[Cite as **Ohio Valley Elec. Corp. v. First Energy Corp., 2025-Ohio-938.**]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

OHIO VALLEY ELECTRIC CORPORATION, Plaintiff-Appellant,	:	Case No. 23CA923
v.	:	
FIRST ENERGY CORPORATION, ET AL., Defendants-Appellees.	:	DECISION AND JUDGMENT ENTRY

APPEARANCES:

D. Dale Seif, Jr., Andrew Pfeifer, Seif & McNamee, LLC, Waverly, Ohio, for Appellant Ohio Valley Electric Corporation.

Brian Chisling, Michael Garvey, Alison Sher, Simpson Thatcher & Bartlett LLP, New York, NY, for Appellant Ohio Valley Electric Corporation.

H. Toby Schisler, Alan H. Abes, Dinsmore & Shohl LLP, Cincinnati, Ohio, for Appellant Ohio Valley Electric Corporation.

Robert S. Faxon, Heather Lennox, T. Daniel Reynolds, Jones Day, Cleveland, Ohio, for Appellees First Energy Corporation and Allegheny Generating Company.

Smith, P.J.

{¶1} Ohio Valley Electric Corporation (OVEC) appeals the April 28, 2023 Decision and Entry of the Pike County Court of Common Pleas granting First Energy Corporation and Allegheny Generating Company's motion to compel arbitration. On appeal, OVEC challenges the trial court's

finding that the allegations contained in the complaint must be arbitrated. Based on our de novo review of the central issue presented by this appeal, whether OVEC's claim against the defendants-appellants for fraudulent transference of assets is arbitrable, we conclude that the trial court abused its discretion in granting the motion to compel arbitration. Appellant's sole assignment of error has merit. The judgment of the trial court is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On December 9, 2021, OVEC filed a Complaint naming three defendants, First Energy Corporation, "FirstEnergy," Monongahela Power Company, "MonPower," and Allegheny Generating Company, "AGC," along with additional John Doe individuals and companies. OVEC alleged that it is the victim of a fraudulent transfer scheme perpetrated by FirstEnergy and non-party Allegheny Energy Supply Company, LLC, "AE Supply." Exhibit A attached to OVEC's complaint was an "Amended and Restated Inter-Company Power Agreement" dated September 10, 2010, "ICPA."

{¶3} The factual basis surrounding the parties' dispute and the ICPA are set forth succinctly in the trial court's Findings of Fact in its April 28, 2023 Decision and Entry. Since neither party has challenged these findings we will utilize them herein.

{¶4} Plaintiff OVEC was created by a group of electrical generating companies to supply power to the Portsmouth Gaseous Diffusion Plant, located in Pike County, Ohio. The terms of OVEC's creation and operation was governed by the ICPA, originally dated 1953. Various power companies were sponsors of OVEC and signatories to the original ICPA.

{¶5} The ICPA has been modified multiple times since OVEC's creation, the most recent is captioned "Restated and Amended Inter-Company Power Agreement." The effective date of the most recent version of the ICPA is September 10, 2010.[1] Defendant MonPower is a signatory to this agreement. Defendants First Energy and AGC are not signatories.

{¶6} In the 1990's, the United States Department of Energy, as the operator of the Portsmouth Gaseous Diffusion Plant, privatized the plant and indicated to OVEC that it would terminate its long-term power purchase agreement with OVEC as of 2003. The ICPA will terminate in its entirety in 2040.

{¶7} Relevant to this appeal, the portion of the ICPA which governs arbitration among the parties, states as follows:

> 9.10 Arbitration. Any controversy, dispute or claim arising out of this Agreement or the refusal by any party hereto to perform the whole or any part thereof, shall be

[1] Throughout the rest of this opinion, when we reference the ICPA, we mean the September 10, 2010 version of the agreement.

> governed by arbitration in the City of Columbus, Franklin County, Ohio, in accordance with the Commercial Arbitration Rules of the American Arbitration Association or any successor organization, except as otherwise set forth in Section 9.10….

{¶8} Defendant First Energy acquired MonPower and AE Supply in 2011 pursuant to a merger. AE Supply is an OVEC sponsor and a signatory to the 2010 ICPA. AE Supply has never defaulted nor failed to pay its obligatory sum under the ICPA. OVEC's complaint, however, alleges that AE Supply's assets were being fraudulently transferred to avoid AE Supply's obligations under the ICPA.

