was a nonsignatory to the sales contracts executed by Robert Grantham and Capitol Chevrolet. She also denies that she is a third-party beneficiary under her husband's contract with Capitol Chevrolet. Thus, in her effort to avoid arbitration, Marcia Grantham has effectively conceded that she has no right to recover under the sales contract. <u>In order to maintain her claims, Marcia Grantham must be treated as a third-party beneficiary</u>. It is well established that a third-party beneficiary is afforded all the rights and benefits, and has imposed upon him or her the burdens, of a contract, including those benefits and burdens associated with arbitration. <u>Ex parte Stamey</u>, 776 So. 2d 85 (Ala. 2000). Therefore, Marcia Grantham cannot base her claims on the contract executed between her husband and Capitol Chevrolet, and at the same time seek to avoid the arbitration agreement. See <u>Infiniti of Mobile, Inc. v. Office</u>, 727 So. 2d 42 (Ala. 1999); <u>Delta Constr. Corp. v. Gooden</u>, 714 So. 2d 975 (Ala. 1998); and <u>Ex parte Dyess</u>, 709 So. 2d 447 (Ala. 1997).'

"784 So. 2d at 289 (emphasis added). This Court, therefore, determined that Mrs. Grantham's claims, including her negligence claim, depended upon her husband's contract with

Capitol. As a result, she could not avoid the arbitration agreement.

"Mrs. Schultz relies on this Court's decision in Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524 (Ala. 2001). In that case, Earnestine Allen was bitten more than 300 times by fire ants while she was a patient at Knollwood Park Hospital ('Knollwood'). Knollwood had a contract with Cook's Pest Control, Inc. ('Cook's'), whereby Cook's provided pest-control services to Knollwood. That contract contained an arbitration agreement. Through her attorney-in-fact, Allen sued Knollwood and Cook's, alleging negligence, wantonness, and breach of contract as a third-party beneficiary of the contract between Knollwood and Cook's. Cook's moved to compel arbitration. Allen subsequently amended her complaint to abandon the breach-of-contract claim. The trial court denied the motion to compel arbitration. Cook's appealed.

"On appeal, this Court distinguished Grantham, stating:

> "'Cook's also relies on our recent opinion in Capitol Chevrolet & Imports, Inc. v. Grantham, 784 So. 2d 285 (Ala. 2000), for the proposition that a third party's claims can be so dependent upon a contract that a mere disavowal of third-party-beneficiary status cannot defeat a properly supported motion to compel arbitration. Under the facts of Grantham, that was the correct conclusion. However, under the facts of this present case, it appears Allen relies on theories of recovery that do not depend upon the existence of the contract. To the extent that she can prove the prima facie elements of her case against Cook's without reference to the contract between Cook's and Knollwood, she is not bound by the arbitration agreement.'

"807 So. 2d at 526-27 (emphasis added). This Court, therefore, determined that the trial court correctly denied Cook's motion to compel arbitration to the extent that Allen's claims did not depend upon the contract between Knollwood and Cook's.

"Based on this Court's statements that the case was decided 'under the facts of this present case' and '[t]o the extent that [Allen could] prove the prima facie elements of her case,' this Court's decision in Cook's is limited to the circumstances presented therein. The theories of recovery on which Allen relied are not sufficiently developed in Cook's so as to permit us to conclude that Allen's claims are sufficiently similar to Mrs. Schultz's claims to justify our reliance on Cook's in this case.

"We must consider the facts presented to us in this case to determine whether the tort claims asserted by Mrs. Schultz depend upon the existence of the 2006 and 2007 contracts containing the arbitration provision. See, e.g., [Custom Performance, Inc. v.]Dawson, 57 So. 3d [90,] 98 [(Ala. 2010)] (quoting this Court's statements in Cook's and stating: 'Accordingly, to determine whether [the plaintiff] is equitably estopped from avoiding the contractual burden of arbitration, we must first consider whether, under the circumstances of this case, any of the legal claims asserted by [the plaintiff] are dependent on the existence of the contract that contains the arbitration agreement.').[1] Mrs. Schultz alleges that Olshan negligently and wantonly performed work on the foundation of her house in August 2006, March 2007, and January 2008, thus damaging her house. It is undisputed that Olshan's work on which Mrs. Schultz bases her claims was done pursuant to the 2006 and 2007 contracts. To support her claims, Mrs. Schultz must prove that Olshan owed her a duty. Mrs. Schultz has not alleged, and we do not see how she may prove, the existence of such a duty without reference to the 2006 and 2007 contracts. As in Grantham, therefore, Mrs.