{¶9} On April 25, 2022, Defendants First Energy, MonPower, and AGC filed Defendants' Motion to Compel Arbitration and Stay Proceedings Pending Arbitration. On June 3, 2022, OVEC filed Plaintiff's Opposition to Defendants' Motion to Compel and Stay Proceedings Pending Arbitration. On June 17, 2022, the defendants filed a Reply in support of their motion.

{¶10} The trial court held a hearing on defendants' motion on March 16, 2023. Subsequent to the hearing, OVEC filed a Notice of Voluntary Dismissal as to Defendant MonPower. The parties also submitted post-hearing briefs.

{¶11} On April 28, 2023, the trial court rendered its decision that allegations of OVEC's complaint must be arbitrated and the action stayed until arbitration was completed. This timely appeal followed.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY GRANTING THE MOTION OF FIRST ENERGY AND AGC TO COMPEL ARBITRATION UNDER THE ICPA'S ARBITRATION CLAUSE.

Standard of Review

{¶12} In general " '[a]n appellate court reviews a trial court's decision to grant or deny a motion to compel arbitration or stay the proceedings under the abuse of discretion standard.' " *Primmer v. Healthcare Indus. Corp.,* 2015-Ohio-4104, ¶ 8 (4th Dist.), quoting *Fields v. Herrnstein Chrysler, Inc.,* 2013-Ohio-693, ¶ 12 (4th Dist.) When applying the abuse-of-discretion standard of review, appellate courts must not substitute their judgment for that of the trial courts. *See In re Jane Doe 1*, 57 Ohio St. 3d 135, 138 (1991).

{¶13} However, a reviewing court "employs a de novo standard of review where the appeal of a motion to stay proceedings pending arbitration presents a question of law." *O'Brien & Associates Co., L.P.A. v. East Worthington, L.L.C.,* 2023-Ohio-3494, ¶ 11 (10th Dist.). Accordingly, "[a] trial court's decision granting or denying a stay of proceedings pending

arbitration is * * * subject to de novo review on appeal with respect to issues of law, which commonly will predominate because such cases generally turn on issues of contractual interpretation or statutory application." *Id.* (Citations omitted.) *See also Taylor Bldg. Corp. of Am. v. Benfield,* 2008-Ohio-938, ¶ 37. This appeal concerns a contractual matter in that OVEC contends that its claims against First Energy and AGC are not subject to the arbitration clause contained in the ICPA. Therefore, we will review the issue of arbitrability under a de novo standard of review.

Legal Analysis

General Principles

{¶14} " 'Ohio and federal courts encourage arbitration to settle disputes.' " *Academy of Medicine of Cincinnati v. Aetna Health, Inc.,* 2006-Ohio-657, ¶ 10, quoting *ABM Farms Inc., v. Woods,* 81 Ohio St.3d 498 (1998). " 'Both the Ohio General Assembly and Ohio courts have expressed a strong public policy favoring arbitration.' " *Primmer, supra,* at ¶ 10, quoting *Hayes v. Oakridge Home,* 2009-Ohio-2054, ¶ 15, citing R.C. Chapter 2711. Arbitration is favored because it provides an expeditious and economical means of resolving a dispute and has the added benefit of lessening the burden on crowded court dockets. *Primmer, supra*; *Hayes* at ¶ 15. (Internal citations omitted.) *See also Alford v. Arbors at Gallipolis,*

2018-Ohio-4653, ¶ 11(4th Dist.). R.C. 2711.02 provides for the enforcement of an arbitration agreement. This court has observed that " ' "[i]n light of the strong presumption favoring arbitration, all doubts should be resolved in its favor." ' " *Alford, supra*, at ¶ 14, quoting *Primmer, supra,* at ¶ 12, quoting *Hayes* at ¶ 15.

{¶15} However, in *Miller v. Cardinal Care,* 2019-Ohio-2826, the Eighth District Court has discussed additional relevant principles as follows at Paragraphs 20 and 21:

> While there are strong federal and state policies favoring arbitration agreements, *ABM Farms, Inc. v. Woods,* 81 Ohio St.3d 498, 500 (1998), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the contract. *I Sports v. IMG Worldwide, Inc.,*2004-Ohio-363,¶ 10 (8th Dist.) "While arbitration is encouraged as a form of dispute resolution, the policy favoring arbitration does not trump the constitutional right to seek redress in court." *Peters v. Columbus Steel Castings Co.,* 2007-Ohio-4787, ¶ 8.

This Court's Prior Decision in *Fields v. Herrnstein*

{¶16} In the matter presently before this court, the trial court granted First Energy and AGC's motion to compel arbitration of OVEC's allegations/claims of fraudulent transfer of assets based on a theory of equitable estoppel. The Pike County trial court found "substantially interdependent conduct by the defendants, some signatories and some not," and "reliance on the terms of the contract." In reaching the underlying

decision, the trial court looked to this Court's prior opinion in *Fields, supra,* for guidance.

{¶17} Plaintiff Fields purchased a new 2010 Jeep Grand Cherokee from Herrnstein Chrysler, Inc. The vehicle purchase was financed by Capital One Auto Finance, Inc., an assignee of Herrnstein Chrysler, Inc., under a Retail Installment Sale Contract signed by Fields and Herrnstein Chrysler, Inc. This contract specified that Capital One Auto Finance, Inc., was an assignee under the terms of the agreement. The contract also contained an arbitration clause. *Fields,* at ¶ 3. Fields and Herrnstein Chrysler, Inc. also executed another, separate arbitration agreement the same day, entitled Agreement to Arbitrate. *Id.* at ¶ 4.

{¶18} Within the first few months after purchasing the vehicle, Fields noticed paint chipping and/or peeling off the vehicle in several different locations. After contacting both Herrnstein Chrysler and Chrysler Group and being unable to obtain an offer to remedy the problem that was acceptable to Fields, he initiated a complaint in the Pike County Court of Common Pleas, naming Herrnstein Chrysler, Inc., Todd A. Montgomery, Bart Herrnstein, Chrysler Group, LLC, Capital One Auto Finance Inc., as well as the John Doe finance agents and representatives of Herrnstein Chrysler, Inc. The named defendants all filed answers to the complaint,

asserting as a defense the fact that Fields' claims were required to be resolved through arbitration.

{¶19} Defendants subsequently filed a joint motion to stay and compel arbitration, citing the court to the arbitration clause contained within the Retail Installment Sales Contract, as well as the separately executed Agreement to Arbitrate. *Id.* at ¶ 5. Montgomery and Bart Herrnstein were neither parties to the superseding arbitration clause, nor signatories to the arbitration agreement or contracts. Chrysler Group, LLC was neither a signatory nor a party to the contract or arbitration agreement. The trial court ultimately granted the motion to compel arbitration of some, but not all, of Fields' claims.

{¶20} Fields appealed. In our decision, we concluded:

> [Fields] alleges common facts that describe each of these defendants, except Todd Montgomery and Capital One, as "Defendants/Suppliers" whose misconduct led to this lawsuit.[2] Thus, although [Fields] claims that these claims are not "intertwined" for purposes of application of alternative estoppel theory and do not allege concerted misconduct, we disagree.

Id. at ¶ 23. We reasoned:

> [T]he claims alleged by [Fields] fell within the purview of the arbitration agreement, which covered the purchase of the vehicle, the financing of the vehicle, the

[2] From the opinion, it appears that Montgomery was an employee or agent/salesman for Herrnstein. Capital One was an assignee of Herrnstein Chrysler.

> scope and validity of the arbitration agreement, any alleged promises, representations and/or warranties made to or relied upon by the parties, as well as any alleged unfair, deceptive, or unconscionable acts or practices. We reach our decision in part based upon [Fields'] own categorization of Appellees as "Defendants/Suppliers" whose common actions led to the filing of the underlying lawsuit. Our conclusion is further supported by the fact that all of [Fields'] claims arise out of a single transaction, which was the purchase of a new vehicle from Herrnstein Chrysler. Thus, we conclude that this is one of those limited situations in which a nonsignatory may bind a signatory to an arbitration agreement.

Id. at ¶¶ 24, 25. In *Fields,* we discussed the theories of equitable estoppel as explained by the Eighth District in *I Sports v. IMG Worldwide, Inc.,* 2004-Ohio-3631(8th Dist.), and we will do so below.