> Schultz's claims depend upon the existence of the contracts containing the arbitration provision. Mrs. Schultz cannot simultaneously 'base her claims on the contract[s] executed between her husband and [Olshan] and at the same time seek to avoid the arbitration agreement.' Grantham, 784 So. 2d at 289.
>
> "Mrs. Schultz's claims, therefore, are subject to the arbitration provision of the 2006 and 2007 contracts. The trial court erred in denying Olshan's motion to compel arbitration of Mrs. Schultz's claims.
>
> "________________________
>
> "[1]Because the plaintiff in Dawson had not asserted a breach-of-warranty claim, because 'in the abstract' the plaintiff's claims were not 'necessarily dependent on the existence of a contract,' and because defendant had not properly supported its arguments, this Court in Dawson concluded that the plaintiff was not estopped from avoiding arbitration. 57 So. 3d at 99."

Olshan, 64 So. 3d at 608-10.

In Ameriprise Financial Services, Inc. v. Jones, 195 So. 3d 263 (Ala. 2015), Ameriprise Financial Services, Inc., and its employee, Robert Shackelford, the defendants in that case, appealed from the circuit court's order that denied, in part, their motion to compel arbitration of the claims asserted against them by the plaintiffs in that case, Paul Jones and Eleanor Jones. In Ameriprise, Charles Jones had opened two investment accounts with Ameriprise. In connection with opening those accounts,

Charles had executed a client agreement that included an arbitration agreement. Subsequently, Charles executed a durable power of attorney naming Paul as his attorney-in-fact and a will leaving all of his property to Paul and Eleanor. Paul contacted Ameriprise and Shackelford numerous times seeking to have his and Eleanor's names added as the beneficiaries of Charles's Ameriprise accounts. The plaintiffs in that case alleged that, at some point, the defendants had informed Paul that he and Eleanor had been designated as beneficiaries of both of Charles's Ameriprise accounts. "However, according to the plaintiffs, Ameriprise instead 'reported to the Autauga County Sheriff's Department that [the plaintiffs had] kidnapped [Charles], and that his signature was forged on the documents provided.'" 195 So. 3d at 265. Sheriff's deputies later spoke with Charles, and he allegedly denied the kidnapping and the suspected forgery. Charles subsequently died, and the plaintiffs made a claim with Ameriprise for the funds in Charles's Ameriprise accounts, but the defendants denied the claims because the plaintiffs had never been named as beneficiaries. The plaintiffs subsequently sued the defendants, alleging numerous claims, including breach of contract, bad faith, negligence, willfulness, wantonness, misrepresentation, and the

tort of outrage. The defendants filed a motion to compel arbitration, in which they argued that, although the plaintiffs were nonsignatories to the client agreement, they were bound by its terms because they were claiming a direct benefit from the agreement. The plaintiffs conceded "that they were 'equitably estopped from avoiding' arbitration as to all their claims except for the tort-of-outrage count." 195 So. 3d at 265. The plaintiffs argued that the tort of outrage did not depend on the existence of any contract and that the prima facie elements of that count could be proven "'with only the slightest references to the ... [client agreement].'" 195 So. 3d at 265. Ultimately, the trial court concluded "that all claims except the tort-of-outrage claim must be arbitrated and that the tort-of-outrage 'claim shall proceed to trial in the ordinary course.'" Ameriprise, 195 So. 3d at 266.