Theories of Equitable Estoppel Applied by State and Federal Courts

{¶21} Ohio has generally relied in part on federal law in developing its own jurisprudence as to the principles governing arbitrability. *Academy of Medicine,* ¶ 10. In a very recent decision, *Fucci v. Bowser,* 2024 WL 2076855, (U.S.D.C. Utah), the federal district court also looked to Ohio's Eighth District decision in *I Sports, supra.* The *Fucci* court observed:

> Ohio law allows a signatory to be estopped from "avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Under Ohio law, "[a]rbitration agreements apply to nonsignatories only in rare circumstances." *Westmoreland v. Sadoux,* 299 F.3d 462, 465 (C.A. 5, 2002). A signatory may be estopped from "avoiding

> arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." There are two instances where equitable estoppel may be applied involving "intertwined claims." First, a nonsignatory can compel arbitration if the "signatory must rely on the terms of the written agreement in asserting claims against a nonsignatory." Second, equitable estoppel binds a signatory to an arbitration clause if "the signatory alleges substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories to the contract."

Fucci at *9 and 10; *I Sports,* ¶¶ 14,16, and 17.

{¶22} Herein, nonsignatories FirstEnergy and AGC, are seeking to compel arbitration against OVEC, a signatory to the ICPA. The trial court stated:

> The issue in this case is whether Plaintiff and the remaining Defendants FirstEnergy and AGC are bound by the terms of the ICPA and required to submit *"any controversy , dispute, or claim arising out of the ICPA, or the refusal by any party hereto to perform the whole or any part thereof to arbitration."* (Emphasis added.) Sec. 9.10 ICPA.

{¶23} In finding that the allegations of OVEC's complaint must be arbitrated under Sec. 9.10 of the ICPA, the trial court found:

> The present situation is exactly as such as is contemplated in *Fields.* Plaintiff is alleging substantially interdependent conduct by Defendants, some of which are signatories to the ICPA and some of which are not, and is relying on at least some of the terms of the ICPA. *It is impossible for this Court to grant relief requested by Plaintiff without*

> *considering and referring to the terms and conditions of the ICPA.* (Emphasis added.)

{¶24} In *Fazio v. Lehman Bros., Inc.,* 340 F.3d 386, 395 (C.A.6, 2003), the Sixth Circuit Court of Appeals held that " a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." A state court in Ohio may base its determination of arbitrability on the federal standard that inquires whether the action could be maintained without reference to the contract or relationship at issue. *Academy of Medicine,* ¶ 30. In its decision granting the motion to compel arbitration of OVEC's claims, the trial court framed one of the issues as whether the ICPA applies to the dispute in [OVEC's] complaint and noted that "[a] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. *Academy of Medicine,* ¶ 6, citing *Fazio,* at ¶ 4. The trial court wrote:

> The ICPA is mentioned literally dozens of times in Plaintiff's Complaint, and the overall allegation is that Defendants First Energy, AGC and MonPower were selling off assets of AE Supply so that AE Supply would not, at some time in the future, be able to meet its contractual obligations under the ICPA.

The trial court also observed that "an arbitration provision must be enforced unless it is not susceptible of an interpretation that covers the asserted

dispute, with any doubt being resolved in favor of arbitration." *Duff v. Christopher*, 2023-Ohio-349, ¶ 10 (11th Dist.), (citation omitted.) *See Academy of Medicine, supra*, 2006-Ohio-657, ¶ 14.

{¶25}We have conducted a de novo review of the trial court's conclusion, as set forth in the appealed from entry, that there was "substantially interdependent conduct by the defendants, some signatories and some not," and "reliance on the terms of the contract," and that OVEC's action cannot be maintained without reference to the ICPA. Based upon our review of the federal and Ohio arbitration case law, and its application to the underlying dispute, we must respectfully disagree with the trial court's analysis herein.

{¶26} In *Fields,* we discussed theories of estoppel as set forth by the Eighth District in *I Sports, supra.* In *I Sports,* the Eighth District observed that the traditional theories arising from common law principles of contract and agency for enforcing arbitration clauses as to nonsignatories, as outlined in *Thompson-CSF, S.A. v. Am. Arbitration Assn.,* 64 F.3d 733, (C.A.2, 1995), are as follows: " '1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.' " *I Sports,* at ¶ 12, quoting *Thomson- CSF*, 64 F.3d at 776. In our view, *Fields* is distinguishable from the matter presently before us. In *Fields*, the non-

signatories were agents of the principal Herrnstein. Obviously, there was a close relationship between principal and agent salesmen, and between principal and assignee Capital One. The relationship of the alleged wrongs pursuant to the sale (and the failure to remedy) related to duties the various defendants had in the sales contract. In addition, Fields had to rely on the sales contract to reach Herrnstein and its agents and assignee. Traditional principles of agency applied to bind Fields to the arbitration agreement. That a theory of estoppel should be applied to compel OVEC to arbitration in this case is not so clear.

Reliance on Terms of Agreement

{¶27} As noted, the recent *Fucci* decision explained that, "under Ohio law, the first theory of 'intertwined claims' requires a finding that the signatory relies on terms of the agreement in question in asserting claims against the nonsignatory, '[t]he test is whether the ... [non-consenting litigant] has asserted claims that arise from the contract containing the arbitration clause.' " *Fucci*, *9, quoting *Atricure v. Meng,* 12 F.4th 516 (C.A. 6, 2021). Where the non-consenting party asserts claims against the arbitration-seeking party that arise from the contract containing the arbitration clause, that non-consenting party may not inconsistently invoke contractual terms, claiming that one term governs the relationship while the

arbitration clause does not. *Id.* Ohio courts apply the "arising from the contract" test strictly. "[I]t is not sufficient that the plaintiff's claims 'touch matters' concerning the agreement or that the claims are 'dependent upon' the agreement." *I Sports,*¶ 17. And "even if a noncontract claim ... depends on a showing of a breach of contract," Ohio courts will often reject estoppel claims. *Atricure,* 529.

{¶28} The *Fucci* court also explained that the key to the analysis is identifying the basis of the non-consenting parties' claims against the parties seeking to compel arbitration. *Id.* at *10. Here, OVEC's claim is based on allegations that First Energy and AGC engaged in fraudulent transfer of assets. The statute cited in OVEC's complaint is R.C. 1336.04, Intent to Defraud. Under the Ohio Uniform Fraudulent Transfer Act, a transfer that is made by a debtor is fraudulent as to a creditor if the transfer was made (1) with actual intent to hinder, delay, or defraud any creditor of the debtor, or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if other conditions exist. R.C. 1336.04(A); R.C. 1336.05. *See Admn. Of State Medicaid Recovery Program v. Miracle ,* 2015-Ohio-1516, at ¶ 23 (4th Dist.).

{¶29} But must OVEC rely on the terms of the ICPA, a power purchase agreement, in asserting the fraudulent transfer claims against First

Energy and AGC, non-signatory parties? First Energy points out that the ICPA has been referenced 125 times in OVEC's complaint. We have observed that OVEC's complaint continually refers to "payment obligations under the ICPA," "interest in the ICPA," or "rights to payment under the ICPA." In our view, while the complaint references the ICPA, OVEC is not relying on the ICPA's terms in order to pursue OVEC's fraud claims.

{¶30} Paragraphs 5, 7, 8, 15, 17, and 19 do reference the ICPA. Yet, it appears that these paragraphs simply set forth the background of the litigation. In particular, we view the following paragraphs referencing the ICPA as providing a "backdrop" to OVEC's fraudulent transfer allegations:

> 10. For many years, Defendant First Energy reaped substantial profits…as a result of AE Supply's participation in the ICPA. Following the 2010 extension of the ICPA, …AE Supply's monthly payments to OVEC became greater than the revenue AE Supply was generating…In order to escape AE Supply's obligations under the ICPA, First Energy embarked on a fraudulent transfer scheme.
>
> 11. Beginning on or about December 13, 2017, FirstEnergy caused AE Supply to sell off all of its valuable income-generating assets...AE Supply then transferred the proceeds from those divestiture transactions to First Energy and other subsidiaries…
>
> 12. As a result of First Energy and AE Supply's divestiture plan, First Energy and Defendants received hundreds of millions of dollars in consideration but AE Supply became completely insolvent…

> 13. According to First Energy, AE Supply is incurring eight to ten million dollars in losses annually as a result of its participation in the ICPA…First Energy has said to OVEC that it will not stand by and continue to incur these losses.
>
> 14. AE Supply's divestiture plan, including its intercompany transfers to defendants, constitute a textbook fraudulent transfer scheme under R.C. 1336.04 of the Ohio Uniform Fraudulent Transfer Act…
>
> 15. OVEC is AE Supply's creditor and AE Supply is OVEC's debtor as defined under the Act…Moreover, because AE Supply acted with express intent to avoid its future liabilities under the ICPA, the divestiture plan constituted an actual fraudulent transfer.