The defendants in Ameriprise appealed solely as to the circuit court's denial of their motion to compel arbitration as to the tort-of-outrage claim. On appeal, the plaintiffs in that case argued that the equitable-estoppel exception did not apply to their tort-of-outrage claim because it was not dependent upon the client agreement containing the arbitration agreement and that "the [client] agreement has only a

'tangential' connection to the facts giving rise to their tort-of-outrage claim, namely the purported false reporting of a forgery and kidnapping." 195 So. 3d at 267.

In addressing whether the circuit court had erroneously denied the defendants' motion to compel arbitration as to the tort-of-outrage claim, this Court noted that the arbitration agreement in that case provided that it "applie[d] to 'all controversies that may arise'" and that the language in that agreement was not limited to claims "related to or arising from the agreement." Ameriprise, 195 So. 3d at 267. This Court noted that the plaintiffs in that case "continue[d] to assert ... that they claim[ed] no benefits under the [client] agreement that relate to the prosecution of their tort-of-outrage claim." Id. This Court further noted that, "[i]n order to determine whether 'a third party's claims can be so dependent upon a contract that a mere disavowal of third-party-beneficiary status cannot defeat a properly supported motion to compel arbitration,' we conduct a fact-specific analysis. [Cook's Pest Control, Inc. v.]Boykin, 807 So. 2d [524,] 526-27 [(Ala. 2001)]." Id. After quoting from Olshan, this Court analyzed the plaintiffs' tort-of-outrage claim, stating:

> "The plaintiffs' tort-of-outrage claim arises from conduct by the defendants that occurred in connection with the

plaintiffs' attempts to effect a beneficiary change under the [client] agreement. Without the [client] agreement, the plaintiffs would never have contacted Ameriprise, and Ameriprise would never have contacted law enforcement with concerns regarding whether the documents submitted to effectuate the change had been forged and Charles had been kidnapped. In fact, it was only in Paul's role as attorney in fact and agent for Charles, who was clearly bound by the duty to arbitrate all controversies, that the requested beneficiary change -- and the allegedly outrageous response of Ameriprise -- occurred. Moreover, the allegedly 'outrageous' nature of Ameriprise's response to the requested benefit change must be viewed in the context of its own responsibilities in determining the validity of a requested beneficiary change on the affected accounts; therefore, the plaintiffs' claims arise out of the manner in which they contend the beneficiary change -- an act the defendants argue was specifically governed by the [client] agreement -- should have been effectuated. See Edward D. Jones & Co. v. Ventura, 907 So. 2d 1035, 1042 (Ala. 2005). See also Edwards Motors, Inc. v. Hudgins, 957 So. 2d 444, 448 (Ala. 2006) (compelling arbitration of purchaser plaintiffs' malicious-prosecution claim where automobile dealership had instituted criminal proceeding against plaintiffs, which was later dismissed, on ground that arbitration provision contained in purchase agreement covered plaintiffs' claim, which '"'result[ed] from or ar[ose] out of or relat[ed] to or concern[ed] the transaction entered into'"' (quoting Dan Wachtel Ford, Lincoln, Mercury, Inc. v. Modas, 891 So. 2d 287, 293 (Ala. 2004))).

"In sum, the nonsignatory plaintiffs have clearly conceded that they are third-party beneficiaries of the [client] agreement. The scope of the arbitration provision in the [client] agreement is indisputably broad enough to encompass the plaintiffs' tort-of-outrage claim. Moreover, as the defendants note, '[t]he events surrounding the change of beneficiary [on the Ameriprise accounts] form the basis for all of the [plaintiffs'] claims.' (Appellants' brief, at pp. 6-7.)

> Under the foregoing reasoning, the plaintiffs' tort-of-outrage claim is, like their other claims, subject to the arbitration provision in the [client] agreement. The circuit court, therefore, improperly denied the defendants' motion seeking to compel arbitration of all of the plaintiffs' claims."

Ameriprise, 195 So. 3d at 268-69 (footnote omitted).