{¶31} Additional Paragraphs 32, 35, 36, 37,40, 43, 49, and 50 generally describe AE Supply's obligations and share of costs as set forth under the ICPA. Paragraphs 51 and 53 set forth additional specific allegations of First Energy's misconduct. Paragraphs 69, 71, 74, and 86, while referencing the ICPA, only describe various sales and proceeds and allegations of misconduct. But nothing in these paragraphs requests *interpretation* of the ICPA, nor requires reliance on the ICPA, in order to prove the fraudulent transfer allegations.

{¶32} OVEC's complaint requests relief as:

> 1. *Avoidance of the* transfers described in the foregoing Paragraphs 47-66 in an amount to be determined sufficient to cover AE Supply's continuing obligations to OVEC under the ICPA.

> 2. An *injunction against further disposition* by Defendants of the assets or other property transferred pending termination of the ICPA.
>
> 3. *Attachment of assets transferred* from AE Supply to Defendants * * * sufficient to satisfy AE Supply's obligations under the ICPA.
>
> 4. *Appointment of a receiver* to take charge of the assets transferred * * * sufficient to satisfy AE Supply's obligations under the ICPA.

Moreover, OVEC's prayer for relief does not request, as in a declaratory judgment action, an interpretation of rights or responsibilities of the parties as established under the ICPA.

{¶33} OVEC has alleged that "First Energy has caused AE Supply to sell off all its valuable income-generating assets," (Par. 1), and that "AE Supply's divestiture plan, including its intercompany transfers to defendants, constitute a textbook fraudulent transfer scheme." (Par. 14.)[3] Simply put, in order to discover if transfers were made "with actual intent to hinder, delay, or defraud," OVEC will likely need to depose representatives of First Energy and AGC. In order to determine if a transfer was made "without receiving a reasonably equivalent value in exchange for the transfer," OVEC

[3] According to the allegations in Paragraph 22, in 2011, FirstEnergy acquired MonPower, a signatory. MonPower became a wholly owned subsidiary. According to the allegations of Paragraph 23 of the Complaint, AE Supply, a signatory, once owned AGC. AE Supply transferred its interest in AGC to MonPower. In 2018, AGC became a wholly owned subsidiary of MonPower. We are mindful that neither MonPower nor AE Supply are parties to this lawsuit.

will likely need to engage in extensive discovery of First Energy and co-defendant AGC's business and banking records. While OVEC is concerned that AE Supply will not meet its obligations, *discovering* whether First Energy and AGC engaged in fraud and *proving* fraud is OVEC's burden in pursuing its claims. AE Supply's obligations under the ICPA is a peripheral matter.

{¶34} In pursuing the fraudulent transfer claims, nothing would require review or interpretation of the ICPA. A review of the ICPA would only be necessary in the event a judgment is rendered against First Energy and AGC for the alleged fraudulent actions. The ICPA sets out a formula in Paragraphs 36-43 which clearly shows what AE Supply's obligations—allegedly wholly owned by First Energy—were, and what First Energy in turn would be responsible for. In our view, OVEC need not *rely* on the terms of the ICPA in asserting its claims for fraudulent transfer of assets against First Energy and AGC. OVEC's fraud claims against First Energy and AGC do not fall within the purview of a 2010 contract to supply energy which OVEC entered with companies who were, years later, acquired by First Energy and AGC.

Concerted Misconduct

{¶35} The trial court also found that "substantial interdependent conduct by defendants, some signatories some not" supported application of the concerted misconduct estoppel theory. This doctrine may be applied "where the signatory to the contract [containing the arbitration clause] alleges substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Fucci,* *11, quoting *I Sports,* ¶ 20.

{¶36} The Sixth Circuit in *Atricure v. Meng, supra,* summarized the concerted-misconduct theory of estoppel as follows:

> This theory permits a defendant alleged to have jointly engaged in fraud with a contracting party to take advantage of those fraud allegations by enforcing an arbitration clause that would not otherwise apply to it. Traditionally, however, the alleged fraudster is the one who is supposed to be estopped, not the alleged victim.

Atricure, 12 F.4th 516, 531, citing *Doe v. Archdiocese of Cincinnati,* 2008-Ohio-67, ¶¶ 6-7. *See also Fives Bronx Inc. v. Kraft Werks Engineering, LLC*, 2023-WL 2599627 (U.S.D.C. N.D.Ohio), *9. ("[M]ere fact that Plaintiff accused [defendant non-signatory] of misconduct that is similar to the allegations against [two other defendant signatories] does not vest this Court with any authority to compel these claims against [nonsignatory] to binding arbitration against Plaintiff's consent.").