In this case, the arbitration agreement included in the Equity Trust custodial agreement provided that arbitration "will be the exclusive means of resolving any claim ..., including any existing or future claim arising out of or relating in any way to (1) this Agreement, (2) any prior Agreement between you and Custodian, (3) your IRA account, or (4) any services provided by Custodian." (Emphasis added.) It also provided that "[a]ll claims are subject to arbitration, no matter what law or legal theory they are based on or what remedy they seek." (Emphasis added.) Similarly, the arbitration agreement included in the 2020 Equity Trust custodial agreement provided that arbitration "will be the exclusive means of resolving any claim ..., including any existing or future claim arising out of or in any way relating to (i) this Agreement[,] (ii) any Prior Agreement between you and Custodian, (iii) your IRA Account, or (iv) any services provided by Custodian." (Emphasis added.) It also provided

that, "[a]ll claims are subject to arbitration, <u>no matter what law or legal theory they are based on or what remedy they seek</u>." (Emphasis added.)

The arbitration agreement in the ETC customer agreement provided that "[a]ny controversy or claim arising out of or relating to this Agreement <u>or the brokerage account established by this agreement or any transaction therein</u> shall be determined by FINRA arbitration under its procedures then in effect." (Some emphasis added; some emphasis omitted.) Thus, as was the case in <u>Ameriprise</u>, the scope of the arbitration agreements in the Equity Trust custodial agreement, the 2020 Equity Trust custodial agreement, and ETC customer agreement were clearly broad enough to encompass the nonsignatory plaintiffs' claims in this case.

Next, we must determine whether, under the facts presented to us in this case, the tort claims asserted by the nonsignatory plaintiffs depend upon the existence of the relevant documents containing the arbitration agreements. The second amended complaint alleged on behalf of the nonsignatory plaintiffs a fraudulent-suppression claim; a fraudulent-misrepresentation claim; claims alleging violations of "the Alabama Blue Sky Law, codified at Ala Code [1975,] § 8-6-19," and the

Florida Securities and Investor Protection Act, § 517.011, et seq., Fla. Stat.; a civil-conspiracy claim; a claim of "aiding and abetting a fraud"; a tort-of-outrage claim; a negligence claim; and a wantonness claim against Equity Trust and/or ETC. However, each of those claims arose from the nonsignatory plaintiffs' accounts at Equity Trust ETC. Similar to Ameriprise, in this case, the events surrounding the creation and handling of the nonsignatory plaintiffs' accounts at Equity Trust and ETC form the basis for all of the nonsignatory plaintiffs' claims against Equity Trust and ETC. In fact, the nonsignatory plaintiffs assert that they are raising their claims individually and on behalf of their respective IRAs. As was the case in Olshan, we do not see how the plaintiffs may prove their claims, including any duties owed to them by Equity Trust or ETC, without reference to their account documents, including the Equity Trust IRA applications and the ETC brokerage-account applications, the Equity Trust custodial agreement, the 2020 Equity Trust custodial agreement, and the ETC customer agreement. Accordingly, the nonsignatory plaintiffs' claims against Equity Trust and/or ETC depend upon the existence of the agreements containing the arbitration agreements. Therefore, the nonsignatory plaintiffs cannot

simultaneously base their claims on their accounts that were created by those agreements and, at the same time, seek to avoid the arbitration agreements contained therein. See Olshan, supra.

Based on the foregoing, the nonsignatory plaintiffs are estopped from avoiding the arbitration agreements included in the Equity Trust custodial agreement, the 2020 Equity Trust custodial agreement, and the ETC customer agreement. Accordingly, the trial court erred when it denied Equity Trust's and ETC's motions to compel arbitration of the nonsignatory plaintiffs' claims against them.[3]

Conclusion

For the above-stated reasons, we reverse the trial court's order denying Equity Trust's and ETC's motions to compel arbitration. Accordingly, we remand this case to the trial court for further proceedings consistent with this opinion.

1200551 -- REVERSED AND REMANDED.

1200552 -- REVERSED AND REMANDED.

Parker, C.J., and Bolin, J., concur.

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[3]Based on our holding in this regard, we pretermit discussion of the remaining arguments raised by the parties.

Sellers and Stewart, JJ., concur in the result.