{¶37} The *Fucci* court observed:

> As an initial matter, it is noted that the concerted misconduct theory has not been adopted by any Ohio Supreme Court decision. *Fucci,* citing *Atricure*, 530. Only a few published Ohio appellate decisions reference the doctrine, let alone apply it. *I Sports*, ¶ 20. Importantly, the leading case, I *Sports v. IMG Worldwide, Inc.,* applies pre-*Arthur Anderson* federal estoppel law, not Ohio contract law.

{¶38} The *Fucci* court also commented:

> Because the alternative estoppel theories originate from pre-*Arthur Andersen* federal law and have only been applied sparingly in two intermediate Ohio courts, it is not clear to what extent the theories are supported by Ohio contract law. Thus, this court seeks to avoid inappropriately expanding Ohio contract law by applying alternative estoppel theories which have seldom been applied and then only in "rare circumstances." *Id*. *12.

{¶39} In *Atricure, supra,* the Sixth Circuit also discussed the *Arthur Andersen* decision, noting:

> [T]he Supreme Court has…held that courts considering whether arbitration clauses cover nonparties should neutrally apply the relevant state law that otherwise governs. *Arthur Anderson LLP v. Carlisle,* 556 U.S. 624, 630-32 (2009). The Court did not say that any policy favoring arbitration should influence things. We thus see no room for this federal "dice-loading" rule of construction to resolve the state-law question. Antonin Scalia, A Matter of Interpretation 28 (1997); cf. *Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134, 1142 (2018).

{¶40} OVEC certainly alleges concerted misconduct beginning in 2017 by non-signatory defendants-appellees First Energy and AGC. These

allegations which involve AE Supply, a signatory, are summarized as follows:

> 10. ...In order to escape AE Supply's obligations under the ICPA, FirstEnergy embarked on a fraudulent transfer scheme.
>
> 11. Beginning on or about December 13, 2017, First Energy caused AE Supply to sell off all of its valuable income-generating assets…
>
> 12. As a result of First Energy *and* AE Supply's divestiture plan, First Energy and Defendants received hundreds of millions of dollars in consideration but AE Supply became completely insolvent…
>
> 14. AE Supply's divestiture plan, including its intercompany transfers to defendants, constitute a textbook fraudulent transfer scheme…
>
> 74. In sum, *AE Supply and other defendants* are engaged in a brazen effort to frustrate OVEC's rights to payment under the ICPA.

{¶41} As is noted, due to acquisitions and mergers subsequent to the 2010 ICPA, the business relationships of the various corporate entities, signatories, and nonsignatories changed. OVEC's allegations that First Energy and AGC engaged in misconduct necessarily relate to AE Supply, a signatory and allegedly a wholly owned subsidiary of First Energy.[4]

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[4]Black's Law Dictionary defines "subsidiary corporation" as "one in which another corporation (i.e. parent corporation) owns at least a majority of the shares, and thus has control. A "parent" is defined as "an entity that controls another entity directly, or indirectly through one or more subsidiaries." 16 C.F.R. 436.1(m); *Burger Dynasty, Inc. v. Bar 145 Franchising, LLC,* 2019-Ohio-4006, ¶ 34 (6th Dist.).

However, we do not think it fair to allow the alleged fraudsters to take advantage of the arbitration provision of the ICPA, which the alleged fraudster defendants never signed.

{¶42} We are also reluctant to apply the "concerted misconduct" theory of estoppel in this matter. We do not find this is a rare circumstance in which "substantial interdependent conduct" by defendants-appellees First Energy and AGC, with AE Supply, a non-party to this action, requires application of the doctrine. While defendants-appellees are alleged to have engaged in fraud with AE Supply, a contracting party to the ICPA, given its alleged status as a wholly-owned subsidiary of First Energy, there is a question of AE Supply's ability to control its own activities. We also reject the notion that this court is vested with the authority to compel OVEC's claims against the nonsignatories herein to binding arbitration against OVECs consent.

Conclusion

{¶43} Based on the foregoing, we find that the trial court granted the motion to compel arbitration in error. We find OVEC's arguments to have merit. Accordingly, the sole assignment of error is sustained and the judgment of the trial court is reversed.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and costs be assessed to Appellees.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.